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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* RSC 1985, c C-36, AS AMENDED
	AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
APPLICANT	DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC., and DELTA 9 CANNABIS STORE INC.
DOCUMENT:	**BENCH BRIEF OF THE APPLICANT (COMEBACK APPLICATION)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP 2100, 222 - 3rd Ave SW Calgary, AB T2P 0B4 Telephone: 403.693.5420/780-969-3501 Attention: Ryan Zahara/Kaitlin Ward Email: rzahara@mltaikins.com kward@mltaikins.com File: 136555-34

APPLICATION BEFORE THE HONOURABLE ASSOCIATE CHIEF JUSTICE NIELSEN

TO BE HELD ON JULY 24, 2024 AT 2:00 PM ON THE COMMERCIAL LIST

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I. OVERVIEW

1. On July 15, 2024, Delta 9 Cannabis Inc. ("**D9 Parent**"), Delta 9 Logistics Inc. ("**Logistics**"), Delta 9 Bio-Tech Inc. ("**Bio-Tech**"), Delta 9 Lifestyle Cannabis Inc. ("**Lifestyle**"), and Delta 9 Cannabis Store Inc. ("**Store**", and together with D9 Parent, Logistics, Bio-Tech, and Lifestyle, the "**Delta 9 Group**" or the "**Applicants**") sought and obtained an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "***CCAA***"). Pursuant to the Initial Order, Alvarez & Marsal Canada Inc. was appointed Monitor of the Applicants (the "**Monitor**").

2. In order to facilitate an orderly restructuring of the Applicants' business, the Applicants and the Plan Sponsor (defined below) have entered into binding plan sponsor term sheet (the "**Restructuring Term Sheet**") which contemplates a sales investment and solicitation process in respect of the assets and/or shares of Bio-Tech (the "**SISP**"). The Restructuring Term Sheet is the product of extensive efforts on the part of the Applicants and the Plan Sponsor to develop a restructuring plan for the Delta 9 Group in a manner that would maximize the value realized for all stakeholders.

3. This Brief is submitted on behalf of the Applicants, in support of an application for:

    a. an amended and restated initial order (the "**ARIO**") granting, among other things:

        i. an extension of the Stay of Proceedings (as defined below) to September 15, 2024;

        ii. approving a break fee of $1,500,000 and granting the Plan Sponsor Protection Charge (defined below) to secure the amount of the break fee;

        iii. approval of an interim financing loan agreement and a charge securing same;

        iv. authorizing the Plan Sponsor (defined below) to advance certain funds from the interim financing facility to the Applicants' senior secured lender, SNDL Inc. ("**SNDL**") on behalf of the Applicants to pay the value of the SNDL Mezzanine Debt (as defined below);

        v. approval of a key employee retention plan (the "**KERP**") and a corresponding charge;

        vi. approval of increases to the Administration Charge and the D&O Charge;

vii. preserving the *status quo* of the Health Canada Licenses and the Excise Licenses; and

viii. appointing Mark Townsend as the chief restructuring officer (in such capacity, the "**CRO**");

b. an order (the "**SISP Order**") approving the sales investment and solicitation process (the "**SISP**") in respect of the assets and/or shares of Bio-Tech;

c. an order (the "**Claims Process Order**") approving a claims process with respect to the Applicants; and,

d. an order (the "**Sealing Order**") directing that the Confidential Appendices to the First Report of the Monitor, dated July 19, 2024 (the "**First Report**") shall be sealed on the Court record in accordance with the terms of the Sealing Order.

II. FACTUAL BACKGROUND

4. The facts underlying this Application are more fully set out in the Affidavit of John Arbuthnot IV, sworn on July 12, 2024 (the "**First Arbuthnot Affidavit**"), the First Supplemental Affidavit of John Arbuthnot IV, sworn on July 15, 2024 (the "**Supplemental Arbuthnot Affidavit**") and the Second Affidavit of John Arbuthnot IV, sworn on July 18, 2024 (the "**Second Arbuthnot Affidavit**" and together with the First Arbuthnot Affidavit, and the Supplemental Arbuthnot Affidavit, the "**Arbuthnot Affidavits**").

5. All capitalized terms used herein that are not otherwise defined have the meaning ascribed to them in the Arbuthnot Affidavits.

A. Status of the *CCAA* Proceedings

6. Consistent with section 11.001 of the *CCAA*, the Initial Order only provided for relief that was reasonably necessary for the continued operations of the Delta 9 Group during the initial 10-day period, including: (i) a stay of proceedings until July 24, 2024 (the "**Stay of Proceedings**"); (ii) approval of the Administration Charge in the amount of $350,000 and the Directors' Charge in the amount of $300,000; (iii) allowing payment to certain suppliers who are critical to the business and operations of the Applicants for pre-filing expenses; and (iv) authorizing the Applicants to incur no further costs in connection with the Securities Filings.

7. Following the issuance of the Initial Order, the Delta 9 Group has continued its business in the ordinary course.[1]

8. The Applicants' activities since the date of the Initial Order, with the assistance of its advisors and the Monitor, include:

   a. conducting ongoing discussions with the Monitor and its legal counsel regarding the Business and financial affairs of the Delta 9 Group;

   b. assisting the Monitor with the roll out of the Delta 9 Group's post-filing communication plan with various trade creditors, suppliers, and other stakeholders;

   c. coordinating townhall meetings with the Monitor and employees both virtually and in person in Winnipeg;

   d. reviewing and discussing weekly payables with the Monitor;

   e. assisting the Monitor with the compilation of budgets to actual reporting for the purposes of reporting to the Court;

   f. engaging in discussions with the plan sponsor, 2759054 Ontario Inc., operating as Fika Herbal Goods ("**Fika**" or the "**Plan Sponsor**") about the Business and next steps in the *CCAA* proceedings;

   g. continued discussions with the Plan Sponsor and the Monitor, towards finalizing the Restructuring Term Sheet and the Interim Financing Agreement (defined below); and

   h. engaging in discussions with the Monitor and the Plan Sponsor regarding the development of the KERP (defined below), the SISP, and the Claims Procedure Order.[2]

B. The Health Canada and Excise License

9. Bio-Tech is a licensed producer and holds a license pursuant to the *Cannabis Act*, SC 2018, c 16, from Health Canada (the "**Health Canada License**") to cultivate, process and sell medical and recreational cannabis and a license (the "**Excise License**" and together

[1] Second Arbuthnot Affidavit at para 12.
[2] Second Arbuthnot Affidavit at paras 12, 14, 29, 37, 58, 70; First Report at para 18.

with the Health Canada License, the "**Licenses**") to sell cannabis products under the *Excise Act*, RSC 1985, c E-14 (the "***Excise Act***").[3]

10. The Applicants collectively owe the Canada Revenue Agency (the "**CRA**") for outstanding GST and excise tax the amount of $8,996,132, which is comprised primarily of excise tax amounts owing to the CRA by Bio-Tech (the "**Excise Tax Arrears**").[4]

11. As a result of the Excise Tax Arrears, the CRA has, since approximately December 2023, only agreed to renew the Excise License on a 30-day recurring basis provided that Bio-Tech continues making the monthly excise duty payment (the "**Excise Duty Payment**"), plus the pre-arranged payment to reduce the Excise Tax Arrears (the "**Monthly Arrears Payment**").[5]

C. The Restructuring Term Sheet

12. Prior to the commencement of these *CCAA* proceedings, the Delta 9 Group engaged with the Plan Sponsor in order to come to the terms set out in the Restructuring Term Sheet, including working cooperatively to prepare a plan or plans of arrangement that will maximize the value realized from the Delta 9 Group for all stakeholders.[6]

13. The Applicants and the Plan Sponsor entered into a binding Plan Sponsor Term Sheet, dated effective as of July 12, 2024, which sets out the key terms of the restructuring amongst the Applicants and the Plan Sponsor and the basis for the Plan Sponsor's support of the *CCAA* proceedings.[7]

14. A detailed summary of the significant aspects of the Restructuring Term Sheet is outlined at paragraphs 14 to 18 of the Second Arbuthnot Affidavit.

15. The Restructuring Term Sheet provides for, among other things, a potential transaction whereby the Plan Sponsor would acquire the Applicants' retail cannabis operations through a plan of arrangement with the additional goal of monetizing the Bio-Tech cannabis producing business as a going-concern through a separate SISP.[8]

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[3] First Arbuthnot Affidavit at paras 47 and 81; Second Supplemental Affidavit of John Arbuthnot, sworn on July 22, 2024 [**Second Supplemental Arbuthnot Affidavit**] at para 6 and Exhibits 1 and 2.
[4] First Arbuthnot Affidavit at para 141; Second Supplemental Arbuthnot Affidavit at para 9.
[5] First Arbuthnot Affidavit at paras 82 to 83; Second Supplemental Arbuthnot Affidavit at paras 11 and 12.
[6] Second Arbuthnot Affidavit at para 14.
[7] Second Arbuthnot Affidavit at paras 14 and 15.
[8] Second Arbuthnot Affidavit at para 17.

(1) The Break Fee and the Plan Sponsor Protection Charge

16. The Restructuring Term Sheet contemplates, among other things, a break fee of $1,500,000 (the "**Break Fee**") to the Plan Sponsor, and an associated charge to secure payment of the Break Fee (the "**Plan Sponsor Protection Charge**") if the Court approves any plan of compromise, arrangement, or other transaction that would preclude the Plan Sponsor from completing the Acquisition Transaction, or the Applicants otherwise enter into any agreement that would preclude the Acquisition Transaction.[9]

17. The Break Fee was calculated to compensate the Plan Sponsor for its considerable investment of both funds and time including work with the Applicants to negotiate with the Applicants' former primary secured lender, CFCU, and other of the Delta 9 Group's shareholders and key stakeholders.[10]

18. The Break Fee represents approximately 3% of the estimated $50,000,000 gross consideration proposed to be advanced by the Plan Sponsor pursuant to the Plan Sponsor Term Sheet.

19. The Plan Sponsor Protection Charge is proposed to rank after all of the other Court-ordered Charges and behind the registrations in favour of SNDL.[11]

(2) The Interim Financing Agreement and Associated Charge

20. Pursuant to the Restructuring Term Sheet, the Plan Sponsor (in such capacity, the "**Interim Lender**") has agreed, subject to certain terms and conditions, to make an interim financing facility available to the Applicants in the principal amount of up to $16,000,000 (the "**Interim Financing Facility**"), payable in two tranches:

    a. Tranche 1: up to $3,000,000 available on the issuance of the ARIO, to be advanced on a weekly basis in accordance with the Cash Flow Forecast; and

    b. Tranche 2: up to $13,000,000 to repay any and all secured obligations owing to SNDL under the second-tier debt of their senior secured lender, SNDL Inc. ("**SNDL**") pursuant to the SNDL Convertible Debenture Agreement (the "**SNDL Mezzanine Debt**"), promptly following the issuance of the ARIO and the Monitor's

[9] Second Arbuthnot Affidavit at para 16(h)
[10] Second Arbuthnot Affidavit at paras 19 and 23.
[11] Second Arbuthnot Affidavit at para 27.

confirmation as to the validity and enforceability of the security registered in respect of the SNDL Mezzanine Debt.[12]

21. The Interim Financing Facility shall bear interest at a rate equal to The Toronto Dominion Bank "prime rate" plus 3%.[13]

22. The Interim Financing Facility is to be used to fund the Applicants' working capital needs during these *CCAA* proceedings.[14]

23. The Interim Financing Facility is conditional upon, among other things: (a) the granting of a Court-ordered charge over the Property in favour of the Plan Sponsor securing all amounts advanced under the Interim Financing Facility (the "**Interim Financing Charge**"); (b) the approval of the SISP Order by the Court; and (c) the Plan Sponsor's approval of the Cash Flow Forecast.[15]

24. The Interim Financing Facility is proposed to be a priority charge subject only to: (a) the Administration Charge; (b) the D&O Charge; (c) the KERP Charge (defined below); and (d) secured obligations owing to SNDL.[16] The result of the ranking of the Interim Financing Charge is that SNDL is not prejudiced in any way by the funds being advanced under that charge and SNDL will receive a significant pay down of the SNDL Mezzanine Debt in a very short period of time after approval of the Interim Financing Facility.

D. Key Employee Retention Plan

25. The Applicants have developed a KERP with input from the Monitor. Nine managers and officers of the Applicants are proposed beneficiaries of the KERP (the "**Eligible Participants**"). The Applicants will not be able to maintain their operations during the SISP and through to a successful closing of a transaction without offering these employees an incentive.

26. The Eligible Participants will receive their respective KERP payments in two tranches: (i) the first is payable within five days following the applicable vesting event for each eligible

[12] Second Arbuthnot Affidavit at paras 28 to 31.
[13] Second Arbuthnot Affidavit at para 31(b).
[14] Second Arbuthnot Affidavit at para 28.
[15] Second Arbuthnot Affidavit at para 31.
[16] Second Arbuthnot Affidavit at para 50 and 51.

Participant; and (ii) the second is payable on the sooner of plan implementation, the sale of the applicable company or the completion of restructuring.[17]

27. The Eligible Participants include directors and officers who are a necessary and integral component of the business and operations of Delta 9 Group's continued operation in the normal course.[18] In particular, John Arbuthnot IV's continued involvement in the operation and business is critical to a successful outcome in this *CCAA* Proceeding as he is the only director and person with the necessary security clearance to allow Bio-Tech to operate in compliance with the Health Canada License.[19]

E. The Proposed Chief Restructuring Officer

28. Mark Townsend is the managing partner of Broderick Capital, which is acting as the financial advisor to the Plan Sponsor in these *CCAA* proceedings.[20] Mr. Townsend has over 14 years' experience in investment banking, private equity, capital markets, corporate development and strategy.[21] Mr. Townsend will be acting as CRO through his corporation, 1198184 B.C. Ltd. [22]

29. Mr. Townsend has been engaged with the Applicants since January 2024 and has completed a significant review of the Applicants' financial performance and valuation of the Business. He has worked extensively with the Applicants in the time leading up to the Initial Order, including assisting in the preparation of key financial analysis and the Cash Flow Forecast.[23]

30. Mr. Townsend's extensive involvement with the Applicants to date and his in-depth knowledge of their Business will create efficiencies, thereby maximizing the potential recoveries for stakeholders in these *CCAA* Proceedings.

F. SISP

31. The Plan Sponsor Term Sheet contemplates, among other things, a SISP in respect of the business and/or assets of Bio-Tech.[24]

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[17] Second Arbuthnot Affidavit at paras 38 to 42.
[18] Second Arbuthnot Affidavit at para 42.
[19] Second Arbuthnot Affidavit at para 42.
[20] Second Arbuthnot Affidavit at paras 54 to 55.
[21] Second Arbuthnot Affidavit at para 54.
[22] Affidavit of Mark Townsend, sworn on July 19, 2024 [**Townsend Affidavit**] at para 1.
[23] Second Arbuthnot Affidavit at para 55.
[24] Second Arbuthnot Affidavit at para 16(c).

32. The business and assets of Bio-Tech were previously marketed for an extended period of time through an informal strategic alternatives process prior to the commencement of the CCAA proceedings. The results of the strategic alternatives process has been that many parties interested in the business or the assets have already been contacted with some conducting preliminary due diligence and several having already conducted significant diligence on a potential transaction involving Bio-Tech.[25]

33. The SISP has been developed by the Applicants and the Monitor to provide a fair and transparent process for qualified bidders to assess the nature of the Bio-Tech Property and Business (as defined in the SISP) as a means to maximize the value of the Applicants' business assets.[26]

34. The SISP calls for a one-stage streamlined process. A summary of key dates is below:[27]

Milestone	Key Dates
Distribution of Teaser Letter and NDA	July 31, 2024
Binding Offer Deadline	August 26, 2024
Auction (if any)	August 28, 2024
Approval and Vesting Order hearing	No later than September 6, 2024
Closing of the Successful Bid	September 9, 2024

G. The Claims Procedure

35. The Applicants, in consultation with the Monitor, have developed a comprehensive procedure to solicit, identify, quantify and if appropriate, resolve Claims against the Applicants and their Directors and Officers.[28]

36. Key aspects of the Claims Procedure are summarized in the Second Arbuthnot Affidavit. Among other things, the Claims Procedure provides for the following features:

a. **Notice**: materials related to the Claims Procedure will be publicly available in national and regional newspapers, posted on the Monitor's website and delivered to the Known Claimants following the issuance of the Claims Procedure Order, if approved;

b. **Claims Bar Date**: the Claims Bar Date shall be 5:00 p.m. MST on August 17, 2024;

[25] First Arbuthnot Affidavit at paras 183 to 185; Townsend Affidavit at paras 24 to 25.
[26] Second Arbuthnot Affidavit at para 62.
[27] Second Arbuthnot Affidavit at paras 65 to 66.
[28] Second Arbuthnot Affidavit at paras 70 to 73; First Report at para 86.

c. **Restructuring Claims Bar Date**: means the later of: (i) the Claims Bar Date; and (ii) 15 days after the Monitor sends a Claims Package with respect to a Restructuring Claim in accordance with the Claims Procedure Order;

d. **Additional Persons with Claims**: if the Monitor becomes aware of additional Persons having a Claim, the Monitor will send a Claims package to such Person and respond to requests for information or documents, as the Monitor considers appropriate in the circumstances;

e. **Notice of Dispute**: Known Claimants who wish to dispute the amounts provided in the Notice to Known Claimants will be afforded sufficient time to file a Notice of Dispute;

f. **Review of Proofs of Claim**: the Monitor, in consultation with the Applicants and, in the case of D&O Claims, in consultation with the Directors and Officers, shall review all Proofs of Claim and accept, revise or disallow in whole or in part the amount and/or status of any Claim set out therein for voting and distribution purposes;

g. **Notice of Dispute of Unknown Claimant**: an Unknown Claimant who intends to dispute a Notice of Revision or Disallowance, shall deliver a Notice of Dispute no later than 7 days after such Claimant has received the Notice of Revision or Disallowance; and

h. **Resolution of Disputes**: if a Notice of Dispute of Known Claimant or a Notice of Dispute of Unknown Claimant cannot be resolved, the Claimant is required to apply to the Court for a final determination on the amount and/or status of the Claim within 10 days after the Monitor receives the Notice of Dispute.[29]

[29] Second Arbuthnot Affidavit at para 71.

III. ISSUES

37. The issues to be determined by the Court are whether:

a. the Stay of Proceedings should be extended;

b. the Interim Financing Facility and the Interim Financing Charge should be approved;

c. the KERP and the KERP Charge should be approved;

d. an increase to the Initial Order Charges should be approved;

e. the *status quo* of the Health Canada License and the Excise License should be approved;

f. Mark Townsend should be appointed CRO;

g. the Break Fee and the Plan Sponsor Protection Charge should be approved;

h. the SISP should be approved and the SISP Order should be granted;

i. the Claims Process should be approved and the Claims Procedure Order should be granted; and

j. the Confidential Appendices to the First Report should be sealed.

IV. LAW AND ARGUMENT

A. The Stay of Proceedings Should be Extended

38. The Stay Period (as defined in the Initial Order) currently expires on July 25, 2024. The Applicants are requesting an extension of the Stay of Proceedings to September 15, 2024.

39. Subsection 11.02(2) of the *CCAA* expressly authorizes this Court to grant an extension of the Stay of Proceedings for "any period the court considers necessary where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence."[30]

[30] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [***CCAA***];, s 11.02(2).

40. A stay of proceedings is appropriate where it maintains the *status quo* and provides the debtors with breathing room while they seek to restore their solvency and emerge from their restructuring on a going concern basis.[31]

41. Since granting the Initial Order, the Applicants have acted, and continue to act, in good faith and with due diligence.[32] In the short time since the Initial Order was granted, the Applicants, in consultation with the Monitor and the Plan Sponsor, have worked diligently to advance this *CCAA* Proceeding including, among other things, by negotiating and papering the Interim Financing Facility, the KERP, the SISP, and the Claims Process.

42. The Monitor and the Applicants will need time in order to properly and diligently implement and carry out the SISP in accordance with its terms and the SISP Approval Order, to obtain the maximum value possible for all stakeholders.[33] It is the Applicants' intention in this *CCAA* Proceeding to implement a plan of arrangement or compromise that will serve to repay the Applicants' secured creditors in full and provide some recovery for unsecured creditors, which is a significant improvement to the position they would otherwise have absent the Stay of Proceedings. Accordingly, the stakeholders in this Proceeding will not be materially prejudiced as a result of the stay extension.

43. The extension of the Stay Period is necessary and appropriate in these circumstances to provide the Applicants with continued stability while they attempt to maximize value for the benefit of all of their stakeholders through the *CCAA* proceedings and the SISP sought herein.[34]

B. The Interim Financing Facility and Interim Financing Charge Should be Granted

44. Pursuant to section 11.2 of the *CCAA*, the Applicants are seeking approval of the Interim Financing Facility and the Interim Financing Charge.

45. The Applicants require interim financing in order to maintain operations and fund these *CCAA* proceedings through the proposed extension of the Stay of the Proceedings.[35]

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[31] *Century Services Inc v Canada (AG),* 2010 SCC 60 at para 14; *Target Canada Co, Re,* 2015 ONSC 303 at para 8 [***Target***].
[32] Second Arbuthnot Affidavit at para 12.
[33] Second Arbuthnot Affidavit at para 10.
[34] Second Arbuthnot Affidavit at paras 9 to 13.
[35] Second Arbuthnot Affidavit at para 28.

46. When determining whether to grant a charge securing interim financing, subsection 11.2(4) of the *CCAA* directs the Court to consider the following non-exhaustive factors:

a. the period during which the Applicants are expected to be subject to the *CCAA* proceedings;

b. how the Applicants' business and financial affairs are to be managed during the *CCAA* proceedings;

c. whether the Applicants' management has the confidence of their major creditors;

d. whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants;

e. the nature and value of the Property;

f. whether any creditor would be materially prejudiced as a result of the security or charge; and

g. the Monitor's report, if any.[36]

47. It is appropriate in the circumstances for the Court to approve the Interim Financing Facility and the Interim Financing Charge, given that:

a. the Cash Flow Forecasts support the need for interim financing to provide the Applicants with the liquidity necessary to continue their operations in the ordinary course;

b. the proposed Interim Financing Facility will preserve the value and going concern operations of the Applicants' business, which is in the best interests of the Applicants and their stakeholders;

c. the amount to be funded under the Interim Financing Facility is appropriate having regard to the Cash Flow Forecasts;

d. the Interim Financing Facility is conditional upon the granting of the Interim Financing Charge; and

[36] *CCAA*, s. 11.2(4).

e. the Monitor is supportive of the Interim Financing Facility and the Interim Financing Charge and does not believe that creditors will be materially prejudiced as a result of their approval.[37]

48. Additionally, as outlined above, SNDL as the primary secured creditor is not being prejudiced by the granting of the Interim Financing Facility as the priority of that charge will rank behind its secured debt. Further, subject to the granting of the Amended and Restated Initial Order: (a) the SNDL Mezzanine Debt will be repaid in full within 10 business days from the granting of the Order (provided the underlying security is found to be valid and enforceable); and (b) the Interim Financing Facility is being advanced in connection with the Restructuring Term Sheet which contemplates that SNDL's senior debt, which it acquired from CFCU pursuant to the SNDL Assignment, will be repaid in full in the ordinary course.

C. The Key Employee Retention Plan and Charge Should be Approved

49. The Applicants are seeking approval of the KERP and, subject to said approval, a KERP Charge up to a maximum amount of $655,000 to secure payment to the Key Employees as contemplated under the KERP.[38]

50. This Court has the authority to approve a KERP pursuant to the Court's general power under section 11 of the *CCAA* to make any order it sees fit in a *CCAA* proceeding.[39] The discretion of the Court to approve a KERP shall be exercised on a case-by-case basis.[40]

51. Courts have frequently recognized the importance and utility of KERPs in restructuring proceedings.[41] A debtor company that is able to retain the critical skills and knowledge of its employees and executives has a greater chance of successfully restructuring its business for the benefit of all stakeholders.[42]

52. The Applicants established the KERP to incentivize certain key employees to remain in their employment during these *CCAA* proceedings. Additionally, the KERP has been developed to ensure that the key directors remain engaged and continue to provide

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[37] Second Arbuthnot Affidavit at paras 28, 31 and 35; First Report at paras 52, and 54 to 55.
[38] Second Arbuthnot Affidavit at para 39.
[39] *CCAA*, s. 11; *Cinram International Inc, Re*, 2012 ONSC 3767 at para 91 [***Cinram***].
[40] *Canwest Global Communications Corp., Re,* ;[2009] OJ No. 4286 (ONSC CL) at para 49 [***Canwest***]..
[41] *Cinram* at paras 90 to 93; *Grant Forest Products Inc, Re*, 2009 CanLII 42046 (ONSC) at paras 8 to 10 [***Grant Forest***]; *Timminco Ltd, Re,* 2012 ONSC 506 at paras 71 to 75 [***Timminco***]; *Target* at paras 56 to 59.
[42] *Timminco* at para 72; *Canwest Global* at paras 49 to 50.

services to the Applicants. Due to the highly regulated nature of the cannabis industry, without the directors continuing to be engaged in this process there is a significant risk to the value that might be recovered by SNDL through any other process that does not involved the cooperation and support from the directors.

53. Under the KERP, 9 key employees will be entitled to aggregate payments in the approximate amount of $655,000 pursuant to the terms and conditions of the KERP.[43]

54. The following factors shall be considered when deciding whether to approve a KERP:

    a. whether the Monitor supports the KERP (to which great weight is attributed);

    b. whether the beneficiaries of the KERP would consider other employment options if the KERP were not secured by the KERP charge;

    c. whether the continued employment of the beneficiaries are important for the stability of the business and to enhance the effectiveness of the marketing process;

    d. the employees' history with the debtor and any special knowledge and skills they possess;

    e. the difficulty in finding a replacement to fulfill the responsibilities of the beneficiaries;

    f. whether the KERP is supported or consented to by secured creditors of the debtor; and

    g. whether the payment under the KERP is payable upon the completion of the restructuring process.[44]

55. For the reasons that follow, the KERP and the KERP Charge ought to be approved in this case:

    a. the Applicants have developed the KERP with input from the Monitor;

    b. the continued employment of the Eligible Participants is integral to the ability of the Applicants to guide the business through these *CCAA* proceedings and preserve value for stakeholders;

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[43] Second Arbuthnot Affidavit at paras 39 and 40.
[44] *Cinram* at para 91, citing *Grant Forest* at paras 8 to 24; *Canwest Global* at para 50; *Aralez Pharmaceuticals Inc, Re*, 2018 ONSC 6980 at para 29.

c. the Eligible Participants have significant experience and specialized expertise that cannot be replicated or replaced. The Eligible Participants include directors and officers that are necessary and integral to the business and operations of Delta 9 continuing to operate in the normal course, including, but not limited to, preserving Delta 9's retail operations. In particular, Mr. Abuthnot IV is the only director and person with the necessary security to allow Bio-Tech to operate in compliance with its Health Canada License, and without him, it would be nearly impossible to successfully complete the SISP for Bio-Tech without his continued involvement in the operation of the business and in the SISP;

d. There is also recognition that these employees will likely have other, more certain employment opportunities, and may be faced with significantly increased workload during these *CCAA* proceedings;

e. the KERP has been designed to provide the necessary incentives for identified employees to remain in their current positions throughout the *CCAA* proceedings and the proposed SISP;

f. the KERP is designed to ensure a level of employee continuity and stability that could otherwise be placed at risk by departure of any of the Eligible Participants;

g. the total payment to be made to the Eligible Participants occurs in two tranches: the first on a designated date (as outlined in the Confidential Supplement) and the second upon a sale or completion of restructuring of the applicable company;

h. the Applicants will not be able to maintain their operations during the SISP and through to a successful closing of a transaction without offering these employees an incentive; and

i. the KERP amounts are built into the Cash Flow Forecast and have been approved by the Monitor and the Interim Lender.[45]

56. The Monitor considered the proposed KERP terms against Court-approved KERPs in cannabis industry insolvency proceedings since 2023 and has concluded that the quantum and the terms of the proposed KERP are commercially reasonable in the circumstances.[46]

[45] Second Arbuthnot Affidavit at paras 37 to 44; First Report at para 22 and 102.
[46] First Report at para 102(g).

57. For reference, the Ontario Superior Court of Justice has approved charges to secure payment in respect of a key employee retention plan in similar or larger amounts in *CCAA* proceedings in the cannabis industry:

a. in *Fire & Flower Holding Corp, Re,* the Court approved a KERP charge of $1,160,000;

b. in *The Flowr Corporation, Re,* the Court approved a KERP charge of $800,000; and

c. in *CannTrust Holdings, Re,* the Court approved a KERP charge of $1,400,000.[47]

58. The terms of the KERP are supported by the Plan Sponsor, the party who is primarily bearing the cost of the KERP at this time. Moreover, the KERP was an integral component of the Restructuring Term Sheet that was negotiated at arms-length by the Plan Sponsor and the Applicants and is part of the broader consideration for both the Applicants and the Plan Sponsor to effect these restructuring proceedings.

59. The terms of the KERP are fair and reasonable in the circumstances and will provide an incentive for the key employees to continue to perform their critical roles throughout the restructuring process. Accordingly, it is appropriate for the Court to approve the KERP and the payments to the key employees contemplated thereby.

D. The Initial Order Charges Should be Increased

60. Pursuant to the Initial Order, the Applicants obtained an Administration Charge in the amount of $350,000 and a D&O Charge in the amount of $300,000. These amounts were deemed reasonably necessary for the continued operations of the Applicants in the ordinary course of business for the Initial Stay Period.

61. The Applicants are now seeking to increase these charges for the amounts reasonably required during these *CCAA* Proceedings.

(1) Administration Charge

62. The Applicants are seeking to increase the Administration Charge to $750,000.[48]

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[47] *Fire & Flower Holdings Corp*, *Re,* Amended and Restated Initial Order (15 June 2023) CV 23-00700581-00CL (ONSC CL) at para 22; *The Flowr Corporation, Re,* Amended and Restated Initial Order (20 October 2022) CV-22-00688966-00CL (ONSC CL) at para 41

[48] Second Arbuthnot Affidavit at para 46.

63. An administration charge has been recognized as necessary to ensure the involvement of the necessary professionals and to achieve the best possible outcome for stakeholders.[49]

64. Section 11.52 of the CCAA expressly provides the Court with the jurisdiction to grant an administration charge. The list of non-exhaustive factors to be considered when granting an administration charge includes: (a) the size and complexity of the business being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; and (vi) the position of the monitor.[50]

65. It is appropriate in the circumstances for the Court to approve the increased Administration Charge, given that:

a. the Applicants' business is highly regulated and subject to numerous statutory and regulatory restrictions and requirements;

b. the beneficiaries of the Administration Charge have the requisite knowledge with respect to those regulations and have, and will continue to, contribute to these *CCAA* proceedings and assist the Applicants with their business;

c. each proposed beneficiary of the Administration Charge is performing distinct functions and there is no duplication of roles;

d. the Monitor is supportive of the increased Administrative Charge and has compared the quantum of the proposed amended charge with those in recent *CCAA* proceedings and is satisfied that it is commercially reasonable and not 'off-market' in the circumstances.[51]

(2) D&O Charge

66. In the Initial Order, the Applicants obtained a Directors' Charge in the amount of $350,000 to secure the indemnity of the Directors & Officers for liabilities they may incur after the commencement of the *CCAA* proceedings. The amount of the Directors' Charge was limited to the estimated exposure during the Initial Stay Period.

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[49] *Walter Energy (Re),* 2016 BCSC 107 at para 41 [***Walter***]; *US Steel Canada Inc*, 2014 ONSC 6145 at para 22.
[50] *Canwest Publishing Inc*, 2010 ONSC 222 at para 54 [***Canwest***].
[51] Second Arbuthnot Affidavit at paras 45 to 49; First Report at paras 106 to 107.

67. The Applicants are now seeking to increase the D&O Charge to $900,000.[52] The Directors and Officers will only be entitled to the benefit of the Directors' Charge to the extent existing insurance coverage is unavailable or insufficient, and it is anticipated that payroll and sales tax liabilities will continue to be paid in the ordinary course.

68. Section 11.51 of the *CCAA* empowers the Court to grant a Directors' Charge for the purpose of ensuring continuity in operations by providing them with protections against liabilities that could be incurred during the restructuring.[53]

69. It is appropriate in the circumstances for the Court to approve the increase to the Directors' Charge, given that:

    a. the Applicants require the active and committed involvement of the directors and officers in order to continue business operations in the ordinary course and to effectively execute the proposed restructuring;

    b. the directors and officers have indicated that their continued service and involvement in these *CCAA* proceedings is conditional upon the granting of the Directors' Charge;

    c. the Directors' Charge applies only to the extent that the directors and officers do not have coverage under the D&O Policy;

    d. the Directors' Charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of the *CCAA* proceedings and does not cover wilful misconduct or gross negligence;

    e. the amount of the Directors' Charge is reasonable in the circumstances; and

    f. the Monitor is supportive of the Directors' Charge.[54]

E. The Regulatory Stay of the Licenses Should be Granted

70. Pursuant to the Amended and Restated Initial Order, the Applicants are seeking a stay in respect of the Health Canada License and the Excise License to prevent a cancelation or expiration of these licenses for the duration of the stay in the *CCAA* proceedings.

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[52] Second Arbuthnot Affidavit at para 8(vii).
[53] *Canwest Global* at paras 45 to 48.
[54] First Arbuthnot Affidavit at paras 241 to 242; First Report at para 111.

71. Section 11.1 (2) of the *CCAA* provides that, subject to subsection (3), no order made under section 11.02 (i.e. a stay of proceedings) affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.[55] The exceptions in subsection (3) provide that the court may order that subsection (2) does not apply to a regulatory body if, in the court's opinion: (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and (b) it is not contrary to the public interest that the regulatory body be affected by the order made under subsection 11.02, provided the regulatory body and the persons likely affected by the order have notice.[56]

72. Canadian courts in *CCAA* proceedings have granted regulatory stays over licenses where, without them, the applicable regulators were likely to suspend or cancel licenses due to the relevant parties having commenced *CCAA* proceedings.[57] In doing so, Courts have commented that to "permit the immediate termination of [a debtor company's] licenses would not avoid social and economic losses but amplify them."[58]

73. In *Just Energy*, the Honourable Justice McLeod of the Ontario Superior Court of Justice stated:

> More plainly put, the CCAA automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.[59]

74. Canadian courts have previously stayed the CRA from seeking to enforce its rights through regulatory actions and estopped the CRA from rescinding or destroying products

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[55] *CCAA*, s. 11.1(2).
[56] *CCAA*, s. 11.02(2) and (3); *Indiva Limited et al, Re* (21 June 2024) CV-23-00722044-00CL (ONSC CL) (Endorsement of J. Osborne) at paras 33 to 34.
[57] *Just Energy Corp, Re,* 2021 ONSC 1793 at para 87 [***Just Energy***]; *Original Traders Energy Ltd,* initial order issued January 31, 2023 [CV-23-00693758-00CL] (ONSC CL) at para 19; *Heritage Cannabis, Re,* amended and restated initial order [CV-24-00717664-00CL] (ONSC CL) [***Heritage ARIO***] at para 48.
[58] *Just Energy* at para 87.
[59] *Just Energy* at para 79.

related to an excise license for the duration of a cannabis company's protection under an insolvency regime in order to maintain the *status quo*.[60]

75. In *Tantalus*, the Superior Court of British Columbia considered its jurisdictional authority to issue *mandamus* against the CRA in NOI proceedings involving a cannabis company. Justice Fitzpatrick held that absent exceptional circumstances, it is not for provincial courts to order public bodies to act in a specific direction to which the legislator has been given a specific mandate.[61] However, Justice Fitzpatrick concluded that exceptional circumstances existed which warranted a stay of the debtor company's license pursuant to the *Excise Act* given that, among other things:

a. the mere filing of insolvency proceedings does not lead to a conclusion that the debtor does not have sufficient financial resources to conduct its business in a responsible manner pursuant to section 2(2)(c)(i) and (e) of the *Regulations Respecting Excise Licenses and Registrations*;

b. the cash flow projections provided that the CRA would be paid any excise tax that was required to be paid during the proceedings; and

c. the preservation of value of the debtor company's inventory meant that the debtor company would possibly be in a position to make some form of payment to its unsecured creditors.[62]

76. The ruling in *Tantalus* has been adopted by Canadian Courts in subsequent *CCAA* proceedings involving cannabis companies:

a. In *BZam Ltd. et al, Re,* Justice Osbourne of the Ontario Superior of Justice granted a regulatory stay over excise licenses of a debtor company on the basis that "[t]he cannabis licenses of the Applicants are among their most valuable assets. Just as importantly, they are required to permit the Applicants to continue operating their underlying business. The expiry or cancellation of licenses will suspend or terminate completely the operation and delivery of products by the Applicants with

[60] *Tantalus Labs Ltd, Re,* 2023 BCSC 1450; *Aleafia Health Inc.,* SISP approval order issued August 22, 2023 [CV-23-00703350-00CL] (ONSC CL); *BZAM Initial Order* at para 44 and 49; *Heritage ARIO* at para 37. *Indiva Limited,* amended and restated initial order issued June 21, 2024 [CV-24-00722044-00CL] (ONSC CL) at para 51.
[61] *Tantalus* at para 31 to 33; citing *Mignault Perrault (Succession de) c Hudson (Ville d'),* 2010 QCCA 2108.
[62] *Tantalus* at paras 34 to 38.

the result that the ability of the Applicants to restructure or continue as a going concern business will in all probability be eliminated".[63]

b. In *Aleafia Health Inc, et al, Re,* Justice Conway of the Ontario Superior Court of Justice granted a regulatory stay over excise licenses of a debtor company. In doing so, Justice Conway held that such an order was consistent with the *status quo* orders in *Just Energy, Abbey Resources, Original Traders*, and *Tantalus* and would "mitigate the risk of destruction of value that revoking the Licenes would have on the business."[64]

77. The Applicants' cannabis licenses (the "**Licenses**") are among the Applicants' most valuable assets and are required to permit the Applicants to continue to operate their underlying business in the normal course.[65] If the Licenses lapse or are cancelled, the Applicants' operation and delivery of cannabis products will need to be halted or suspended.[66] Accordingly, the lapsing or cancellation of the Licenses would terminate their ability to restructure or continue as a going-concern business. Without the stability of customer contracts that the Applicants have developed, they would lose vital revenue streams, threatening their viability and frustrating the fundamental purpose of these insolvency proceedings.[67]

78. Additionally, if Bio-Tech's Licenses are cancelled or its operations are interrupted during the marketing process to be conducted under the SISP, any such interruptions could have significant negative impact on the value to be obtained for the stakeholders of Bio-Tech in the SISP.

79. As of the filing of the Applicants' application materials, the Applicants are current on the Excise Duty Payment and the Monthly Arrears Payment and the projections in the Cash Flow Statements provide that the CRA will be paid any excise tax that is required to be paid as a results of any sales of inventory during the *CCAA* Proceedings. Accordingly, Heath Canada and the CRA are not prejudiced by a provision granting the requested relief to maintain the *status quo* in respect of the licenses.

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[63] *BZam Ltd, Re,* (28 Feb 2024) CV-24-00715773-00CL (ONSC CL) (Endorsement of J. Osborne) at para 48.
[64] *Aleafia Health Inc, Re,* (22 Aug 2023) CV-23-00703350-00CL (ONSC CL) (Endorsement of J. Conway) at para 5.
[65] Second Supplemental Arbuthnot Affidavit at paras 20 to 22.
[66] Second Supplemental Arbuthnot Affidavit at para 21.
[67] First Arbuthnot Affidavit at para 243; Second Supplemental Arbuthnot Affidavit at paras 20 to 22.

F. The CRO Should be Appointed

80. The Applicants seek the appointment of Mark Townsend as the CRO pursuant to the terms and conditions set out in the CRO Engagement contained at Confidential Appendix B to the First Report.[68]

81. The CRO Engagement provides that the CRO shall be responsible for, among other things:

a. assisting with the restructuring generally;

b. communicating with and providing information to the Monitor and the Plan Sponsor in furtherance of the *CCAA* Proceedings;

c. managing key stakeholder communications and information requests;

d. assisting the Applicants in carrying out the terms of the Restructuring Term Sheet, all applicable Orders of the Court and the Applicants' plan of arrangement, if approved;

e. participating in the Applicants' management and executive team;

f. assisting with the administration of financing and related matters;

g. reviewing planned disbursements throughout the course of the restructuring; and

h. such other services as requested by the Applicants.[69]

82. This Court has the jurisdiction to approve the engagement of a CRO pursuant to section 11.52 of the *CCAA*.[70] Courts frequently appoint a chief restructuring officer in order to provide expertise to assist the debtors in achieving the objectives of the *CCAA*, to assist the debtor's management in dealing with a crisis situation, and to allow management to focus on the debtor's continued operation.[71]

83. The proposed CRO, Mr. Townsend, has extensive restructuring advisory experience and experience in the cannabis in the cannabis industry, and in the course of his duties as the

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[68] First Report at Confidential Appendix B.
[69] *ibid.*
[70] *Payless ShoeSource Canada Inc. et al, Re,* 2019 ONSC 1215 at para 33 [***Payless ShoeSource***]; *Walter Energy* at paras 39 to 43.
[71] *Pascan Aviation Inc., Re*, 2015 QCCS 4227 at paras 57 to 58; *Walter Energy* at para 35; *JTI-Macdonald Corp., Re,* 2019 ONSC 1625 at para 26.

financial advisor to the Plan Sponsor, has become uniquely familiar with the Delta 9 Group's business.[72] He has been engaged by the Applicants since January 2024 and has completed significant review of the Applicants' financial performance and valuation of the business.[73] Mr. Townsend is uniquely positioned to guide the Delta 9 Group through the restructuring process into the SISP.

84. In these circumstances, the Applicant sand the Monitor are of the view that the appointment of Mr. Townsend as chief restructuring officer will assist the Applicants in achieving their objective in their restructuring including, among other things: (a) working with the Monitor to stabilize operations; (b) assisting with the successful implementation of the SISP; and (c) providing guidance and expertise throughout the course of these proceedings.

85. The CRO Engagement and the ARIO provide the CRO with certain protections from liability in the execution of his duties. The appointment of a CRO is often accompanied by certain protections from liability, in a similar manner to court-appointed monitors.[74]

86. Providing certain protections in the proposed Order will ensure that the proposed CRO can assist with the management and oversight of the Applicants' day to day business and overall restructuring efforts, particularly throughout the implementation of the SISP.

87. The Monitor supports the appointment of Mr. Townsend as CRO.[75]

G. The Plan Sponsor Protection Charge Should be Approved

88. This Court has jurisdiction to approve the Plan Sponsor Protection Charge pursuant to section 11 of the *CCAA*, which provides the authority for the Court to make any order it sees fit to achieve the goal of the legislation.[76]

89. Canadian Courts have frequently approved break fees and expenses in favour of stalking horse bidders in insolvency proceedings.[77] In that context, the break fees are designed to compensate the stalking horse bidder for the cost and risk incurred in putting together the bid, as well as an additional premium over said expenses to account for the "price of

[72] Townsend Affidavit at paras 14 to 20.
[73] Townsend Affidavit at para 17.
[74] *ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd.*, 2007 SKQB 121 at para 19.
[75] First Report at paras 38 to 39.
[76] *CCAA*, s. 11.
[77] *Danier Leather Inc, Re*, 2016 ONSC 1044 at para 45 [***Danier***]; *Green Growth Brands Inc, Re,* 2020 ONSC 3565 at para 52 [***Green Growth***].

stability".[78] The same rationale applies equally to plan sponsors who incur cost and risk associated with putting forward a proposed plan of arrangement or compromise.

90. The Plan Sponsor has entered into the Restructuring Term Sheet and agreed to provide the Interim Financing Facility to not only fund the Applicants ongoing business operations during these *CCAA* Proceedings, but also to repay in full the SNDL Mezzanine Debt.[79]

91. In light of the SNDL Demands and absent the stability of the Restructuring Term Sheet, the Applicants would be left to source a transaction in a relatively short timeframe that would not only have to repay all indebtedness owing to SNDL, but also provide value to the Applicants' unsecured creditors and shareholders, something the Applicants were unable to do previously.[80]

92. The Break Fee has been negotiated with the Plan Sponsor to protect the Plan Sponsor from the risk that it will not be compensated for engaging in the significant negotiations and discussions with the Delta 9 Group to formulate the proposal contained in the Plan Sponsor Term Sheet after such terms are exposed in a public process.[81]

93. The reasonableness of break fees and expense reimbursements are subject to the exercise of the applicants' business judgment, so long as they lie within a range of reasonable alternatives.[82]

94. The Monitor has reviewed bid protections approved by Canadian courts in insolvency proceedings for the cannabis industry since 2023 and believes the Break Fee to be: (i) customary; (ii) reasonable in the circumstances and within the range of reasonable bid protections in comparable restructuring proceedings.[83]

95. The Applicants submit that the Break Fee is in an amount such that it will not create uncertainty or discourage interested parties from participating in the SISP or putting forward their own plan of arrangement or compromise.

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[78] *Danier* at para 41.
[79] Second Arbuthnot Affidavit at para 20.
[80] Second Arbuthnot Affidavit at para 21.
[81] Second Arbuthnot Affidavit at para 23.
[82] *Cannapiece Group Inc v Carmela Marzili*, 2022 ONSC 6379 at para 5.
[83] First Report at para 36.

96. The Applicants request that the Court grant a charge over the Property in favour of the Plan Sponsor as security for payment of the Break Fee. Similar charges for bid protection have been commonly granted by Canadian *CCAA* courts.[84]

97. The Applicants will return to Court to seek approval of the Plan Sponsor Term Sheet and are not seeking approval of same at this time.

H. The SISP Order Should be Approved

98. It is well recognized that the Court has jurisdiction to approve a sales process in relation to a *CCAA* debtor's business and assets, prior to the development (or in the absence) of a plan of compromise and arrangement.[85]

99. In *Nortel*, the Ontario Superior Court of Justice identified a number of factors to consider when determining whether to authorize a sales process, including:

a. whether a sales transaction is warranted at the time;

b. whether the sale will benefit the whole "economic community";

c. whether any of the debtors' creditors have a *bona fide* reason to object to a sale of the business; and

d. whether there is a better viable alternative.[86]

100. Canadian courts have applied the foregoing factors in considering applications to approve sales processes in the cannabis industry in a number of *CCAA* matters.[87]

101. In *Brainhunter Inc., Re,* the Ontario Superior Court of Justice noted that the factors in section 36 of the *CCAA* directly apply only in the context of the approval of a sale, as opposed to the sales process.[88] Nevertheless, the *Nortel* criteria should be evaluated in light of considerations that may apply when seeking the eventual approval for a concluded sale pursuant to section 36, and the Court can consider: (a) whether the proposed SISP is likely to satisfy the requirement that the process be fair and the best price has been

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[84] See, i.e., *Loyaltyone*, at para. 13; *Loyaltyone Co, Re,* (20 Mar 2023) CV-23-00696017-00CL (ONSC CL), SISP Approval Order at para 13; *Just Energy (Re)*, (August 18, 2022) CV-21-00658423-00CL (ONSC CL), SISP Approval Order at para. 10.
[85] CCAA, s. 11 and 36; *Nortel Networks Corp, Re* (2009), 55 CBR (5th) 229 (ONSC CL) at para 48 [***Nortel***].
[86] *Nortel* at para 49.
[87] *Green Growth* at para 61; *Fire & Flower Holdings Corp, et al,* (21 June 2023) CV-23-00700581-00CL (ONSC CL) (Endorsement of J. Osborne); *BZAM Ltd., Re,* [***BZAM***] (8 March 2024) CV-24-00715773-00CL (ONSC CL) (Endorsement of J. Osborne);
[88] *Brainhunter Inc, Re,* 2009 CanLII 72333 (ONSC) at paras 16 to 17 [***Brainhunter***].

obtained; (b) the Monitor is supportive of the SISP; (c) the extent to which creditors were consulted; and (d) any other relevant factors.

102. In other *CCAA* cases, Canadian courts have also considered the following factors:

a. the fairness, transparency, and integrity of the proposed process;

b. the commercial efficacy of the proposed process in light of the specific circumstances; and

c. whether the sales process will optimize the chances, in the particular circumstances of securing the best possible price for the assets up for sale.[89]

103. The *Nortel* criteria are satisfied in the circumstances and the Court ought to approve the SISP, given that:

a. the SISP was developed by the Applicants in consultation with the Monitor. It is intended to provide a fair and reasonable process to canvass the market to obtain the best possible result for stakeholders[90]. The Monitor has also advised that it is likely to engage sales advisors to help support the SISP as well as to source all possible available transactions to monetize that component of the Delta 9 Group for the highest possible value;[91]

b. a sale in respect of the business and assets of Bio-Tech will benefit the whole community with an economic interest by providing a going-concern solution for the Applicants, thereby potentially preserving the jobs of the Applicants' employees, as well as critical economic relationships with multiple suppliers, regulators, and other stakeholders. Moreover, it is necessary and urgent for the preservation of value of the Applicants' business that the Applicants complete a going-concern solution and conclude these proceedings;[92]

c. the Applicants do not believe there is any *bona fide* reason for their creditors to object to the sale of the business of the Bio-Tech or the need to undertake a SISP; and

[89] *Walter Energy* at paras 20 to 21; *CCM Master Qualified Fund v Blutip Power Technologies,* 2012 ONSC 1750 at para 6; *Fire & Flower Holdings Corp, et al,* (21 June 2023) CV-23-00700581-00CL (ONSC CL) (Endorsement of J. Osborne); at paras 17 and 26 to 29.
[90] Second Arbuthnot Affidavit at paras 60 and 62.
[91] First Report at para 86.
[92] Second Report at para 9.

d. there is no other viable alternative for the Bio-Tech business to the SISP.

104. In anticipation of the criteria that may eventually have to be satisfied under section 36 of the *CCAA* for approval of the Successful Bid, the Applicants submit that the proposed SISP is fair, transparent, and objective. In consultation with the Monitor, the Applicants have set the applicable timelines and terms of the SISP with a view to providing sufficient time to allow interested parties to fully participate in the SISP.

105. The Monitor has compared the duration of the SISP with those in recent insolvency proceedings in the cannabis industry and is satisfied that the proposed timeframe for the SISP is comparable and commercially reasonable in the circumstances.[93]

106. The SISP should be approved as the Applicants are insolvent, unable to indefinitely continue operations in their current state and must restructure to preserve their business. There is insufficient capital to meet Delta 9's debt obligations while funding the operations of Bio-Tech that continue to operate at a significant loss.[94] A sale of the Bio-Tech business (which is a cash-flow negative component of the larger Delta 9 Group) will maximize value for the Applicants' stakeholders, either through allowing the business to continue as a going-concern or through ascribing fair market value to the business and the assets of Bio-Tech. The broad flexibility afforded by the SISP is designed to solicit the highest value available for the Bio-Tech Property and Business and to alleviate Delta 9's significant debt obligations of Bio-Tech, for the benefit of all stakeholders.

I. Claims Process Order Should be Granted

107. Section 11 of the *CCAA* gives the Court authority to grant any order it considers appropriate in the circumstances, including the ability to approve a process to solicit and determine claims against a debtor company and/or its directors and officers.[95]

108. Canadian Courts routinely approve claims processes, including those providing for a 'reverse' claims process (as is the case here), in *CCAA* proceedings, is "well accepted".[96]

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[93] First Report at para 82.
[94] First Arbuthnot Affidavit at para 16.
[95] *CCAA*, s. 11.
[96] Re ScoZinc Ltd, 2009 NSSC 136 at para 25; Re Toys "R" Us (Canada) Ltd, 2018 ONSC 609 at para 8; Re US Steel Canada Inc, 2017 ONSC 1967 at paras 5-6.

Claims processes and claims bar dates allow a debtor company to "determine the universe of claims" against it and/or its directors and officers.[97]

109. It is appropriate for the Court to exercise its discretion to approve the Claims Procedure and the Claims Procedure Order given that:

a. the Claims Procedure is intended to provide a comprehensive, fair and expeditious means of identify, quantifying and resolving Claims against the Applicants and their Directors and Officers;

b. the Claims Procedure was developed in consultation with the Monitor, and the Monitor supports approval of the Claims Procedure;

c. the 'reverse' claims process was designed to streamline the Claims Procedure for Claimants and the Applicants, and provides for appropriate flexibility;

d. the Claims Procedure will assist the Applicants with the developments of its restructuring strategy, including determining the classes and quantum for all creditors, and help facilitate an orderly exit from the *CCAA* Proceedings;

e. the proposed Bar Dates are fair and reasonable in the circumstances, were selected by the Applicants in consultation with the Monitor, and provide sufficient time for potential Claimants to submit and/or dispute their Claims;

f. the direct notification and publication of notice to potential Claimants will make the Claims Procedure widely distributed and publicized; and

g. in the event that disputed Claims cannot be resolved, the Claimants may apply to the Court for an order resolving the dispute.[98]

110. The proposed Claims Procedure Order satisfies the overarching purpose of claims processes generally: "to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost-effective manner".[99]

111. For these reasons, the proposed Claims Procedure Order is fair, reasonable, and appropriate in the circumstances and should be approved by the Court.

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[97] Timminco Limited (Re), 2014 ONSC 3393 ("Timminco") at para 43; Re Aralez Pharmaceuticals, (October 10, 2018), Ont SCJ (Commercial List), Court File No. CV18-603054-00CL (Claims Procedure Order); Re Timminco, (June 15, 2012), Ont SCJ (Commercial List), Court File No. CV-12-9539-00CL (Claims Procedure Order).
[98] Second Arbuthnot Affidavit at paras 69 to 73; First Report at para 87.
[99] *Canwest Global Communications Corp*, 2011 ONSC 2215 at para 40.

J. The Confidential Appendices to the First Report Should be Sealed

112. The Applicants request to seal the Confidential Appendices to the First Report of the Monitor, dated July 18, 2024 (the "**Confidential Appendices**").

113. Pursuant to Part 6, Division 4 of the Alberta *Rules of Court*, AR 124/2010, the Court has the discretionary authority to order that a document filed in a civil proceeding is confidential, may be sealed, and not form part of the public record of the proceedings.[100]

114. A sealing order may be granted where the applicant demonstrates 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.[101]

115. The Confidential Appendices contain commercially sensitive information, including details of the payments to be made to the Key Employees under the terms of the KERP and the confidential CRO Engagement, that in the hands of the public, could have a material and negative impact on efforts to restructure the Applicants' business in a manner that maximizes realization for stakeholders in a *CCAA* proceeding.[102]

116. The proposed form of Sealing Order contemplates that the Order will remain in place only until January 24, 2025. For that reason, the salutary effects of a sealing order outweigh any negative effects to the principles of Court openness.

117. The proposed Sealing Order is the least restrictive and prejudicial alternative to prevent the dissemination of commercially sensitive information.

V. RELIEF SOUGHT

118. The Applicants submit that they have met all of the qualifications required to obtain the requested relief and respectfully request that this Court grant the proposed form of Initial Order.

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[100] *Rules of Court*, AR 124/2010, Part 6, Division 4.
[101] *Sherman Estate v Donovan*, 2021 SCC 25 at para 38.
[102] Second Arbuthnot Affidavit at paras 74 and 75.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd DAY OF JULY, 2024.

MLT AIKINS LLP

FOR: 

Ryan Zahara/Kaitlin Ward
Counsel for the Delta 9 Group

LIST OF AUTHORITIES

A. Legislation

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36

B. Case Law

1. *Century Services Inc v Canada (AG)*, 2010 SCC 60
2. *Target Canada Co, Re*, 2015 ONSC 303
3. *Cinram International Inc, Re*, 2012 ONSC 3767
4. *Canwest Global Communications Corp., Re*, ;[2009] OJ No. 4286 (ONSC CL)
5. *Grant Forest Products Inc, Re*, 2009 CanLII 42046 (ONSC)
6. *Timminco Ltd, Re*, 2012 ONSC 506
7. *Aralez Pharmaceuticals Inc, Re*, 2018 ONSC 6980
8. *Walter Energy (Re)*, 2016 BCSC 107
9. *US Steel Canada Inc*, 2014 ONSC 6145
10. *Canwest Publishing Inc*, 2010 ONSC 222
11. *Indiva Limited et al, Re* (21 June 2024) CV-23-00722044-00CL (ONSC CL) (Endorsement of J. Osborne).
12. *Just Energy Corp, Re*, 2021 ONSC 1793
13. *Tantalus Labs Ltd, Re*, 2023 BCSC 1450
14. *BZam Ltd, Re*, (28 Feb 2024) CV-24-00715773-00CL (ONSC CL) (Endorsement of J. Osborne)
15. *Aleafia Health Inc, Re*, (22 Aug 2023) CV-23-00703350-00CL (ONSC CL) (Endorsement of J. Conway)
16. *Payless ShoeSource Canada Inc. et al, Re*, 2019 ONSC 1215
17. *Pascan Aviation Inc., Re*, 2015 QCCS 4227
18. *JTI-Macdonald Corp., Re*, 2019 ONSC 1625
19. *ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd.*, 2007 SKQB 121
20. *Danier Leather Inc, Re*, 2016 ONSC 1044
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22. *Cannapiece Group Inc v Carmela Marzili*, 2022 ONSC 6379
23. *Nortel Networks Corp, Re* (2009), 55 CBR (5^{th}) 229 (ONSC CL)

24. *Fire & Flower Holdings Corp, et al,* (21 June 2023) CV-23-00700581-00CL (ONSC CL) (Endorsement of J. Osborne);
25. *BZAM Ltd., Re,* (8 March 2024) CV-24-00715773-00CL (ONSC CL) (Endorsement of J. Osborne)
26. *Brainhunter Inc, Re,* 2009 CanLII 72333 (ONSC)
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29. Re Toys "R" Us (Canada) Ltd, 2018 ONSC 609
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31. Timminco Limited (Re), 2014 ONSC 3393
32. *Canwest Global Communications Corp,* 2011 ONSC 2215
33. *Sherman Estate v Donovan*, 2021 SCC 25

C. Court Orders

1. *Fire & Flower Holdings Corp*, *Re,* Amended and Restated Initial Order (15 June 2023) CV 23-00700581-00CL (ONSC CL)
2. *The Flowr Corporation, Re,* Amended and Restated Initial Order (20 October 2022) CV-22-00688966-00CL (ONSC CL)
3. *Original Traders Energy Ltd,* initial order issued January 31, 2023 [CV-23-00693758-00CL] (ONSC CL)
4. *Heritage Cannabis, Re,* amended and restated initial order [CV-24-00717664-00CL] (ONSC CL)
5. *Aleafia Health Inc.,* SISP approval order issued August 22, 2023 [CV-23-00703350-00CL] (ONSC CL)
6. *Indiva Limited,* amended and restated initial order issued June 21, 2024 [CV-24-00722044-00CL] (ONSC CL)
7. *Loyaltyone Co, Re,* (20 Mar 2023) CV-23-00696017-00CL (ONSC CL), SISP Approval Order at
8. *Just Energy (Re)*, (August 18, 2022) CV-21-00658423-00CL (ONSC CL), SISP Approval Order
9. Re Aralez Pharmaceuticals, (October 10, 2018), Ont SCJ (Commercial List), Court File No. CV18-603054-00CL (Claims Procedure Order)
10. Re Timminco, (June 15, 2012), Ont SCJ (Commercial List), Court File No. CV-12-9539-00CL (Claims Procedure Order).

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to June 19, 2024

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Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la

establishes a *provincial pension plan* as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 128; 2009, c. 33, s. 28.

province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 128; 2009, ch. 33, art. 28.

Meaning of *regulatory body*

11.1 (1) In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Définition de *organisme administratif*

11.1 (1) Au présent article, ***organisme administratif*** s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Organisme administratif — ordonnance rendue en vertu de l'article 11.02

(2) Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Exception

(3) Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

a) il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

b) l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may,

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à

on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

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;

titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Abrogé, 2005, ch. 47, art. 128]

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

(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.

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

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.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138.

Facteur additionnel : demande initiale

(5) Lorsqu'une demande est faite au titre du paragraphe (1) en même temps que la demande initiale visée au paragraphe 11.02(1) ou durant la période visée dans l'ordonnance rendue au titre de ce paragraphe, le tribunal ne rend l'ordonnance visée au paragraphe (1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65; 2019, ch. 29, art. 138.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Cessions

11.3 (1) Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de cession, le cas échéant;

b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

c) l'opportunité de lui céder les droits et obligations.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

2005, c. 47, s. 131; 2007, c. 29, s. 109, c. 36, ss. 77, 112; 2012, c. 31, s. 421.

Obligations and Prohibitions

Obligation to provide assistance

35 (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the *Bankruptcy and Insolvency Act*

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

2005, c. 47, s. 131.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Restriction

(9) Aucune ordonnance rendue au titre de la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit d'effectuer les opérations visées au paragraphe (8).

Valeurs nettes dues à la date de résiliation

(10) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par la compagnie à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée être un créancier de la compagnie relativement à ces sommes.

Rang

(11) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

2005, ch. 47, art. 131; 2007, ch. 29, art. 109, ch. 36, art. 77 et 112; 2012, ch. 31, art. 421.

Obligations et interdiction

Assistance

35 (1) La compagnie débitrice est tenue d'aider le contrôleur à remplir adéquatement ses fonctions.

Obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité*

(2) Elle est également tenue de satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

2005, ch. 47, art. 131.

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

[1] Deschamps J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] La juge Deschamps — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler* and *Jeremy Dacks*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

Alan Mark, *Melaney Wagner*, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

   a) Should the stay be extended to the Partnerships?

   b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

   c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

   d) Should the Court approve protections for employees?

   e) Is it appropriate to allow payment of certain pre-filing amounts?

   f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

   g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

   h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 ("*Canwest Global*").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R (4^{th}) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

CITATION: Cinram International Inc. (Re), 2012 ONSC 3767
COURT FILE NO.: CV-12-9767-00CL
DATE: 20120626

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A", Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert J. Chadwick, Melaney Wagner and Caroline Descours, for the Applicants**

Steven Golick, for Warner Electra-Atlantic Corp.

Steven Weisz, for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent

Tracy Sandler, for Twentieth Century Fox Film Corporation

David Byers, for the Proposed Monitor, FTI Consulting Inc.

HEARD &
ENDORSED: **JUNE 25, 2012**

REASONS: **JUNE 26, 2012**

ENDORSEMENT

[1] Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").

SCHEDULE "C"

A. THE APPLICANTS ARE "DEBTOR COMPANIES" TO WHICH THE CCAA APPLIES

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds $5 million.

> CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds $5 million.

(1) The Applicants are Debtor Companies

43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.
>
> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

> does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
>
> CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global*, the Court outlined the test for granting such a charge:

> I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.
>
> *Canwest Global, supra* at paras 46-48; Book of Authorities, Tab 1.
> *Canwest Publishing, supra* at paras. 56-57; Book of Authorities, Tab 16.
> *Timminco, supra* at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD$13 million, given:

a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;

c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;

d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;

e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

f. the Monitor is in support of the proposed Directors' Charge.

Bell Affidavit, paras. 249, 250, 254-257 ; Application Record, Tab 2.

(D) KERP Charge

90. The Applicants seek a KERP Charge in an amount of CAD$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);

b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

d. the employees' history with and knowledge of the debtor;

e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Re Grant Forest Products Inc. (2009), 57 C.B.R. (5th) 128 (Ont. Sup. Ct. J [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.
Canwest Publishing supra, at paras 59; Book of Authorities, Tab 16.
Canwest Global supra, at para. 49; Book of Authorities, Tab 1.
Re Timminco Ltd. (2012), 95 C.C.P.B. 48 (Ont. Sup. Ct. J [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest, *supra* at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD$3 million, given:

a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora

Employees to remain with the Cinram Group while the company pursued its restructuring efforts;

b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;

c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;

d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;

e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;

f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate

in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

> *Sino-Forest, supra*, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;

b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and

c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

> Bell Affidavit, para. 176; Application Record, Tab 2.

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

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

[42] Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, 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. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

[44] The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

[45] Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (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 that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[46] I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[47] The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

[49] Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

[10] (2003), 39 C.B.R. (4th) 216.

orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

[52] In 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.

Annual Meeting

[53] The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

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[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

COURT FILE NO.: CV-09-8247-00CL
DATE: 20090811

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: 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 Grant Forest Products Inc., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Applicants

BEFORE: Justice Newbould

COUNSEL: A. Duncan Grace for GE Canada Leasing Services Company

Daniel R. Dowdall and Jane O. Dietrich, for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Sean Dunphy and Katherine Mah for the Monitor Ernst & Young Inc.

Kevin McElcheran for The Toronto-Dominion Bank

Stuart Brotman for the Independent Directors

DATE HEARD: August 6, 2009

E N D O R S E M E N T

[1] KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was

made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

[2] GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

[3] The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

[4] The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

[5] Grant Forest has total funded debt obligations of approximately $550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately $400 million. The second lien lenders are owed approximately $150 million.

[6] Grant Forest has unsecured trade creditors of over $4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. $6.5 million.

[7] The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately $50 million for debt financing provided to the business.

Analysis

[8] Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

[9] In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. … Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by

> the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

[10] I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

[11] The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

[12] Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

[13] It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296. In that

case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from Re *Warehouse Drug Store Ltd.*, [2006] O.J. No. 3416, that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

[14] I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Re Nortel Networks Corp*. [2009] O.J. No. 1188, Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

[15] In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

[16] It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

[17] It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

[18] A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

[19] The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp*. (1991), 4 O.R. (3d) 1, while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

> When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

[20] The first lien security holders owed approximately $400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

[21] With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately $400 million are consenting and the second lien lenders owed approximately $150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be

any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately $50 million, supports the KERP provisions for Mr. Lynch.

[22] In his work, *Canadian Insolvency in Canada, supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

[23] In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

[24] I have been referred to the case of *Re MEI Computer Technology Group Inc*. (2005), 19 C.B.R. (5th) 257, a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are

necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

[25] The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

NEWBOULD J.

DATE: August 11, 2009

CITATION: Timminco Limited (Re), 2012 ONSC 506
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120202

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants

BEFORE: MORAWETZ J.

COUNSEL: A. J. Taylor, M. Konyukhova and K. Esaw, for the Applicants

D.W. Ellickson, for Communications, Energy and Paperworkers' Union of Canada

C. Sinclair, for United Steelworkers' Union

K. Peters, for AMG Advance Metallurgical Group NV

M. Bailey, for Superintendent of Financial Services (Ontario)

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec

HEARD: January 12, 2012
RELEASED: January 16, 2012
REASONS: February 2, 2012

ENDORSEMENT

[1] This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[63] In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial* and *Nortel Networks Corporation (Re)*).

[64] In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

[65] There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

[66] In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

[67] If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

[68] For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

[69] I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities' obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

[70] I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities' failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) The KERPs

[71] Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

[72] In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities' CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is $269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corporation (Re)*, (2009) O.J. No. 1044 (S.C.J.), *Grant Forest Products Inc. (Re)*, (2009) 57 C.B.R. (5th) 128 (Ont. S.C.J.) [Commercial List], and *Canwest Global Communications Corp. (Re)*, (2009) 59 C.B.R. (5th) 72 (Ont. S.C.J.).

[73] In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

[74] The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

[75] I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be

necessary to replace them. It is reasonable to conclude that the replacement of such employees would not provide any substantial economic benefits to the company. The KERPs are approved.

[76] The Timminco Entities have also requested that the court seal the Confidential Supplement which contains copies of the unredacted KERPs, taking the position that the KERPs contain sensitive personal compensation information and that the disclosure of such information would compromise the commercial interests of the Timminco Entities and harm the KERPs participants. Further, the KERPs participants have a reasonable expectation that their names and salary information will be kept confidential. Counsel relies on *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 at para. 53 where Iacobucci J. adopted the following test to determine when a sealing order should be made:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[77] CEP argues that the CCAA process should be open and transparent to the greatest extent possible and that the KERPs should not be sealed but rather should be treated in the same manner as other CCAA documents through the Monitor. In the alternative, counsel to the CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

[78] In my view, at this point in time in the restructuring process, the disclosure of this personal information could compromise the commercial interests of the Timminco Entities and cause harm to the KERP participants. It is both necessary and important for the parties to focus on the restructuring efforts at hand rather than to get, in my view, potentially side-tracked on this issue. In my view, the Confidential Supplement should be and is ordered sealed with the proviso that this issue can be revisited in 45 days.

Disposition

[79] In the result, the motion is granted. An order shall issue:

(a) suspending the Timminco Entities' obligation to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administrative Charge and the D&O Charge;

(c) approving the KERPs and the grant of the KERP Charge;

(d) authorizing the sealing of the Confidential Supplement to the First Report of the Monitor.

MORAWETZ J.

Date: February 2, 2012

CITATION: Aralez Pharmaceuticals Inc. (Re), 2018 ONSC 6980
COURT FILE NO.: CV-18-603054-00CL
DATE: 20181121

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC., Applicants

BEFORE: S.F. Dunphy J.

COUNSEL: *Maria Konyukhova and Kathryn Esaw* for Applicants

Jeffrey Levine, for the Official Committee of Unsecured Creditors

David Bish, for Richter Advisory Group, Monitor

Danish Afroz, for Deerfield Management Company, L.P.

HEARD at Toronto: November 16, 2018

REASONS FOR DECISION

[1] This case raises for determination the always-troubling question of Key Employee Retention Plans (or "KERPs") and Key Employee Incentive Plans (or "KEIPs"). At the conclusion of the hearing. I indicated that I would be approving the proposed KERP involving three employees with reasons to follow and would take under reserve the matter of the proposed KEIP.

[2] For the reasons that follow, I have determined to approve the KEIP as well. My reasons that follow apply to both programs.

Background facts

[3] The applicants Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. brought this application under the *Companies' Creditors Arrangement Act*, R.S.C. 1990, c. C.-36 and an initial order was granted by me on August 10, 2018 with Richter Advisory Group Inc. appointed as Monitor. A number of affiliated entities in the

same corporate group sought relief pursuant to Chapter 11 of the United States Bankruptcy Code on the same day. The Chapter 11 case is being managed by Justice Glenn in the United States Bankruptcy Court for the Southern District of New York. Both courts have adopted a cross-border protocol.

[4] As their names suggest, the Aralez group of companies are in the pharmaceutical industry. The debtor companies have operated in an integrated manner and have 41 employees at the Canadian entities and 23 in the Chapter 11 entities.

[5] In addition to being operationally integrated, Aralez has an integrated capital structure as well. The secured credit facility is secured by substantially all of the assets of the debtor companies on both sides of the border. The secured creditors – Deerfield Partners L.P. and Deerfield Private Design Fund III, L.P. – possess security on substantially all of the assets of the debtor companies on both sides of the border. The security in Canada has been subjected to independent review by the Monitor and its counsel and no issues have arisen nor have any creditors objected to their claims.

[6] These cases have been targeting a managed liquidation from the start. On September 18, 2018, the Canadian and US entities entered into three stalking horse agreements and, pursuant to a court-ordered sales process order, are in the process of completing a bid process in the coming days. The three stalking horse bids place a "floor" under sale proceeds of approximately $240 million subject to possible adjustments. This compares to the secured claim of Deerfield that is approximately $275 million.

[7] I understand that a motion may be brought in the United States to challenge some aspects of Deerfield's security in that jurisdiction (no such motion has been suggested in Canada to date). However, as things currently stand, the bid process underway would have to yield a fairly significant improvement from the existing stalking horse offers in order to result in surplus being available for junior creditor groups. The point of this analysis is merely to establish that Deerfield's input into the process of design of the KEIP and KERP programs before me is a material factor. Any funds diverted to KEIP or KERP programs have a substantial likelihood of coming out of Deerfield's pocket in the final analysis and any improvements or de-risking to either cash flow or sales proceeds will enure very substantially to Deerfield's benefit.

[8] Stated differently – Deerfield has significant "skin in the game" when it comes to a KERP or KEIP.

[9] Deerfield's interest acquires somewhat greater weight when one considers that one of the stalking horse bids (in the United States) is a credit bid whereas the Canadian stalking horse bid involves a sale of the assets of Aralez Pharmaceuticals Inc., resulting in the unsecured creditors of subsidiary Aralez Pharmaceuticals Canada Inc. being granted effective priority over Deerfield despite Deerfield's secured claims.

Deerfield is thus very likely to be one of the only Canadian creditors substantially impacted by the KEIP or KERP.

[10] This does not imply that the Court is a rubber stamp as to whatever Deerfield may have approved nor does it imply that other voices have no weight. It does imply that some comfort can be taken that this process has been subject to arm's length market discipline. Deerfield has an interest in getting as much as possible in the way of value-added effort out of the employee group and they have an interest in getting that effort at as low a cost as they can bargain for.

[11] The KERP program involved only three employees, was reported upon extensively by the Monitor and was not opposed by any stakeholder. I approved it at the hearing with reasons to follow (these are those reasons). The KEIP program affects nine senior management employees whose services are provided to both the Canadian and United States debtors and was accordingly presented to both courts for approval. I am advised that Justice Glenn approved the KEIP program for purposes of the United States debtors on November 19, 2018.

[12] While the KERP and KEIP programs were presented to me separately, they have many features in common. Were this not a transnational proceeding, it is quite likely that I should have had but a single combined KERP-KEIP program before me since these are not commonly differentiated in this jurisdiction. Different considerations obtain in the United States where KERP programs for some categories of employees are not allowed and KEIP programs are subject to specific rules one of which is that the predominant purpose of a KEIP must be *incentive* and not *retention*. Both are appropriate criteria in our process. In approving the KEIP program for the United States debtors, Justice Glenn indicated that he was satisfied that the KEIP program was designed primarily to incent the beneficiaries of the program.

[13] The Canadian KERP impacts three employee of Aralez Pharmaceuticals Canada Inc. The KERP would provide these three with a retention bonuses of between 25% and 50% of salary. The total amount payable under the proposed program would be $256,710 and payment is to be made on the earlier of termination without cause, death or permanent disability and the closing of a sale of the Canadian assets.

[14] The KEIP impacts nine senior management employees of the Canadian debtors who provide services (in all but one case) that benefit both estates. None of the KEIP participants are expected to have on-going roles once the bankruptcy sales process is completed. The program is designed to incent participants to assist in achieving the highest possible cash flow during the bankruptcy process (thereby reducing the need to rely upon DIP financing) and to achieve the highest level of sales proceeds. Cash flow is measured relative to the DIP budget and nothing is payable until sales are completed.

[15] The affected individuals are members of the senior management team that can be expected to be in a position to achieve a positive impact upon both criteria (cash flow and sales proceeds), but their roles are such that the level and value of the contributions of each towards those targets are difficult to measure with precision. Total payouts under the “super-stretch” targets could rise to as much as $4,058,360. This figure may be compared to the stalking horse bids that establish a floor price of $240 million.

[16] Since all but one of the participants in the KEIP program are providing services for the benefit of both United States and Canadian debtors, the KEIP program has been designed such that costs will be shared by the two estates regardless of residence.

[17] The design of the two programs was supervised by Alvarez & Marsal Inc, the financial advisor to the United States and Canadian debtors. The Compensation Committee of the parent company’s Board was involved as was the debtor’s counsel. The Monitor was consulted at every step in the process and provided significant input that was taken into account. The Board of Directors of each affected entity has approved the plans.

[18] The programs were disclosed to the proposed beneficiaries at or near the outset of the bankruptcy process. At the request of the DIP Lender, court approval of these programs was not sought at that time as is relatively common. The stalking horse bids were several weeks away from being finalized and significant effort from the affected employees would be needed to but those transactions to bed. The sales process that followed also needed to be put on the rails and the all hands were needed to ensure that the business passed through the initial stages of the bankruptcy filing without undue adversity. In short, the affected employees were asked to acquiesce in the deferral of approval of these programs with the understanding that the employer would pursue their approval in good faith.

[19] With only a few weeks remaining until the expected end of the sales process, it is fair to observe the employees have more than delivered on their end of the bargain. Cash flow has held up very well and the stalking horse bids have been firmed up at a favourable level.

[20] The motion for approval of the KEIP (not the KERP) was opposed by the Official Committee of the Unsecured Creditors appointed pursuant to the United States Chapter 11 process. I shall not review here the nature of their standing claim – and the dispute of that claim. Their intervention has been focused, their arguments precise and the prospect of harm in the form of unnecessary delay or expense is minimal. Without prejudice to the position of everyone on the status of this committee in other contexts, I agreed to hear them and receive their written arguments. The cross-border protocol that both courts have approved affords me discretion to allow the Official Committee standing on a case-specific or *ad hoc* basis.

[21] In the view of the Official Committee, the KEIP program bonuses are too high and too easily earned. I shall address both of these arguments below.

Issues to be determined

[22] Ought this court to exercise its discretion to approve the KERP or KEIP programs as proposed by the applicants?

Analysis and discussion

[23] KERP/KEIP programs throw up a number of thorny issues that must be grappled with because there are a number of potentially conflicting policy considerations to balance.

[24] The early stages of an insolvency filing are chaotic enough without having added pressures of trying stem the hemorrhage of key employees. “Key” is of course an elastic concept. Everyone is key to someone. Employees are not hired to amuse management but to perform necessary functions. Sorting out “key” in the context of the organized chaos that is the early days of an insolvency filing requires a weathered eye to be cast in multiple directions at once:

- restructuring businesses often have inefficiencies that need identifying and resolving that may impact some otherwise “key” employees;

- with the levers of traditional shareholder oversight blunted in insolvency, the risks of management resolving conflicts in favour of self-interest are acute;

- it is easy to overstate the risk of loss of key employees if a “bunker mentality” causes management to take counsel of their fears rather than objective evidence, such evidence to be informed by a recognition that *some* degree of instability is inevitable; and

- “business as usual” is a goal, but never a perfectly achievable one and small amounts of stability acquired at high cost may be a bad investment.

[25] While the risks of abuse or wasted effort are easily conjured, the legitimate use of an appropriately-calibrated incentive plan are equally obvious:

- Employees in newly-insecure positions are easy prey to competitors able to offer the prospect of more stable employment, sometimes even at lower salary levels, to people whose natural first priority is looking after their families;

- There is a risk that the most employable and valuable employees will be cherry-picked while the debtor company may find itself substantially handicapped in trying to compete for replacement employees;

- Whether by reason of internal restructuring or a court-supervised sales process, employees may often find themselves being asked to bring all of their skills and devotion to the task of putting themselves out of work; and

- Since many employers use a mix of base salary and profit-based incentives, employees of an insolvent business in restructuring may find themselves being asked to do more – sometimes covering for colleagues who have being laid off or who have left for greener pastures - while earning a fraction of their former income.

[26] What is wanting to sort out these competing interests is one thing that the court – on its own at least – is singularly ill-equipped to provide. It is here that the essential role of the Monitor as the proverbial “eyes and ears of the court” comes to the fore. The court cannot shed its robe and wade into the debate in a substantive way. The Monitor on the other hand can shape the manner in which the debate is conducted and in which the decisions presented to the court for approval are made.

[27] What the court is unable to supply on its own can be summed up in the phrase “business judgment”. Outside of bankruptcy, the debtor company is entitled to exercise its own business judgment in designing such programs subject to the oversight of shareholders and the directors they appoint. Inside bankruptcy, the oversight of the court is required to assess the reasonableness of the exercise of the debtor company’s business judgment. In my view, the court’s role in assessing a request to approve a KERP or KEIP program is to assess the totality of circumstances to determine whether the process has provided a reasonable means for *objective* business judgment to be brought to bear and whether the end result is objectively reasonable.

[28] Perfect objectivity, like the Holy Grail, is unattainable. However, where business judgment is applied in a process that has taken appropriate account of as many of the opposing interests as can reasonably be brought into the equation, the result will adhere most closely to that unattainable ideal.

[29] My review of the limited case law on the subject of KERP (or KEIP) approvals suggests that there are no hard and fast rules that can be applied in undertaking this task. However the principles to be applied do emerge. Morawetz J. suggested a number of considerations in *Cinram International Inc. (Re),* 2012 ONSC 3767 (CanLII),

relying on the earlier decision of Newbould J. in *Grant Forest Products Inc. (Re)*, 2009 CanLII 42046 (ON SC)[1]. I reproduce here the synthesis of Morawetz J. (*Cinram*, para. 91):

> a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
> b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
> c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
> d. the employees' history with and knowledge of the debtor;
> e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
> f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
> g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
> h. whether the payments under the KERP are payable upon the completion of the restructuring process.

[30] I have conducted my examination of the facts of this case having regard to the following three criteria which I think sweep in all of the considerations underlying *Grant* and *Cinram* and which provide a framework to consider the degree to which appropriately objective business judgment underlies the proposal:

> (a) Arm's length safeguards: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process – from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly

[1] See also Pepall J. (as she then was) in *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) at para. 49-52.

benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.

(b) Necessity: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.

(c) Reasonableness of Design: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

(a) Arm's length safeguards

[31] In my view, there is substantial evidence that the process of negotiating and designing both programs has benefitted from significant arm's length and objective oversight in the negotiation, design and implementation phases of these two programs.

[32] The process leading to both programs began prior to the insolvency filings on August 10, 2018. Aralez had engaged A&M as its financial advisor for the restructuring process and asked A&M to help formulate both the key employee incentive and retention programs. A&M worked on program design in consultation with the debtor's legal counsel and with input from the compensation committee of the Aralez Pharmaceuticals Inc. Board of Directors, none of whom are beneficiaries of either program.

[33] The Monitor has been consulted extensively. The Monitor has inquired into the design and objects of the proposed plans and has verified the levels of the proposed

incentives relative to the objectives of the programs and other historical data. The Monitor's input has resulted in a number of alterations to the proposals as these have evolved. As the programs have emerged from the process, the Monitor's conclusion is that the KERP is comparable to other KERP plans this court has approved and is reasonable in the circumstances. The Monitor has concluded that the KEIP addresses the concerns raised by the Monitor, protects the interest of Canadian stakeholders and these would not be materially prejudiced by approval of the KEIP. Both recommendations are entitled to very significant weight from this court.

[34] The U.S. Trustee raised a number of concerns with the proposed KEIP which have also resulted in revisions.

[35] Finally, Deerfield has been consulted and has indicated that they take no objection to either program as they have emerged from this process. For the reasons discussed above, Deerfield's *imprimatur* carries a particularly significant degree of weight in these circumstances in terms of establishing the arm's length and market-tested nature of the two programs before me.

[36] The business judgment of Deerfield and the Board of Directors of API are entitled to significant weight. The independent and very significant input of the Monitor, A&M and the U.S. Trustee afford significant comfort that objective viewpoints have played a significant role in designing and vetting the proposals. Finally, the recommendation of the Monitor is entitled to significant weight given the unique role the Monitor plays in the Canadian restructuring process.

[37] In summary, the process followed provides a high degree of comfort that a reasonable level of objective business judgment has been brought to bear. Circumstances will not allow every case the luxury of such a thorough process. However, this process was professionally designed thoroughly run. It has appropriately generated a high level of confidence in the integrity of the outcome

(b) Necessity

[38] The design of the two programs demonstrates an appropriate regard for the criterion of necessity. They are not over-broad.

[39] Any analysis of whether a program is over-broad must take into account the nature of the business. In some respects, Aralez may be likened to a virtual pharmaceutical company in that it out-sources many functions of a traditional pharmaceutical company such as manufacturing. It thus has relatively few employees compared to its size.

[40] In designing the programs and assessing which employees to be included, an assessment was undertaken of each prospective beneficiary in terms of the ease with which they might be replaced, the degree to which they are critical to daily operations of

the debtor companies or completion of the sales process and – for the KERP program at least – the perceived level of retention risk. The Monitor's input was sought at each level of the design and finalization of the programs.

[41] The KERP program involves three employees in Canada and I am advised that their inclusion in the KERP is a condition of the purchaser under the stalking-horse bid. The loss of these three employees – critical to the Canadian business being sold – would endanger the stalking horse bid process at worst and disrupt the business being sold by requiring the debtor companies to deal with recruiting, transition and similar matters at a juncture where they are least able to deal with them at best. Their departure at this juncture would entail significant additional expenditures in terms of professional time at least if that event did not endanger the stalking horse bid.

[42] The KEIP program involves nine members of senior management. They are employees the nature of whose function defies precise description or measurement. They are employees who act in concert with each other as part of a team for whom neither the clock nor the calendar play more than a subsidiary role in dictating their hours of labour. These employees are essential to ensuring the business remains stable and performs well during the restructuring process. They play a key role in helping ensure the sales process achieves the highest level of return. They are also employees most of whom are laboring under the near certainty that the more efficient and successful they are in their efforts, the sooner they will be out of a job.

[43] At such a high level, personal reputation and professional pride remain as significant motivators to be sure. While a job well done may be its own reward, appropriate financial incentives are not without their place. This is a classic case for a well-designed incentive program.

[44] I am satisfied that the design of these programs satisfies the criterion of necessity.

(c) Reasonableness of design

[45] The KERP program provides for retention bonuses ranging from 25% to 50% of annual salary. The aggregate compensation available is $256,710, a figure that may be contrasted to the stalking horse bid for the Canadian assets of $62.5 million. Payment is made on the earlier of termination without cause by the company, death or permanent disability and the completion of the sales transaction.

[46] The timing of payments and the amount of the payments provided for, relative both to the salary of the individuals and to the value of the company, are both well in-line with precedent.

[47] The KEIP program provides for incentive payments to participants based on the debtors' performance relative to target established for cash flow targets during the

bankruptcy proceedings and relative to the achieved asset sale proceeds. Failure to reach targets results in no bonus, while four levels of bonus are possible (Threshold[2], Target, Stretch and Super Stretch).

[48] The real controversy on the motion was in respect of the KEIP.

[49] It is true that the cash flow performance of the debtors to date plus the projections of cash flow over the coming weeks put the KEIP participants well on track to achieving the highest "super-stretch" level of incentive. It is also true that if *no* bids are received in the sales process now underway and only the stalking horse bids are completed, the participants will be comfortably within the "target" level of incentive for asset sales. Combined, this means that that total incentives of approximately 81.25% of salary appears to be all but assured to KEIP participants. In the circumstances, the Official Committee objects that these incentives are simply too easily earned.

[50] They also object to the level of incentives relative to salary as being unacceptably high.

[51] The answer to both of these objections lies in the peculiar facts of this case.

[52] The KERP and KEIP programs were both conceived of and designed primarily in the period leading up to the initial filings made in August 2018, although alterations have been made following the input of, among others, the United States trustee. The employees selected for inclusion in both programs have been operating in the expectation that the employer would proceed in good faith to seek court approval as soon as practicable. At the request of the DIP Lender, the process of seeking court approval was deferred to put priority on the process of securing and finalizing the stalking horse bids and getting the sales process underway. At the time these plans were first offered to employees, forecasting cash flow in bankruptcy and sales proceeds was looking through a glass darkly. It is only hindsight – and the past efforts of the employees – that has made the targets appear to be such an easy goal.

[53] Of course, the employer could not promise and the employee could not expect that court approval of these plans would be a rubber stamp. That does not mean that this court should not take into account the circumstances prevailing when the plans were first offered to employees and the good faith of the employees in continuing to apply their shoulders to the wheel without causing disruption to the process when it could least afford it. It would be fundamentally unfair to penalize the affected employees for their good faith and constructive behavior in this case. It would also be counter-productive as such a precedent would not fail to alter behavior in future cases.

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[2] The threshold incentive based on cash flow was removed after discussions with the United States Trustee.

[54] I am satisfied that the targets were realistic and appropriate at the time they were set and served to align the interests of employees with stakeholders in an appropriate manner.

[55] The level of incentive is also less than meets the eye when the facts are examined more closely. While the combined cash flow plus asset sale incentives could result in incentives of up to 125% of salary, that figure is premised on base salary. In the case of the employees within the proposed KEIP program, base salary has been but one portion of their total compensation. When historical compensation is taken into account, the incentive payments recede to levels significantly below the 80% level calculated by the Official Committee to something closer to 50%.

[56] I am satisfied that the incentive amounts are reasonable in all of the circumstances.

Disposition

[57] In the result, I confirmed the KERP program at the hearing of the motion on December 16, 2018 and am granting the motion in respect of the KEIP program at this time. My approval extends to the requested priority charges securing the KEIP payments.

[58] Order accordingly.

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S.F. Dunphy J.

Date: November 21, 2018

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107

Date: 20160126
Docket: S1510120
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 as Amended

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, as Amended

And

In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	Marc Wasserman Mary I.A. Buttery Tijana Gavric Joshua Hurwitz
Counsel for United Mine Workers of America 1974 Pension Plan and Trust:	John Sandrelli Tevia Jeffries
Counsel for Steering Committee of First Lien Creditors of Walter Energy, Inc.:	Matthew Nied
Counsel for Her Majesty the Queen in Right of the Province of British Columbia:	Aaron Welch
Counsel for Morgan Stanley Senior Funding, Inc.:	Kathryn Esaw

Counsel for KPMG Inc., Monitor:	Peter Reardon Wael Rostom Caitlin Fell
Counsel for Canada Revenue Agency:	Neva Beckie
Counsel for the United States Steel Workers, Local 1-424:	Stephanie Drake
Place and Date of Hearing and Ruling given to Parties with Written Reasons to Follow:	Vancouver, B.C. January 5, 2016
Place and Date of Written Reasons:	Vancouver, B.C. January 26, 2016

[14] The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

[15] It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

[16] Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

[17] At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

The Sale and Investment Solicitation Process ("SISP")

[18] The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

[19] It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

[20] Approvals of SISPs are a common feature in *CCAA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750. At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[21] Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a *CCAA* proceeding: see *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 at paras. 17-19.

[22] In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable, particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

[23] The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

[24] No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

Appointment of Financial Advisor and CRO

[25] The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

[26] The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

[27] In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

[28] A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

[29] The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

[30] Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

[31] In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

[32] The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

[33] In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *Mobilicity Group (Re)*, 2013 ONSC 6167 at para. 17). No question arises as to his extensive qualifications to fulfil this role.

[34] The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his

involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

[35] The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the *CCAA*: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*., 2007 SKQB 121 at para. 19.

[36] The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

[37] PJT is to receive a monthly work fee of US$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

[38] At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US$75,000. In

addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to $1 million upon the happening of a "triggering event" (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

[39] To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of $10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

[40] The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*:

> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[41] In *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

[42] In *Canwest Publishing Inc*., 2010 ONSC 222 at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining

whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

[43] I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

[44] The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

[45] Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept

the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

[46] The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

[47] Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

[48] In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of $10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

Key Employee Retention Plan ("KERP")

[49] The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

[50] The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

[51] I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at

CITATION: U.S. Steel Canada Inc. (Re), 2014 ONSC 6145
COURT FILE NO.: CV-14-10695-00CL
DATE: 20141022

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *R. Paul Steep, Jamey Gage and Heather Meredith*, for the Applicant

Kevin Zych, for the Monitor

Michael Barrack, Robert Thornton and Grant Moffat, for United States Steel Corporation and the proposed DIP Lender

Gale Rubenstein, Robert J. Chadwick and Logan Willis, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)

Ken Rosenberg and Lily Harmer, for the United Steelworkers International Union and the United Steelworkers Union, Local 8782

Sharon L.C. White, for the United Steelworkers Union, Local 1005

Shayne Kukulowicz and Larry Ellis, for the City of Hamilton

Steve Weisz and Arjo Shalviri, for Caterpillar Financial Services Limited

S. Michael Citak, for various trade creditors

Kathryn Esaw and Patrick Corney, for the Independent Electricity System Operator

Andrew Hatnay, for certain retirees and for the proposed representative counsel

HEARD AND ENDORSED: October 8, 2014
RELEASED: October 22, 2014

ENDORSEMENT

[1] U.S. Steel Canada Inc. (the "Applicant") brought an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, and was granted the requested relief pursuant to an initial order of Morawetz R.S.J. dated

September 16, 2014 (the "Initial Order"). The Initial Order contemplated that any interested party, including the Applicant and the Monitor, could apply to this court to vary or amend the Initial Order at a comeback motion scheduled for October 6, 2014 (the "Comeback Motion").

[2] The Comeback Motion was adjourned from October 6, 2014 to October 7, 2014, and further adjourned on that date to October 8, 2014. On October 8, 2014, the Court heard various motions of the Applicant and addressed certain other additional scheduling matters, indicating that written reasons would follow with respect to the substantive matters addressed at the hearing. This endorsement constitutes the Court's reasons with respect to the five substantive matters addressed in two orders issued at the hearing.

[3] In this endorsement, capitalized terms that are not defined herein have the meanings ascribed to them in the Initial Order.

DIP Loan

[4] The Applicant seeks approval of a debtor-in-possession loan facility (the "DIP Loan"), the terms of which are set out in an amended and restated DIP facility term sheet dated as of September 16, 2014 (the "Term Sheet") between the Applicant and a subsidiary of USS (the "DIP Lender").

[5] The Term Sheet contemplates a DIP Loan in the maximum amount of $185 million, to be guaranteed by each of the present and future, direct or indirect, wholly-owned subsidiaries of the Applicant. The Term Sheet provides for a maximum availability under the DIP Loan that varies on a monthly basis to reflect the Applicant's cash flow requirements as contemplated in the cash flow projections attached thereto. Advances bear interest at 5% per annum, 7% upon an event of default, and are prepayable at any time upon payment of an exit fee of $5.5 million together with the lender's fees and costs described below. The Term Sheet provides for a commitment fee in the amount of $3.7 million payable out of the first advance. The Applicant is also obligated to pay the lender's legal fees and any costs of realization or disbursement pertaining to the DIP Loan and these CCAA proceedings.

[6] The Term Sheet contains a number of affirmative covenants, including compliance with a timetable for the CCAA proceedings. The DIP Loan terminates on the earliest to occur of certain events, including: (1) the implementation of a compromise or plan of arrangement; (2) the sale of all or substantially all of the Applicant's assets; (3) the conversion of the CCAA proceedings into a proceeding under the *Bankruptcy and Insolvency Act*; (4) December 31, 2015, being the end of the proposed restructuring period according to the timetable; and (5) the occurrence of an event of default, at the discretion of the DIP lender.

[7] A condition precedent to funding under the DIP Loan is an order of this Court granting a charge in favour of the DIP lender (the "DIP Lender's Charge") having priority over all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (herein, collectively "Encumbrances") other than the Administration Charge (Part I), the Director's Charge and certain permitted liens set out in the Term Sheet, which include existing and future purchase money security interests and certain equipment financing security registrations listed in a schedule to the Term Sheet (the "Permitted Priority Liens").

[8] The terms and conditions of the DIP Loan, as set out in the Term Sheet, have been the subject of extensive negotiation in the period prior to the hearing of this motion. The DIP Loan is supported by the monitor and USS, and is not opposed by any of the other major stakeholders of the Applicant, including the Province of Ontario and the United Steelworkers International Union and the United Steelworkers Union, Locals 1005 and 8782 (collectively, the "USW").

[9] The existence of a financing facility is of critical importance to the Applicant at this time in order to ensure stable continuing operations during the CCAA proceedings and thereby to provide reassurance to the Applicant's various stakeholders that the Applicant will continue to have the financial resources to pay its suppliers and employees, and to carry on its business in the ordinary course. As such, debtor-in-possession financing is a pre-condition to a successful restructuring of the Applicant. In particular, the Applicant requires additional financing to build up its raw materials inventories prior to the Seaway freeze to avoid the risk of operating disruptions and/or sizeable cost increases during the winter months.

[10] The Monitor, who was present during the negotiations regarding the terms of the DIL Loan, the Chief Restructuring Officer (the "CRO") and the Financial Advisor to the Applicant have each advised the Court that in their opinion the terms of the DIP Loan are reasonable, are consistent with the terms of other debtor-in-possession financing facilities in respect of comparable borrowers, and meet the financial requirements of the Applicant. The Monitor has advised in its First Report that it does not believe it likely that a superior DIP proposal would have been forthcoming.

[11] The Court has the authority to approve the DIP Loan under s. 11 of the CCAA. I am satisfied that, for the foregoing reasons, it is appropriate to do so in the present circumstances.

[12] The Court also has the authority under s. 11.2 of the CCAA to grant the requested priority of the DIP Lender's Charge to secure the DIP Loan. In this regard, s. 11.2(4) of the CCAA sets out a non-exhaustive list of factors to be considered by a court in addressing such a motion. In addition, Pepall J. (as she then was) stressed the importance of three particular criteria in *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 at paras. 32-34 (S.C.), [2009] O.J. No. 4286 [*Canwest*]. In my view, the DIP Lender's Charge sought by the Applicant is appropriate based on those factors for the reasons that follow.

[13] First, notice has been given to all of the secured parties likely to be affected, including USS as the only secured creditor having a general security interest over all the assets of the Applicant. Notice has also been given broadly to all PPSA registrants, various governmental agencies, including environmental agencies and taxing authorities, and to all pension and retirement plan beneficiaries pursuant to the process contemplated by the Notice Procedure Order.

[14] Second, the maximum amount of the DIP Loan is appropriate based on the anticipated cash flow requirements of the Applicant, as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period. The cash flows to January 30, 2015 are the subject of a favourable report of the Monitor in its First Report.

[15] Third, the Applicant's business will continue to be managed by the Applicant's management with the assistance of the CRO during the restructuring period. The Applicant's board of directors will continue in place, a majority of whom are independent individuals with significant restructuring and steel-industry experience. The Applicant's parent and largest creditor, USS, is providing support to the Applicant by providing the DIP Loan through a subsidiary. Equally important, the existing operational relationships between the Applicant and USS will continue.

[16] Fourth, for the reasons set out above, the DIP Loan will assist in, and enhance, the restructuring process.

[17] Fifth, the DIP Lender's Charge does not secure any unsecured pre-filing obligations owed to the DIP lender or its affiliates. It will not prejudice any of the other parties having security interests in property of the Applicant. In particular, the DIP Charge will rank behind the Permitted Priority Liens. Although it will rank ahead of any deemed trust contemplated by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the DIP Loan contemplates continued payment of the pension contributions required under the Pension Agreement dated as of March 31, 2006, as amended by the Amendment to Pension Agreement dated October 31, 2007 (collectively, the "Stelco Pension Agreement") and Ontario Regulation 99/06 under the *Pension Benefits Act* (the "Stelco Regulation").

[18] Based on the foregoing, it is appropriate to grant the DIP Charge having the priority contemplated above. As was the case in *Timminco Ltd. (Re)*, 2012 ONSC 948 at paras. 46-47, [2012] O.J. No. 596 [*Timminco*], it is not realistic to conceive of the DIP Loan proceeding in the absence of the DIP Lender's Charge receiving the priority being requested on this motion, nor is it realistic to investigate the possibility of third-party debtor-in-possession financing without a similar priority. The proposed DIP Loan, subject to the benefit of the proposed DIP Lender's Charge, is a necessary pre-condition to continuation of these restructuring proceedings under the CCAA and avoidance of a bankruptcy proceeding. I am satisfied that, in order to further these objectives, it is both necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex Finance, LLC v. United Steel Workers*, 2013 SCC 6, [2013] 1 S.C.R. 271 [*Sun Indalex*] such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of the DIP Lender's Charge.

Administration Charge and Director's Charge

[19] The Initial Order provides for an Administration Charge (Part I) to the maximum amount of $6.5 million, a Director's Charge to a maximum amount of $39 million, and an Administration Charge (Part II) to a maximum amount of $5.5 million plus $1 million. On this motion, the Applicant seeks to amend the Initial Order, which was granted on an *ex parte* basis, to provide that the Administration Charge (Part I) and the Director's Charge rank ahead of all other Encumbrances in that order, and the Administration Charge (Part II) ranks ahead of all Encumbrances except the prior-ranking court-ordered charges and the Permitted Priority Liens.

[20] The Court's authority to grant a super-priority in respect of the fees and expenses to be covered by the Administration Charge (Part I) and the Administration Charge (Part II) is found in s. 11.52 of the CCAA. Similarly, s. 11.51 of the CCAA provides the authority to grant a

similar charge in respect of the fees and expenses of the directors to be secured by the Director's Charge.

[21] As discussed above, the Applicant has fulfilled the notice requirements in respect of those provisions by serving the motion materials for this Comeback Motion to the parties on the service list and by complying with the requirements of the Notice Procedure Order.

[22] It is both commonplace and essential to order a super-priority in respect of charges securing professional fees and disbursements and directors' fees and disbursements in restructurings under the CCAA. I concur in the expression of the necessity of such security as a pre-condition to the success of any possible restructuring, as articulated by Morawetz R.S.J. in *Timminco* at para. 66.

[23] In *Canwest*, at para. 54, Pepall J. (as she then was) set out a non-exhaustive list of factors to be considered in approving an administration charge. Morawetz R.S.J. addressed those factors in his endorsement respecting the granting of the Initial Order approving the Administration Charge (Part I) and the Administration Charge (Part II). Similarly, Morawetz R.S.J. also addressed the necessity for, and appropriateness of, approving the Director's Charge in such endorsement.

[24] In my opinion, the same factors support the super-priority sought by the Applicant for the Administration Charge (Part I), the Director's Charge and the Administration Charge (Part II). Further, I am satisfied that the requested priority of these charges is necessary to further the objectives of these CCAA proceedings and that it is also necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex*, such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of these Charges. I am satisfied that the beneficiaries of the Administration Charge (Part I) and the Administration Charge (Part II) will not likely provide services to the Applicant in these CCAA proceedings without the proposed security for their fees and disbursements. I am also satisfied that their participation in the CCAA proceedings is critical to the Applicant's ability to restructure. Similarly, I accept that the Applicant requires the continued involvement of its directors to pursue its restructuring and that such persons, particularly its independent directors, would not likely continue in this role without the benefit of the proposed security due to the personal exposure associated with the Applicant's financial position.

The KERP

[25] The Applicant has identified 28 employees in management and operational roles who it considers critical to the success of its restructuring efforts and continued operations as a going concern. It has developed a key employee retention programme (the "KERP") to retain such employees. The KERP provides for a cash retention payment equal to a percentage of each such employee's annual salary, to be paid upon implementation of a plan of arrangement or completion of a sale, upon an outside date, or upon earlier termination of employment without cause.

[26] The maximum amount payable under the KERP is $2,570,378. The Applicant proposes to pay such amount to the Monitor to be held in trust pending payment.

[27] The Court's jurisdiction to authorize the KERP is found in its general power under s. 11 of the CCAA to make such order as it sees fit in a proceeding under the CCAA. The following factors identified in case law support approval of the KERP in the present circumstances.

[28] First, the evidence supports the conclusion that the continued employment of the employees to whom the KERP applies is important for the stability of the business and to assist in the marketing process. The evidence is that these employees perform important roles in the business and cannot easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

[29] Second, the Applicant advises that the employees identified for the KERP have lengthy histories of employment with the Applicant and specialized knowledge that cannot be replaced by the Applicant given the degree of integration between the Applicant and USS. The evidence strongly suggests that, if the employees were to depart the Applicant, it would be very difficult, if not impossible, to have adequate replacements in view of the Applicant's current circumstances.

[30] Third, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the Applicant's operations, the employees to be covered by the KERP would likely consider other employment options if the KERP were not approved

[31] Fourth, the KERP was developed through a consultative process involving the Applicant's management, the Applicant's board of directors, USS, the Monitor and the CRO. The Applicant's board of directors, including the independent directors, supports the KERP. The business judgment of the board of directors is an important consideration in approving a proposed KERP: see *Timminco Ltd. (Re)*, 2012 ONSC 506 at para.73, [2012] O.J. No. 472. In addition, USS, the only secured creditor of the Applicant, supports the KERP.

[32] Fifth, both the Monitor and the CRO support the KERP. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor has advised in its First Report that it is satisfied that each of the employees covered by the KERP is critical to the Applicant's strategic direction and day-to-day operations and management. It has also advised that the amount and terms of the proposed KERP are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings.

[33] Sixth, the terms of the KERP, as described above, are effectively payable upon completion of the restructuring process.

Appointment of Representative Counsel for the Non-USW Active and Retiree Beneficiaries

[34] The beneficiaries entitled to benefits under the Hamilton Salaried Pension Plan, the LEW Salaried Pension Plan, the LEW Pickling Facility Plan who are not represented by the USW, the Legacy Pension Plan, the Steinman Plan, the Opportunity GRRSP, RBC's and RA's who are not represented by the USW and beneficiaries entitled to OEPB's who are not represented by the USW (collectively, the "Non-USW Active and Retiree Beneficiaries") do not currently have representation in these proceedings. The defined terms in this section have the meanings ascribed thereto in the affidavit of Michael A. McQuade referred to in the Initial Order.

[35] The Applicant proposes the appointment of six representatives and representative counsel to represent the interests of the Non-USW Active and Retiree Beneficiaries. The Court has authority to make such an order under the general authority in section 11 of the CCAA and pursuant to Rules 10.01 and 12.07 of the *Rules of Civil Procedure*. I am satisfied that such an order should be granted in the circumstances.

[36] In reaching this conclusion, I have considered the factors addressed in *Canwest Publishing (Re)*, 2010 ONSC 1328, [2010] O.J. No. 943. In this regard, the following considerations are relevant.

[37] The Non-USW Active and Retiree Beneficiaries are an important stakeholder group in these proceedings under the CCAA and deserve meaningful representation relating to matters of recovery, compromise of rights and entitlement to benefits under the plans of which they are beneficiaries or changes to other compensation. Current and former employees of a company in proceedings under the CCAA are vulnerable generally on their own. In the present case, there is added concern due to the existence of a solvency deficiency in the Applicant's pension plans and the unfunded nature of the OPEB's.

[38] Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.

[39] Third, the contemplated representation will avoid a multiplicity of retainers to the extent separate representation is not required. In this regard, I note tha,t at the present time, there is a commonality of interest among all the non-USW Active and Retiree Beneficiaries in accordance with the principles referred to in *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 3028 at para. 62 (S.C.), [2009] O.J. No. 3280 [*Nortel*]. In particular, at the present time, none of the CRO, the proposed representative counsel and the proposed representatives see any material conflict of interest between the current and former employees. In these circumstances, as in *Nortel*, I am satisfied that representation of the employees' interests can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims. If the interests of such parties do in fact diverge in the future, the Court will be able to address the need for separate counsel at such time. In this regard, the proposed representative counsel has advised the Court that it and the proposed representatives are alert to the possibility of such conflicts potentially arising and will bring any issues of this nature to the Court's attention.

[40] Fourth, the balance of convenience favours the proposed order insofar as it provides for notice and an opt-out process. The proposed representation order thereby provides the flexibility to members of this stakeholder group who do not wish to be represented by the proposed representatives or the proposed representative counsel to opt-out in favour of their own choice of representative and of counsel.

[41] Fifth, the proposed representative counsel, Koskie Minsky LLP, have considerable experience representing employee groups in other restructurings under the CCAA. Similarly, the proposed representatives have considerable experience in respect of the matters likely to be addressed in the proceedings, either in connection with the earlier restructuring of the Applicant or in former roles as employees of the Applicant.

[42] Sixth, the proposed order is supported by the Monitor and a number of the principal stakeholders of the Applicant and is not opposed by any of the other stakeholders appearing on this motion.

Extension of the Stay

[43] Lastly, the Applicant seeks an order extending the provisions of the Initial Order, including the stay provisions thereof, until January 23, 2015. Section 11.02(2) of the CCAA gives the Court the discretionary authority to extend a stay of proceedings subject to satisfaction of the conditions set out in s. 11.02(3). I am satisfied that these requirements have been met in the present case, and that the requested relief should be granted, for the following reasons.

[44] First, the stay is necessary to provide the stability required to allow the Applicant an opportunity to work towards a plan of arrangement. Since the Initial Order, the Applicant has continued its operations without major disruption. In the absence of a stay, however, the evidence indicates the Applicant will have a cash flow deficiency that will render the objective of a successful restructuring unattainable. As mentioned, the Monitor has advised that, based on its review, the Applicant should have adequate financial resources to continue to operate in the ordinary course and in accordance with the terms of the Initial Order during the stay period.

[45] Second, I am satisfied that the Applicant is acting in good faith and with due diligence to facilitate the restructuring process. In this regard, the Applicant has had extensive discussions with its principal stakeholders to address significant objections to the initial draft of the Term Sheet that were raised by such stakeholders.

[46] Third, the Monitor and the CRO support the extension.

[47] Lastly, while it is not anticipated that the restructuring will have proceeded to the point of identification of a plan of arrangement by the end of the proposed stay period, the Applicant should be able to make significant steps toward that goal during this period. In particular, the Applicant intends to commence a process of discussions with its stakeholders as well as to explore restructuring options through a sales or restructuring recapitalization process (the "SARP") contemplated by the Term Sheet. An extension of the stay will ensure stability and continuity of the applicant's operations while these discussions are conducted, without which the Applicant's restructuring options will be seriously limited if not excluded altogether. In addition, the Applicant should be able to take steps to provide continuing assurance to its stakeholders that it will be able to continue to operate in the ordinary course during the anticipated restructuring period, without interruption, notwithstanding the current proceedings under the CCAA.

[48] Accordingly, I am satisfied that an extension of the Initial Order will further the purposes of the Act and the requested extension should be granted.

Wilton-Siegel J.

Date: October 22, 2014

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[13] This exception also applies to the other charges granted.

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

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

[14] Supra note 7 at paras. 44-48.

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-24-00722044-00CL **DATE:** June 21, 2024

NO. ON LIST: 1

TITLE OF PROCEEDING: **In the Matter of INDIVA LIMITED *et al***

BEFORE JUSTICE: **OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Laura Culleton	Ontario Securities Commission	laurac@chaitons.com

ENDORSEMENT OF JUSTICE OSBORNE:

1. This is the comeback hearing in this CCAA proceeding.

2. On June 13, 2024, I granted the Applicants certain ten-day relief as set out in the Initial Order of that date, including but not limited to a stay of proceedings until and including June 23, 2024. They return today seeking additional relief, and in particular, an Amended and Restated Initial Order ("ARIO"):

    a. extending the Initial Stay Period to and including September 6, 2024;

    b. increasing the maximum principal amounts that the Applicants can borrow under the DIP Facility;

    c. increasing the quantum of:

        i. the Administration Charge to a maximum of $700,000;

        ii. the DIP Lenders Charge to a maximum principal amount of $2,400,000 plus accrued and unpaid interest, fees and expenses; and

        iii. the Directors' Charge to a maximum amount of $2,651,000;

    d. approving a key employee plan ("KERP") and granting a related super priority charge, subordinate to the above-noted charges;

    e. sealing the summary of the KERP filed as a confidential exhibit to the Affidavit of Carmine Neil Marotta sworn June 17, 2024 (the "KERP Summary"); and

    f. maintaining the status quo of Indiva's Excise Licence.

3. The Service List has been served.

4. No party has filed materials in opposition to the motion, and none appears today to oppose the relief sought. The relief is supported by the DIP Lender, and is recommended by the Court-appointed Monitor.

5. The Applicants rely upon the Affidavit of Carmine Neil Marotta sworn June 17, 2024, together with Exhibits thereto, as well as the First Report of the Monitor dated June 19, 2024. Defined terms in this Endorsement have the meaning given to them in my Endorsement of June 13, 2024, the motion materials, and/or the Reports of the Monitor.

6. For the reasons set out below, I am satisfied that the proposed relief should be granted.

7. With respect to the continued stay of proceedings, I am satisfied that such would preserve the status quo and afford the Applicants. The necessary time and breathing space, in the context of stability, required to advance the restructuring and in particular to develop and seek approval of a SISP while continuing the ordinary course operations of the Business.

8. The Applicants are forecasted, by the cash flow forecast appended to the First Report, to have sufficient liquidity (assuming the proposed ARIO is granted) to fund their obligations and the costs of these proceedings through the end of the Stay Period.

9. No creditor is expected to suffer material prejudice as a result of the proposed extension of the Stay of Proceedings, and it is supported by the Monitor who is of the view that it is reasonable and appropriate in the circumstances.

10. The proposed stay extension is granted.

11. I am also satisfied that the increase in the maximum principal amount available under the DIP Facility and the corresponding increase in the DIP Lender's Charge should be increased as requested.

12. Initially, the maximum principal amount that the Applicants were authorized to borrow under the DIP Facility was, quite properly, limited to those amounts necessary for the Initial Stay Period. That is now sought to be increased, as described in the Marotta Affidavit and the First Report, to provide sufficient liquidity to maintain operations of the Business of the Applicants and fund these proceedings through the proposed stay extension period.

13. The Monitor is supportive of the increase, and the cash flow forecast appended to the First Report reflects that such funds are reasonable and appropriate to achieve these objectives.

14. In the same way, the DIP Lender's Charge was initially granted in the amount of $900,000 plus interest, fees and costs which was appropriate as that amount was limited to the amount to be funded under the DIP Facility during the Initial Stay Period.

15. As the Applicants are also seeking an increase in the DIP Facility maximum principal amount from $900,000 to $2,400,000, it is appropriate to correspondingly increase the DIP Lender's Charge, so it continues to attract the maximum amount outstanding under the DIP Facility at the relevant time. The Monitor is supportive of the proposed increase to both the ability of the Applicants to incur additional indebtedness under the DIP Facility as proposed, and to the corresponding increase in the DIP Lender's Charge.

16. The Initial Order limited the quantum of the DIP Lender's Charge to that which was reasonably necessary for the Applicants' continued operations during the Initial Stay Period in accordance with section 11.001 and subsection 11.2(5) of the *CCAA*. For the reasons set out in the motion materials and in the First Report, I am satisfied that this relief now sought in the form of the proposed increases is appropriate. Notice has been provided to the secured creditors in accordance with subsection 11.2(1) of the *CCAA*, and the proposed charge will not secure obligations incurred prior to the commencement of the *CCAA* proceedings.

17. The proposed increase in the Administration Charge is also appropriate and is permitted under section 11.52 of the *CCAA*, the requirements of which have been satisfied here. In addition, the factors set out in CanWest Publishing have been met here: *CanWest Publishing Inc.*, 2010 ONSC 2221 at para. 54. The Administration Charge will assist in securing the involvement of the necessary professionals and achieve the best possible outcome for stakeholders: see *Walter Energy (Re),* 2016 BCSC 107, at para. 41 ("*Walter*"); and *U.S. Steel Canada Inc,* 2014 ONSC 6145 at para 22 ("*U.S. Steel*").

18. The Directors' Charge was also initially sized as security for the obligations and liabilities to be incurred or potentially incurred by the Directors and Officers during the Initial Stay Period. As with the Administration Charge, the proposed increase is intended to achieve the same objective during the extension of the Stay Period.

19. It is important to have the continued involvement of the Directors and Officers in these proceedings. The Monitor and the DIP Lender are supportive of the proposed increase, and I am satisfied that such is appropriate. The Directors and Officers will only be entitled to the benefit of the Directors' Charge to the extent that existing insurance policies in their favour are unavailable or insufficient. I am satisfied that this relief is appropriate.

20. The proposed KERP was developed in consultation with the Monitor and DIP Lender, and is intended to authorize retention payments to certain individuals who have been identified as Key Employees of either of Indiva OpCo or Indiva Limited. Jurisdiction to approve a KERP is founded in the general power of the Court under section 11 of the *CCAA* to make any order it sees fit in a *CCAA* proceeding.

21. I am satisfied that the Key Employees are essential to the continued operation of the Business and in particular, will be needed to assist in the SISP and in the closing of the transaction thereunder assuming that occurs.

22. The proposed maximum of the KERP is $132,100 in the aggregate, and provides that each Key Employee could be entitled to one payment equal to 10% of their current salary upon a KERP Milestone Date, but only if certain conditions are met.

23. I am satisfied that the KERP, including its terms and conditions, is appropriate. It is supported by the DIP Lender and recommended by the Monitor who is of the view that the terms of the KERP are comparable to the terms of other KERPs that have been approved by this Court. This KERP will provide the necessary incentive for the Key Employees to remain employed and this will in turn benefit not only the Applicants, but all of their stakeholders and maximizing the chances of the success of this restructuring.

24. While the factors affecting the decision of whether or not a KERP should be approved are fact specific, and vary from case to case, certain factors are generally required, including: the importance of an employee to the restructuring process; whether the employee will consider other employment; whether the KERP was developed in consultation with the Monitor or other professionals; and whether the monitor supports the KERP: see *Walter* at para. 57 and *Re Timminco Limited*, 2012 ONSC 2515 at para 15.

25. The corresponding KERP Charge is therefore appropriate for the same reasons, and to provide security for the obligations under the KERP.

26. The ARIO proposes to now provide that all of the Charges, including the KERP Charge would rank in priority to other Encumbrances. I observe that those parties benefiting from the Encumbrances have been given notice of this motion and the proposed form of the ARIO, and further that the ability to seek this relief on the comeback hearing was expressly provided for in paragraph 37 of the Initial Order. The affected parties have now been served with notice of this motion, and the proposed form of the ARIO.

27. The KERP, the KERP Charge and the proposed priority of Charges are approved.

28. The Applicants seek a sealing order with respect to the KERP Summary. It contains confidential and sensitive information about the identity and compensation of the Key Employees. The sealing relief is limited, proportionate and appropriate. In particular, the ARIO continues to have the comeback provision, and any party may request advice, directions or relief from this Court on notice at any time in this proceeding, including but not limited to relief with respect to the sealing order.

29. I am satisfied that the test as articulated by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate* has been met here. Jurisdiction to grant a sealing order is found in section 137(2) of the *Courts of Justice Act*. The proposed sealing order is approved in respect of Confidential Exhibit D to the Marotta Affidavit, pending further order of this Court. The Applicants should file a copy of that document with the Commercial List Office in a sealed envelope marked: "Confidential and not to form Part of the Public Record subject to further order of this Court" to ensure completeness of the Record.

30. With respect to the Excise Licences, Indiva OpCo holds certain licences with Health Canada and the CRA that are critical to the continued operations of its business. While Indiva OpCo's licences with Health Canada are not at risk of expiry in the near term, its cannabis licence with the CRA (the "Excise Licence") will expire on July 11, 2024.

31. The Applicants submit that if the Excise Licence is allowed to expire, or be cancelled or revoked, Indiva OpCo would not be able to use its existing stock of cannabis excise stamps or continue obtaining an ongoing supply of cannabis excise stamps, which would in turn destroy the ability of the Company to continue to operate as a going concern.

32. For these reasons, the Applicants seek an order preserving and maintaining the Excise Licence during the Stay Period for the benefit of the Company and its stakeholders.

33. Section 11.1 of the *CCAA* specifically addresses the applicability of a stay to a regulatory body (defined in section 11.1(1) (sometimes referred to as a "regulatory stay"). Section 11.1(2) provides that, subject to subsection (3), no order made under section 11.02 (i.e., a stay of proceedings) affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

34. The exceptions enumerated in subsection (3) provide that the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion: a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02. However, notice to the regulatory body and to the persons who are likely to be affected by the order is required.

35. In this particular case, the Affidavit of Service filed reflects that the Service List includes the Department of Justice representing both the CRA and Health Canada. Accordingly, I am satisfied that those parties are on notice of the relief requested.

36. Moreover, counsel for the Applicants confirms that they have had discussions with counsel for the DOJ as recently as yesterday, specifically about the relief requested in the form of the ARIO, and that the DOJ does not oppose the relief sought, specifically including the regulatory stay to maintain the status quo and ensure that the Excise Licence will not expire. Counsel to the Court-appointed Monitor confirms that both they and the Monitor itself were involved in those discussions. The Monitor supports and recommends the relief sought in this respect: see paragraphs 34 – 37 of the First Report.

37. Accordingly, and in the circumstances, I am satisfied that it is not contrary to the public interest that the stay of proceedings apply so as to continue, pending and concurrent with the stay of proceedings, the Excise Licence. It is necessary for the Applicants to continue their ongoing business operations, and the suspension, cancellation or revocation of the Excise Licence would, I am satisfied, cause the immediate ceasing of business operations of the Applicants, have a materially detrimental effect on the value of their assets, and therefore be materially detrimental to the ultimate success of this proceeding and recovery for all stakeholders.

38. This relief is consistent with the relief that has been granted by other CCAA courts: see *Tantalus Labs Ltd. (Re),* 2023 BCSC 1450 at para 39; *In the Matter of a Plan or Compromise of Arrangement of Aleafia Health Inc.*, (22 August 2023) Toronto, ONSC [Commercial List], CV-23-00703350-00CL (SISP Approval Order) ("*Aleafia*"); and *BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645 at paras 46 – 49.

39. Finally, the Ontario Securities Commission appears today to request that the ARIO include the language that has been endorsed by the Commercial List in many CCAA proceedings relating to the effect of the ARIO on the jurisdiction of securities regulatory authorities. The proposed language here is consistent with that previously endorsed language, is consented to by the Applicants and recommended by the Monitor. It is appropriate, and is approved.

40. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Glaum, J.

CITATION: Re Just Energy Corp., 2021 ONSC 1793
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20210309

SUPERIOR COURT OF JUSTICE – ONTARIO

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants

BEFORE: Koehnen J.

COUNSEL:

Marc Wasserman, Michael De Lellis, Jeremy Dacks, Shawn Irving, Waleed Malik, David Rosenblatt and Justine Erickson, for the Applicants

Robert Thornton, Rebecca Kennedy and Rachel Bengino, Puya Fesharaki, for the Proposed Monitor

Scott Bomhof, for the Term Loan Lenders

Heather Meredith and James D. Gage, for the Credit Facility Lenders

Ryan Jacobs, Jane Dietrich and Michael Wunder, for the DIP Lender

Howard Gorman, for Shell

Robert Kennedy and Kenneth Kraft, for BP

Paul Bishop and Jim Robinson, Proposed Monitor

Brian Schartz, and Mary Kogut Brawley, US counsel for the Applicants

Chad Nichols and David Botter, U.S. Counsel to DIP Lender

Kelli Norfleet, U.S. Counsel to BP

Doug McIntosh, Advisor to the Credit Facility Lenders

John Higgins

HEARD: March 9, 2021

ENDORSEMENT

Overview

[1] The applicant, Just Energy Group Inc. ("Just Energy") seeks protection under *the Companies' Creditors Arrangement Act*, (the "*CCAA*")[1] by way of an initial order. Just Energy is the ultimate parent of the Just Energy group of companies and limited partnerships.

[2] Just Energy buys electricity and natural gas from power generators and re-sells it to consumer and commercial customers, usually under long term, fixed price contracts.

[1] R.C.C. 1985, c. c-36, as amended

[75] As part of the proposed Initial Order, the Applicants seek to stay provincial and foreign regulators from, among other things, terminating the licenses granted to any Just Energy entity.

[76] With the benefit of the DIP Facility, the Applicants intend to continue paying amounts owing to their contractual counterparties (primarily utilities) in the ordinary course. Just Energy is concerned that even if it continues making such payments, regulators may still try to terminate its licenses or impose other conditions.

[77] In my view it is appropriate to stay the conduct of provincial regulators in Canada.

[78] Section 11.1 of the *CCAA* provides:

> 11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.
>
> (2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.
>
> (3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
>
> (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
>
> (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

[79] More plainly put, the *CCAA* automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.

[80] In the circumstances of this case, it is, in my view, appropriate to stay the exercise of other regulatory powers against Just Energy at least for the interim 10 day period.

[81] As noted earlier, Just Energy's liquidity crisis arises because of controversial steps taken by PUCT and ERCOT which steps Just Energy is in the process of challenging.

[82] It would appear to me to be unjust to take regulatory steps that might shut down entire business when the financial concerns that prompt those steps may turn out to be unjustified if PUCT and ERCOT adjust some or all of the price increases they imposed during the storm. Even if PUCT and ERCOT are unable or unwilling to adjust their price increases, it may be appropriate for regulators to consider whether Just Energy should be shut down because of a temporary liquidity crisis and whether Just Energy should be given a window of opportunity to work out its liquidity crunch. That will obviously need to be measured against the objectives the regulator was created to further. It strikes me, however, that the circumstances of this case warrant at least a 10 day period to allow all parties to assess the issue with the benefit of more reflection than the instant application of a regulatory policy may afford.

[83] One of the primary goals of regulators is to ensure that providers of electrical power are paid and that customers receive electrical power on competitive business terms. A stay does not offend these policy objectives. The goal of the stay and the financing associated with it is to be able to continue to pay providers of power to Just Energy and to continue to service Just Energy customers according to their existing contracts. The DIP financing and the charge in favour of essential suppliers will ensure that this remains the case.

[84] Section 11.1 (3) of the *CCAA* allows the court to stay action by regulators on notice to the regulator. Regulators have not been given notice of today's hearing. I am nevertheless inclined to grant the relief sought.

[85] Providing notice would have potentially allowed regulators to cancel or suspend Just Energy's licenses before the hearing occurred. If such suspensions or cancellations were ultimately set aside, they would still have caused substantial disruption to the marketplace as a whole and to Just Energy in particular. Just one of the many regulators to whom Just Energy is subject could cause material disruption.

[86] Cancellation or suspension of licenses would, for example, mean that upstream suppliers of gas and electricity to Just Energy would have their contracts terminated. Any new power supplier to whom Just Energy's customers would be transferred would have their own source of power supply. That would create more market disruption than would a stay.

[87] In this light, the granting a 10 day stay against regulatory conduct is consistent with the remedial purpose of the *CCAA* which is to avoid social and economic losses resulting from the liquidation of an insolvent company. To permit the immediate termination of Just Energy's licenses would not avoid social and economic losses but amplify them by extending them beyond Just Energy to its upstream suppliers.

[88] I am also mindful of the admonition of the Supreme Court of Canada in *Century Services* to the effect that general language in the *CCAA* should not be read as being restricted by the availability of more specific orders. Although the *CCAA* contains specific provisions relating to regulatory stays which require notice to the regulator, the general power to make such orders as are appropriate should not, in my view, be restricted by the notice requirement when the relief sought relates only to a 10 day temporary stay, when providing notice could undermine the entire scheme of the *CCAA* and when there are adequate financing mechanisms in place to ensure that the regulators' policy objectives are not undermined during the 10 day period.

[89] A foreign regulator is not a "regulatory body" within the plain meaning of section 11.1(1) of the *CCAA*. As such, foreign regulators do not benefit from the same exemption from the stay as a Canadian regulator. A foreign regulator is therefore presumptively subject to the Stay, with respect to matters that fall within the jurisdiction of the Canadian *CCAA* Court. Canadian courts have held that a foreign regulator is precluded by the stay from taking steps in Canada in relation to matters that are within the *CCAA* court's jurisdiction.[16]

[90] This result is consistent with the language of the model CCAA order which stays, among other things, all rights and remedies of any "governmental body or agency"

[91] Whether and to what extent the stay should apply to American regulators will be for an American court to determine. To give effect to that stay in the United States, Just Energy intends to commence chapter 15 proceedings immediately for such a determination.

E. Should Supplier Charges and Prefiling Payments be Authorized?

[92] Just Energy seeks a charge in favour of what it has referred to as commodity suppliers and ISO Service Providers. Commodity suppliers are those who provide gas and electricity to Just Energy. ISO Service Providers are often commodity suppliers as well but also provide additional services to Just Energy such as working capital and credit support. By way of example, as noted earlier, ERCOT sends invoices to service providers like Just Energy. Those invoices must be paid within two days. In certain cases, Just Energy uses and ISO Service Provider to act as the front facing entity to the regulator. In those cases, ERCOT sends its invoice to the ISO Service Provider who is obliged to pay within two days. The ISO Service Provider then looks to Just Energy for payment but gives Just Energy extended

[16] *Nortel Networks Corp., Re*, 2010 ONSC 1304 at para. 41 and 42.

time to pay, say for example 30 days. In effect, the ISO Service Provider is providing Just Energy with working capital and liquidity.

[93] Just Energy has received advice to the effect that these arrangements amount to Eligible Financial Contracts under the *CCAA*. This poses a challenge because Eligible Financial Contracts are not subject to the prohibition on the exercise of termination rights under the *CCAA*.[17] Since the parties to Eligible Financial Contracts cannot be prevented from terminating, Just Energy is of the view that counterparties to those contracts must be given incentives to continue to provide power supply and financial services. The proposed incentive takes the form of a charge in favour of those counterparties that continue to provide commodities or services to Just Energy.

[94] Shell and BP, the two largest commodity and ISO Service Providers, have already entered into such arrangements. The proposed order would allow any other commodity provider or ISO Service Provider to enter into a similar arrangement with Just Energy and benefit from a similar charge.

[95] No one has challenged that analysis for today's purposes and no one opposes the proposed charges. Given the possibility of mischief in the absence of such charges and given that the relief today is sought for only 10 days, in my view it would be preferable to offer the protection of the charges as requested.

[96] I note that in certain circumstances, the court can compel commodity and service providers to continue supplying a *CCAA* debtor. I am, however, somewhat reluctant to use those provisions given that the suppliers and service providers in question are part of a highly regulated, interwoven industry. Compelling a supplier in such an industry to continue to provide supply or services may well infringe on the regulators' objective of maintaining a financially sound electrical market. Given the urgency with which the application arose, it is preferable to provide financial incentives to such parties and not risk imperiling the financial stability of other regulated actors by forcing them to supply.

[97] This court has already observed in the past that the availability of critical supplier provisions under the *CCAA* does not oust the court's jurisdiction under section 11 to make any other order it considers appropriate.[18]

[98] The proposed charges would rank either *pari passu* with the DIP or immediately below it, depending on the nature of the transaction. Although Just Energy's secured creditors were present at today's hearing, they did not object to the proposed charges.

[99] Certain prefiling obligations such as tax arrears could result in directors of Just Energy being held personally liable. The company seeks authorization to make prefiling payments

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[17] *CCAA* s. 34 (1), (7), (8) and (9).
[18] Re CanWest Publishing Inc., 2010 ONSC 222 at para. 50.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tantalus Labs Ltd. (Re),* 2023 BCSC 1450

Date: 20230710
Docket: B230269
Registry: Vancouver
Estate No.: 11-2960200

In the Matter of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as Amended

And

In the Matter of the Notice of Intention to Make a Proposal of Tantalus Labs Ltd.

Before: The Honourable Justice Fitzpatrick

Oral Reasons for Judgment (Re: *Status Quo* Order)

In Chambers

Counsel for Tantalus Labs Ltd.:	W.E.J. Skelly
Counsel for the Proposal Trustee, Ernst & Young Inc.:	P.J. Reardon
Counsel for The Sungrown Mortgage Corporation:	E. Watson
Counsel for the Canada Revenue Agency:	A. Sabzevari
Place and Date of Hearing:	Vancouver, B.C. July 10, 2023
Place and Date of Judgment:	Vancouver, B.C. July 10, 2023

[1] **THE COURT:** This application has been brought before the Court today by the debtor, Tantalus Labs Ltd. (“Tantalus”), on a very urgent basis.

[2] On June 28, 2023, Tantalus commenced this proposal proceeding under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*]. The present issue concerns certain cannabis inventory owned by Tantalus.

[3] In its notice of application filed July 7, 2023, Tantalus applied for a substantial number of orders relating to the Canada Revenue Agency (CRA). The relief sought was crafted toward attempting to stop certain actions by the CRA in relation to the inventory or, perhaps more accurately, requiring CRA to take certain steps that were available to it in relation to the inventory.

Factual Background

[4] Tantalus is in the business of producing, distributing and selling retail and wholesale cannabis products in Canada. Its major secured creditor is The Sungrown Mortgage Corporation (“Sungrown”) who is owed in excess of $5 million. Sungrown holds registered security against Tantalus’ production facilities in Maple Ridge and also, Tantalus’ personal property.

[5] Upon Tantalus filing its notice of intention to make a proposal (NOI), Ernst & Young Inc. was appointed as the Proposal Trustee.

[6] I am advised that Tantalus' does not anticipate a going concern outcome arising from these NOI proceedings and that a liquidation is the most realistic scenario. In that vein, Tantalus and Sungrown are hoping to achieve an orderly liquidation of Tantalus’ assets within the course of these NOI proceedings.

[7] Tantalus’ relationship with the CRA arises from certain licences held by Tantalus. Tantalus holds a cannabis licence issued by Health Canada pursuant to the *Cannabis Act*, S.C. 2018, c. 16 that allows it to cultivate, process and sell cannabis. More particular to the issue before the Court, Tantalus holds a cannabis excise licence issued by the CRA pursuant to the *Excise Act, 2001*, S.C. 2002, c. 22

(the “Excise License"). The Excise Licence allows Tantalus to sell cannabis inventory pursuant to the provisions of the *Excise Act*.

[8] The significant fact that gives rise to this urgent application is that the Excise Licence is due to expire today. More background facts with respect to the CRA will put that circumstance into perspective.

[9] Tantalus owes the CRA a large amount of money with respect to excise tax accruing from February 2021. The current amount outstanding is approximately $4.4 million. Tantalus and the CRA have been engaged in various discussions since 2021 regarding payment plans to reduce or eliminate the arrears. The current payment plan agreed to by the parties was accepted on June 12, 2023 and required that Tantalus make its first payment of $35,000 on June 30, 2023 (the “Payment Plan”).

[10] On June 16, 2023, in conjunction with the Payment Plan, the CRA renewed the Excise License to July 10, 2023. In doing so, the CRA stated to Tantalus that, if it wished to renew the Excise License, it must continue to meet the requirements under the *Excise Act* and the *Regulations Respecting Excise Licences and Registrations*, SOR/2003-0115 (the “*Regulation*”). One requirement under ss. 2(2)(c)(i) and (e) of the *Regulation* is that a corporation must:

> … have sufficient financial resources to conduct their business in a responsible manner;

[11] On June 12, 2023, the Payment Plan was overtaken by the fact that Sungrown made demand for payment and issued a notice of intention to enforce its security against Tantalus’ assets.

[12] On June 16, 2023, the CRA also advised Tantalus that, in order to demonstrate that it had “sufficient financial resources to conduct [its] business in a responsible manner”, Tantalus was required to fully comply with all terms and conditions of the Payment Plan.

[13] On June 28, 2023, the NOI was filed and the 30-day stay is now in effect until July 28, 2023. On June 30, 2023, Tantalus did not make the payment to the CRA given the need to maintain the status *quo* with respect to its pre-filing indebtedness under the NOI proceeding.

[14] On July 7, 2023, the CRA wrote to Tantalus and advised that it did not meet the requirements for a renewal of the Excise License based on the above "sufficient financial resources" provision in the *Regulation*. Specifically, the CRA pointed to Tantalus' failure to comply with earlier payment plans and its filing of the NOI as an "Insolvent Person".

[15] Tantalus has a large amount of inventory at this time, including substantial bulk inventory. Earlier today, I granted Tantalus' application and approved a sale of that bulk inventory on an urgent basis or "fire sale" basis: *Tantalus Labs Ltd. (Re)*, 2023 BCSC 1291.

[16] The remaining difficulty vis-à-vis the CRA arises from the fact that Tantalus still holds a large amount of packaged inventory. I am told that this inventory has an approximate value of $2 million if ordinary course sales could be arranged over the next 30 days or so; however, Tantalus requires an excise license under the *Excise Act* to complete those sales. The failure of the CRA to renew the Excise Licence has the prospect of Tantalus being unable sell that packaged inventory with the result that no recovery will be made from those assets for the benefit of stakeholders.

[17] Indeed, the CRA has at this point threatened to take steps to attend at the Tantalus' premises after today or have the RCMP do so, in order to destroy the packaged inventory and the stamps that are associated with the cannabis products.

Discussion

[18] As a result of this urgent situation, what stands in the balance is Tantalus' intention to preserve the substantial value of its packaged inventory for the benefit of all stakeholders.

[19] The relief sought by Tantalus in its notice of application included: declaring the CRA in breach of the stay of proceedings under s. 69.6(4) of the *BIA*; declaring the CRA is estopped from destroying the cannabis stamps and inventory until July 28, 2023; declaring the Excise License is extended until July 28, 2023; and granting Tantalus the ability to sell its inventory out of the ordinary course of business in the absence of the Excise License but subject to the approval of the Proposal Trustee.

[20] I consider the CRA's decision to refuse to renew the Excise License even for a short period of time to be inexplicable, given that the CRA is itself one of the substantial stakeholders who stands to benefit from a proper and orderly disposition of the inventory, given its substantial unsecured debt.

[21] Leaving that aside, the CRA has raised substantial issues in its application materials concerning the jurisdictional basis upon which the Court might be prepared to grant the relief sought by Tantalus in the *BIA* proceedings.

[22] Tantalus and CRA are both agreed that a more fulsome hearing must be convened to address the matter with proper consideration of the relevant authorities. The parties have referred to a substantial list of authorities in their application materials and throughout the course of their submissions today.

[23] Tantalus' counsel has referred to *Re Fantasy Construction Ltd. (Bankrupt)*, 2007 ABQB 502; *Strickland v. Canada (Attorney General)*, 2015 SCC 37; and *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41. Tantalus and Sungrown, who supports Tantalus, have referred me to s. 183 of the *BIA*.

[24] In its application response, the CRA has referred to various authorities, all in aid of the CRA's position that any challenge to its decision not to renew the Excise Licence must be brought before the Federal Court by way of judicial review with regard to the established principles, such as set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[25] Tantalus disagrees that a judicial review is required and states that, in any event, this Court has jurisdiction under the *BIA* to address the matter, at least on an interim basis.

[26] Having considered the matter, I am satisfied that Tantalus has established that the granting of relief is appropriate, on an interim basis. I conclude that this Court has the ability to maintain the status *quo* to preserve the substantial value in Tantalus' remaining inventory for the benefit of all stakeholders, including the CRA. The very unusual and extraordinary circumstances that exist at this time dictate that Tantalus be allowed a short period of time in order for it and the CRA to prepare for a more fulsome hearing of the issues.

[27] In terms of jurisdiction, I rely on s. 183(1)(c) of the *BIA*, which provides this court will such jurisdiction in law and in equity that enable me to exercise original, auxiliary and ancillary jurisdiction in bankruptcy matters.

[28] In addition, I rely on the comments of the court in *Arrangement relatif à Rising Phoenix International Inc.*, 2022 QCCS 1670 [*Rising Phoenix*], a decision referred to by CRA. In that case, pursuant to its jurisdiction under the *CCAA*, the Quebec court refused to order federal and Quebec authorities to extend student's residency and study permits or declare that those permits were renewed for a certain period of time. Those students attended at the debtor company's private colleges in Quebec.

[29] In *Rising Phoenix*, the federal and Quebec authorities argued that the court did not have jurisdiction to grant *mandamus* orders with respect to the renewal of the student's permits. Justice Collier agreed with this argument but he also stated:

> [16] It is only in exceptional cases that the above rule doesn't apply, such as in cases where the public decision-maker enjoys little discretion, has already exercised their discretion, or is unlikely to exercise their discretion reasonably or in a timely fashion. [FN removed] …

[30] In making the above statement, Justice Collier relied on the decision in *Mignault Perrault (Succession de) c. Hudson (Ville d')*, 2010 QCCA 2108 [*Mignault*].

I should add that this decision was issued in French and I am relying on an unofficial translation.

[31] In *Mignault*, the applicants sought a declaration that they had the right to proceed with demolition of a building and they sought an order of *mandamus* to require the respondent to issue a demolition permit, which had been earlier refused. The trial judge declined to grant the orders sought and the applicants appealed.

[32] As to the ability of the court to issue *mandamus* against the public authority, the Quebec appeal court stated:

> [4] The rule of principle applicable here states that it is not for the courts to order public bodies to act in a specific direction since a court of justice cannot, without serious reasons, substitute its decision for that of the body to which the legislator has given a specific mandate. In the case of *mandamus*, the application of this principle means that if it is possible by this remedy to compel the public administration or a court to exercise its jurisdiction, even when it comes to the exercise of a discretionary power, one cannot ask that this discretionary power be exercised in a specific direction.
>
> [5] It is only exceptionally that our court has disregarded this rule and ordered the organization to issue the permit sought even if the issuance of the latter was based on a discretionary power conferred by law. This will be the case if in particular the order for the return of the file to the body is unnecessary or inappropriate because, depending on the facts of the case, the discretion is restricted or it has in fact been exercised, the body has exhausted its jurisdiction, the body is unlikely to act in accordance with the rules of natural justice, or the return will cause undue delay. These are exceptional cases.
>
> [Emphasis added.]

[33] I consider that this is an exceptional case for the reasons I have already outlined above. There is considerable urgency and significant interests are at risk. Therefore, I am exercising my jurisdiction under s. 183(1) of the *BIA* to grant what the parties have described as a status *quo* order. I do so for the following reasons.

[34] Firstly, the parties have agreed that, in the face of the CRA's opposition, they will schedule a further court hearing on July 27, 2023, which is within a short period of time. During that short period of time, the Proposal Trustee will supervise any ordinary-course sales, and any out-of-the-ordinary course sales of inventory will be

brought before the Court for consideration and possible approval under the *BIA* provisions.

[35] Secondly, in addition to Tantalus' evidence, the material before me includes the First Report of the Trustee dated July 7, 2023. In that Report, the Trustee confirms that Tantalus has sufficient cash flow to fund operations through the NOI proceedings, a sale of its assets and a winddown of its operations and to do so in a responsible manner. At para. 53 of the Report, the Trustee rejects the CRA's view that the filing of the NOI means that Tantalus does not meet the requirement in the *Regulation* to qualify for a renewal of the Excise License:

> ... It appears to the Proposal Trustee that the Company does maintain sufficient financial resources to conduct its business in a responsible manner. The Proposal Trustee, through discussions with its counsel, is of the opinion that the mere filing of the NOI should not lead the CRA to conclude that the Company does not have sufficient financial resources to conduct its business in a responsible manner.

[36] On a preliminary basis, I agree that the cash flow supports that Tantalus is able to operate properly during the course of the NOI proceedings in the sense of meeting its financial obligations.

[37] Importantly, the cash flow projections provide that the CRA will be paid any excise tax that is required to be paid under the *Excise Act* as a result of any sales of inventory during the NOI proceedings, which includes the 17-day delay that I have mentioned above. Accordingly, there seems to be little, if any, prejudice to the CRA as a result of my order. This does not, of course, mean that the CRA will be paid its prior debt during this period of time; however, that is the situation for all of Tantalus' creditors while these NOI proceedings are underway.

[38] Finally, I rely on the fact that any further sales that might be arranged during this short period of time will result in realizing and preserving value from Tantalus' remaining inventory for the benefit of all stakeholders, including the CRA. In that respect, the preservation of value may possibly mean that Tantalus will be in a position to make some payment to its unsecured creditors, including as was owing to the CRA as of the NOI filing.

[39] Accordingly, in light of these extraordinary circumstances, including the urgency that I have discussed above, I exercise my discretion and grant the amended relief sought by Tantalus, as follows:

> 2. The status *quo* in respect of the cannabis excise licence (the "Excise Licence") in the within Notice of Intention to Make Proposal proceedings (the "Proposal Proceedings") shall be maintained and renewed to July 27, 2023;
>
> 3. The status *quo* shall include the following:
>
> a. CRA shall be stayed from taking any actions against Tantalus with respect to the cannabis stamps and cannabis inventory;
>
> b. Tantalus shall be permitted to continue selling its cannabis inventory in the ordinary course under the Excise Licence, which Tantalus validly held at the time of the commencement of the Proposal Proceedings.
>
> 4. The Proposal Trustee shall approve every sale of the cannabis inventory in the ordinary course of business.

[40] The relief in Tantalus' notice of application is adjourned to July 27, 2023 at 10:00 a.m.

"Fitzpatrick J."

Electronically filed / Déposé par voie électronique : 05-Mar-2024
Toronto Superior Court of Justice / Cour supérieure de justice

Court File No./N° du dossier du greffe : CV-24-00715773-00CL

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ENDORSEMENT

COURT FILE NO.:

DATE: February 28, 2024

NO. ON LIST: 1 (4:30pm)

TITLE OF PROCEEDING:

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP., AND FINAL BELL CORP.

BEFORE: JUSTICE OSBORNE

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE OSBORNE:

1. This is an Application for relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA") by BZAM Ltd. ("BZAM"), BZAM Holdings Inc., BZAM Management Inc., BZAM Cannabis Corp., Folium Life Science Inc., 102172093 Saskatchewan Ltd., The Green Organic Dutchman Ltd. ("TGOD"), Medican Organic Inc. , High Road Holding Corp., and Final Bell Corp. (collectively, the "Applicants" or the "Companies").

2. Following the hearing, I granted the initial order with reasons to follow. These are those reasons.

3. In particular, the Applicants seek:

    a. a declaration that they are companies to which the CCAA applies;

    b. the appointment of FTI Consulting Canada Inc. ("FTI") as Monitor;

    c. the approval for TGOD to borrow up to a principal amount of $2,400,000 by way of a debtor-in-possession ("DIP") credit facility (the "DIP Loan") to finance critical working capital requirements for the Applicants over the next 10 days;

    d. a stay in effect for an initial period of not more than 10 days;

    e. the extension of the benefit of the stay to the Non-Applicant Stay Parties (as defined in the materials) and their respective directors and officers;

    f. relief from certain securities reporting obligations until further order of this Court; and

g. approval of the Administration Charge, the DIP Lender's Charge, the Edmonton Property Charge and the Directors' Charge (each as defined in the motion materials) in the priorities as set out in the motion materials.

4. BZAM is the ultimate parent company to several entities in the cannabis industry in Canada (collectively, the "Company"). It is a reporting issuer listed on the Canadian Securities Exchange, and its shares trade in the United States on the OTCQX.

5. The Company engages in the production, cultivation, processing and distribution of cannabis and cannabis related products.

6. The Applicants are insolvent. One of their cannabis licences is set to expire imminently. Absent protection under the CCAA, as well as access to the proposed DIP financing, the Applicants lack sufficient cash to meet their obligations as they come due, their liabilities exceed the value of their assets, and they will be forced to immediately cease operations.

7. The Applicants seek protection from their creditors while they continue as a going concern to allow time to explore various restructuring options and possibilities for the benefit of stakeholders. Those options will likely include, it is submitted, a Court-supervised sale and investor solicitation process ("SISP").

8. The relief sought by the Applicants today is fully supported by the senior secured creditor, the subordinate creditor, and is recommended by the Proposed Monitor. The Applicants submit that it is also limited to what is reasonably necessary to allow them to maintain the status quo and continue operations during the initial 10 day stay of proceedings.

9. With this context in mind, the issues on this Application are:

    a. does the Court have jurisdiction to grant the relief requested under the CCAA and should a stay of proceedings be granted?

    b. should the Court approve the DIP Loan?

    c. should FTI be appointed as Monitor?

    d. should the benefit of the stay be extended to the Non-Applicant Stay Parties?

    e. should relief from the securities reporting obligation be granted? and

    f. should the Charges be approved, and approved in the proposed priority?

Jurisdiction

10. The Applicants rely on the Affidavit of Matthew Milich sworn February 28, 2024 together with the exhibits thereto, and the Pre-filing Report of the Proposed Monitor dated February 28, 2024. Defined terms in this Endorsement have the meaning given to them in the Application materials unless otherwise indicated.

11. Each of the Applicants is incorporated under Canadian corporate statute. All of the non-BZAM Applicants are wholly-owned, directly or indirectly, by BZAM except for Folium Life and BZAM Cannabis, in respect of which BZAM Holdings is the majority shareholder as to 80% and 80.3%, respectively.

12. Five of the Applicants are licenced with Health Canada and operate cannabis facilities in Ontario, Alberta and British Columbia. 102 Saskatchewan leases a retail store in Saskatchewan.

13. The majority of the Company's business is conducted out of Ontario. Two cannabis facilities of the Applicants, including its largest facility, are located in Ontario and approximately 256 of the 441 employees of the Applicants are employed in Ontario.

14. The Company's senior secured creditor, Cortland Credit Lending Corp. ("Cortland") is also headquartered in Toronto.

15. The majority of BZAM's directors reside in Ontario, and its Chief Financial Officer and Chief Executive Officer divide their time between the Company's offices in Ontario and British Columbia.

16. The Non-Applicant Stay Parties include four directly or indirectly wholly-owned subsidiaries of BZAM: 9430-6347 Québec Inc. ("943 Québec), a company incorporated under the QBCA; (ii) The Green Organic Beverage Corp. ("Green Organic"), a company based in Delaware; (iii) TGOD Europe B.V. ("TGOD Europe"), a company based in the Netherlands; and (iv) The Green Organic Dutchman Germany GmbH ("TGOD Germany"), a company based in Germany.

17. 943 Québec is a licensed entity with Health Canada operating out of a leased facility in Québec.

18. The evidence satisfies me that the Applicants are unable to meet their obligations as they become due. They have accrued payables in the ordinary course of business that they cannot meet and are unable to pay amounts owed to secured parties.

19. As at January 1, 2024, the Company had total consolidated assets with a book value of approximately $95,711,080 and liabilities with a book value of approximately $112,873,839. The Applicants anticipate having on hand only approximately $1,848,000 in cash at the close of business today, with the result that they face an urgent liquidity crisis.

20. Secured financing has been provided by Cortland pursuant to a credit agreement entered into on March 31, 2020 between Cortland as Agent for the Lenders and TGOD as borrower. It has been amended and restated including as recently as January 8, 2024 (as amended, the "Credit Agreement").

21. Pursuant to the Credit Agreement, Cortland provided TGOD with an interest-bearing revolving credit facility totaling $34 million. The guarantors under the Credit Agreement are TGOD, BZAM, Medican Organic, BZAM Holdings, BZAM Management, BZAM Cannabis, Folium Life, High Road and BZAM Labs (together, in such capacity, the "Cortland Obligors").

22. As of February 28, 2024, approximately $31,919,208.84 of principal is owing together with interest of an additional $362,916.21.

23. In addition, BZAM has entered into six (6) promissory notes (the "Stone Pine Promissory Notes") with Stone Pine Capital Ltd. ("Stone Pine"), an entity controlled by BZAM's largest shareholder and current Chairman. The Stone Pine Promissory Notes were all amended on January 4, 2024, to each be payable upon demand, provided that Stone Pine shall not be permitted to make a demand until the later of either: (i) the maturity date of the Cortland Credit Agreement; and (ii) March 31, 2025.

24. Contemporaneously with the execution of the Stone Pine Promissory Notes, BZAM and Stone Pine entered into general security agreements (the "Stone Pine GSAs") under which Stone Pine was granted security over all present and after-acquired property, assets and undertakings of BZAM. Additionally, BZAM, Stone Pine and Cortland entered into subordination and postponement agreements to subordinate the amounts loaned under the Stone Pine Promissory Notes to the amounts loaned under the Credit Agreement with Cortland.

25. As of February 28, 2024, approximately $8,515,000 of principal is owing to Stone Pine, and approximately an additional $509,755 of interest accrued month-to-date for a total amount owing of

$9,624,755.07. The Stone Pine Promissory Notes each carry an interest rate of 8% or 10% per annum, with interest being calculated monthly and payable on the last day of each month. No interest has ever been paid on the Stone Pine Promissory Notes.

26. BZAM Cannabis entered into a $5 million loan from for private lenders that is secured against the Edmonton Facility pursuant to a commitment letter dated May 19, 2021 as well as a general security agreement over all of the property of BZAM Cannabis and a corporate guarantee from BZAM Management.

27. In addition to the above, the Applicants have a number of unsecured obligations including a promissory note issued by BZAM to Final Bell Holdings International Inc. dated January 5, 2024 in the amount of $8 million and employee liabilities including monthly aggregate payroll obligations of approximately $2,344,764 related to both salaried and hourly employees. The Applicants also owe $1,103,860 and accrued and unpaid vacation pay and another $702,000 in unpaid bonuses.

28. The Applicants had accounts payable and accrued liabilities as at January 31, 2024 of approximately $28,211,004, and CRA liabilities as at February 15, 2024 of approximately $4,440,000 in excise tax arrears, $2,650,000 in sales tax arrears, and a modest amount in respect of unremitted payroll deductions. BZAM Management and TGOD have entered into payment plans with the CRA in respect of their excise and/or sales tax arrears.

29. It is clear that the current cash position of the Applicants is not sufficient to meet their obligations as they come due, particularly relating to ongoing and future payroll obligations and the cash required to maintain business operations while preventing the expiry of valuable (and required) cannabis licences.

30. The CCAA applies in respect of a "debtor company or affiliated debtor companies" whose liabilities exceed $5 million. The term "debtor company" is defined as "any company that: (a) is bankrupt or insolvent [...]", and the term "company" is defined as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province [...]".

31. The CCAA also specifies companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company. Each of the Applicants is a "company" within the meaning of the CCAA as each was incorporated under Canadian provincial or federal laws. All of the Applicants other than BZAM are direct or indirect subsidiaries of BZAM. Accordingly, the Applicants are all affiliated companies.

32. Each of the Applicants is a "debtor company" as defined in the CCAA. The insolvency of a debtor company is assessed as of the time of filing the CCAA application. Courts have taken guidance from the definition of "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act*, which, in relevant part, provides that an "insolvent person" is a person:

    a. who is for any reason unable to meet his obligations as they generally become due;
    b. who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
    c. the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

33. A company is also insolvent for the purposes of the CCAA "if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

34. The Applicants collectively have over $55,500,000 in debt and only approximately $1,648,000 of cash on hand. Absent the Stay of Proceedings and the approval of the DIP Loan, the Applicants will be unable to meet their obligations as they come due. As such, the Applicants are affiliated debtor companies to which the CCAA applies.

35. I am also satisfied that Ontario is the chief place of business of the Applicants, and as such this Application is properly made to this Court.

36. Section 9(1) of the CCAA provides that an application for a stay under the CCAA may be made to the court that has jurisdiction in the province in which the head office or chief place of business of the company in Canada is situated.

37. In *Nordstrom Canada Retail, Inc.* , this Court found that the company's "chief place of business" was Ontario despite the fact that Nordstrom Canada Retail was incorporated and had significant business operations in British Columbia. In determining whether the court had jurisdiction over the proceedings, this Court considered multiple factors, including the location of the company's assets, employees and sales.

38. The Court found that there was sufficient evidence establishing Ontario as the proper jurisdiction based on the following: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled $220 million, compared to $148 million in British Columbia and $77 million in Alberta.

39. The same analysis can be applied here. Approximately 58% of the employees of the Applicants are situated in Ontario. While the Applicants have two cannabis facilities in each of Ontario and British Columbia, the largest facility of the Company is in Hamilton, Ontario. The Company maintains corporate offices in both Ontario and British Columbia and a majority of the BZAM directors reside in Ontario. In addition, the principal place of business of the senior secured lender, Cortland, is Ontario.

Stay of Proceedings

40. Section 11.02(1) of the CCAA provides that the Court may order a stay of proceedings on an initial CCAA application for a period of not more than 10 days. Section 11.001 of the CCAA provides that relief granted on an initial CCAA application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day period.

41. A stay of proceedings is clearly necessary here if any form of restructuring process is to be successful. The relief sought today is limited to what is reasonably necessary.

Non-Applicant Stay Parties

42. I am also satisfied that the stay should apply to the Non-Applicant Stay Parties. The Court has authority to extend the stay to non-parties pursuant to sections 11 and 11.02(1) of the CCAA, which permits the Court to make an initial order on any terms imposed. In determining whether a stay should be extended to non-parties, courts have considered numerous factors, including whether the subsidiaries of applicants had guaranteed secured loans of the applicants, whether the non-applicants were deeply integrated into the business operations of the applicants, and whether the claims against the non-applicants were derivative of the primary liability of the applicants: See *MPX International Corporation*, 2022 ONSC 4348 ("*MPX*") at para 52, *Lydian International Limited, (Re)*, 2019 ONSC 7473 at para 39; *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at paras 5, 18, and 31; at paras 28-29; and *Target Canada Co.*, 2015 ONSC 303 ("*Target*") at paras 49-50.

43. All of the Non-Applicant Stay Parties here are highly integrated into the business as wholly-owned subsidiaries (direct or indirect) of BZAM, or in the case of 943 Québec, as a soon to be acquired company. None carry on active business. The three entities other than 943 Québec also have tax attributes which could be beneficial to the objective of maximizing value for stakeholders.

44. I am satisfied that the stay should be extended to these parties to prevent uncoordinated realization and enforcement attempts from being made in different jurisdictions all of which would be counterproductive to the maximization and protection of value for stakeholders of the Applicants.

45. Moreover, the Applicants advise that they intend to seek approval of a SISP in this proceeding which will include the Non-Applicant Stay Parties with the result that the stay should apply to them to give comfort to potential bidders that enforcement actions against those parties will be stayed while a sales process is being conducted.

Regulatory Stay of Licences

46. CCAA courts have granted regulatory stays over licences where, absent such a stay, the applicable regulators were likely to suspend or cancel licences due to the commencement of the CCAA proceeding. Other courts have observed that permitting the immediate termination of the licenses of a debtor company would not avoid social and economic losses but rather would amplify them. See: *Re Just Energy* Corp., at para 87; *Abbey Resources Corp., Re, (29 July 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB); Original Traders Energy Ltd. et al., (30 January 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00693758-00CL* (Initial Order) at para 19.

47. Canadian courts have also granted stays to prevent the Canada Revenue Agency from seeking to enforce its rights through regulatory actions related to an excise licence for a cannabis company during the period in which it was under protection in an insolvency regime: *Tantalus Labs Ltd., Re*, 2023 BCSC 1450 ("*Tantalus*")and *Aleafa Health Inc*. SISP Approval Order August 22, 2023 [CV-23-00703350-00CL].

48. In *Tantalus,* the British Colombia Supreme Court granted an order as part of the BIA proposal maintaining the status quo of a cannabis excise licence during the course of the proposal proceeding. It did so, rejecting the submission of the CRA, which had submitted that a ministerial decision to not renew a licence could not be the subject of a stay under the *BIA*. The same principles apply to a CCAA proceeding.

49. The cannabis licences of the Applicants are among their most valuable assets. Just as importantly, they are required to permit the Applicants to continue operating their underlying business. The expiry or cancellation of licences will suspend or terminate completely the operation and delivery of products by the Applicants with the result that the ability of the Applicants to restructure or continue as a going concern business will in all probability be eliminated.

Appointment of FTI as Monitor

50. The Applicants propose to have FTI appointed as the Monitor. FTI is a "trustee" within the meaning of subsection 2(1) of the BIA, is established and qualified, and has consented to act as Monitor. The involvement of FTI as the court-appointed Monitor will lend stability and assurance to the Applicants' stakeholders. FTI is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

51. I am satisfied that FTI should be appointed as Monitor in these CCAA Proceedings.

The DIP

52. Pursuant to a DIP facility agreement dated February 28, 2024 (the "DIP Agreement"), Cortland as proposed DIP Lender, has agreed to provide TGOD as borrower with a super priority, non-revolving

credit facility up to a maximum principal amount not to exceed the lesser of $41 million and the Revolving Facility Limit (as defined in the Second ARCA) plus $7 million, subject to certain conditions. Each of the Applicants is a guarantor under the DIP Agreement.

53. The DIP Loan has a commitment fee of $98,000 and bears interest at the greater of the Toronto-Dominion Bank's floating annual rate of interest plus 8.05% per annum and 12% per annum (an interest rate that I observe is the same as that set out in the Second ARCA).

54. The DIP Loan is conditional on the granting of the DIP Charge.

55. The amount of the DIP Loan to be funded during the initial stay period of 10 days (up to $2,400,000) is only that portion necessary to ensure the continued operation of the business of the Applicants in the ordinary course for that period of time such that I am satisfied it is appropriate that it be approved at this time pursuant to section 11.2(5) of the CCAA, as was approved in *Mjardin Group, Inc., (Re),* 2022 ONSC 3338 at para. 31.

56. While the DIP Agreement contemplates what the Applicants describe as a "creeping-roll up" structure pursuant to which all post-filing receipts by the Applicants will be applied to repay pre-filing obligations owing to Cortland, it is important to note that the DIP Charge does not secure any obligation that existed prior to the granting of the Initial Order. This Court has previously approved DIP facilities that use receipts from operations post-filing to repay pre-filing amounts, pursuant to the jurisdiction found in section 11.2(1). The emphasis is on preserving the pre-filing status quo, so as to uphold the relative pre-stay priority position of each secured creditor: *Comark Inc., (Re)*, 2015 ONSC 2010 at paras. 40-41; and *Performance Sports Group Ltd.*, 2016 ONSC 6800 at para. 22.

57. Moreover, and in accordance with section 11.2(1), notice has been provided to the secured creditors proposed to be primed by the DIP, and as noted above, the proposed DIP Charge does not secure any pre-filing obligations of the Applicants. Cortland, the proposed DIP Lender, is already in first position as the senior secured creditor in respect of all of the property of the Applicants save and except for the Edmonton Facility which is not proposed to be primed by the DIP in any event. Stone Pine Capital is supportive of the proposed DIP Loan.

58. Section 11.2(4) of the CCAA sets out a non-exhaustive list of criteria that the Court must consider in deciding whether to grant a DIP lender's charge. Those criteria include the period during which the Applicants are expected to be subject to CCAA proceedings, how the Applicants' business and financial affairs are to be managed during the proceedings, whether the Applicants' management has the confidence of its major creditors, whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants, the nature and value of the Applicants' property, whether any creditor would be materially prejudiced as a result of the security or charge, and whether the monitor supports the charge.

59. DIP financing may be approved even if it potentially prejudices some creditors, as long as the prejudice is outweighed by the benefit to all stakeholders.

60. It is important that an applicant meet the criteria in section 11.2(1) as well as those in section 11.2(4). (See *CanWest Publishing Inc., Re*, 2010 ONSC 222 ("*CanWest*") at paras. 42-44).

61. I am satisfied that the Applicants are facing a liquidity crisis and the Cash Flow Statement shows that financing even on an interim basis is required to fund these proceedings.

62. I am also satisfied that the terms of the proposed DIP Loan are appropriate. I recognize that the interest rate is at the very high end of the range within which DIP loans have been approved by this Court. However, I am satisfied that it is appropriate here. First, the rate is exactly the same as the rate applicable to the existing credit facilities of the senior secured creditor, Cortland, who is the proposed DIP Lender,

so there is no increase in the cost of borrowing relative to the current facilities. Second, the commitment fee is relatively modest as against the total funding be made available. The cost of borrowing necessarily involves a consideration of the commitment fee together with the applicable interest rate. Third, interest rates generally have increased materially over the last year, so one must proceed with caution in considering a previously established range of interest rates. Fourth, the cannabis sector generally has faced and continues to face significant challenges and risks, with the result that the cost of borrowing within the sector generally is expensive.

63. Finally, the Proposed Monitor is supportive of the DIP Loan and corresponding charge, and is further in agreement that those amounts proposed to be advanced during the initial 10 day period are required in order to preserve the status quo and the going concern operations of the Applicants.

Administration Charge

64. The Court has jurisdiction to grant an administration charge under s. 11.52 of the CCAA. It is to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge, and the position of the Monitor. (See *CanWest*, at para. 54).

65. The administration charge of $500,000 is appropriate. It is supported by the Proposed Monitor and the senior creditors.

Directors' Charge

66. The Court has jurisdiction to grant a directors' charge under section 11.51 of the CCAA, provided notice is given to the secured creditors who are likely to be affected by it. To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors and officers, who have considerable institutional knowledge and specialized expertise.

67. Here, I recognize that the proposed quantum of the Directors' Charge is very significant at $5,300,000. However, almost all of that is as a result of the excise tax obligations owing by the Applicants which are very material and which, I observe, will increase going forward.

68. The Monitor supports the Applicants' request for the Directors' Charge. I am satisfied it is appropriate here.

69. The Directors' Charge is approved.

Relief from Securities Obligations

70. The Applicants seek relief to dispense with certain securities filing requirements and in particular, the authority to incur no further expenses in relation to any filings, and that none of the directors or officers, employees or other representatives of the Applicants or the Monitor shall have personal liability with respect thereto.

71. This Court has previously granted such relief and I am satisfied that it is appropriate here. See: *Aleafa Health Inc.*, amended and restated initial order issued August 4, 2023 [CV-23-00703350-00CL] paras 45-46; *MPX International Corporation*, amended and restated initial order issued July 25, 2022 [CV-22-00684542-00CL] at para 46-47; *CannTrust Holdings Inc., Re,* initial order issued March 31, 2021 [Court File No. CV-20-00638930] at paras 46-47; and *Pure Global Cannabis, Inc., Re*, initial order issued March 19, 2020 [CV-20-00638503-00CL] at para. 49.

Authorization for Pre-Filing Payments

72. The Applicants seek the authority but not the requirement to make payments for goods or services supplied to the Applicants prior to the date of the Initial Order, but in all cases only with the consent of the Monitor and the DIP Lenders, and only in circumstances where, in the opinion of the Applicants and the Monitor, the supplier or service provider is critical to preserve, protect or enhance the value of the business.

73. While section 11.4 of the CCAA gives the Court authority to declare a person to be a critical supplier and to grant a charge on the debtor's property to secure amounts owing for services provided post-filing, nothing in that section removes the inherent jurisdiction of the court to allow the payment of pre-filing amounts to suppliers who services are critical to the post-filing operations of the debtor, even where the debtor does not propose to secure the payment of post-filing goods or services with a critical supplier charge: See *Cline Mining Corp., Re,* 2014 ONSC 6998 at para. 38, and *MPX* at para. 70.

74. Such relief may be included in an initial order: see *Target*, at paras. 64-65.

75. I am satisfied that such relief is appropriate here, particularly given that the consent of the Monitor is required for such payments to be made.

Comeback Hearing

76. The comeback hearing shall take place on Friday, March 8, 2024 commencing at 2:00 PM via Zoom.

77. The order I have signed is effective immediately and without the necessity of issuing and entering.

Osborne, J.

SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00703350-00CL

DATE: **22-AUG-2023**

NO. ON LIST: 6

TITLE OF PROCEEDING: ALEAFIA HEALTH INC. et al.

BEFORE: JUSTICE CONWAY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Miranda Spence	Applicants	mspence@airdberlis.com
Samantha Hans	Applicants	shans@airdberlis.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Sean Zweig & Josh Foster	Ad Hoc Committee of the Convertible Debentureholders	zweigs@bennettjones.com fosterj@bennettjones.com
Martino Calvaruso	Monitor	mcalvaruso@osler.com
Virginie Gauthier	Red White & Bloom Brands Inc.	virginie.gauthier@gowlingwlg.com
Saneea Tanvir	1260356 Ontario Limited and Royal Group Resources Ltd.	stanvir@mccarthy.ca

Noah Goldstein Murtaza Tallat	Observer, KSV Restructuring Inc. as Monitor	ngoldstein@ksvadvisory.com mtallat@ksvadvisory.com
Chris Burr	Board of Directors	chris.burr@blakes.com

ENDORSEMENT OF JUSTICE CONWAY:

[1] All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of the Applicants dated August 17, 2023.

[2] The Applicants bring this motion for an order approving a SISP, approving the Stalking Horse Agreement, preserving the Licenses during the extended Stay of Proceedings, and extending the Stay Period to October 31, 2023. The Monitor supports all of the relief sought.

[3] As a result of negotiations between stakeholders – in particular the Ad Hoc Committee of Debentureholders – the motion is now proceeding on an unopposed basis. Counsel for the Applicants advised the court that changes have been made to how the SISP will be conducted to ensure that it proceeds in an independent manner, which has addressed the concerns of the Ad Hoc Committee, as confirmed by its counsel in court. Counsel for the board of directors and the secured creditor 1260356 Ontario Limited also voiced their support for the relief sought.

[4] I reviewed the terms of the Stalking Horse Agreement and the timelines in the SISP. I am satisfied that the SISP process, accompanied by the Stalking Horse Agreement, is warranted to adequately canvass the market for the benefit of all stakeholders and should be approved.

[5] With respect to the *status quo* order for the Licenses, the Monitor's counsel advised that CRA has expressly told the Monitor that it does not oppose the order. It did not attend or file any opposing materials. While Health Canada did not expressly advise the Monitor, it has been served and did not oppose. The *status quo* order is consistent with those granted in *Just Energy, Abbey Resources, Original Traders* and *Tantalus* and will mitigate the risk of destruction of value that revoking the Licenses would have on the business. I am granting the *status quo* order.

[6] The stay extension to October 31, 2023 is granted. The Applicants have acted and are continuing to act in good faith and with due diligence. The Updated Cash Flow Forecast indicates that the Applicants will have sufficient liquidity to fund their business during the extended period. The Monitor confirms that no creditor will be materially prejudiced by the extension.

[7] Order to go as signed by me and attached to this Endorsement. This order is effective from today's date and is enforceable without the need for entry and filing.

CITATION: Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re) 2019 ONSC 1215
COURT FILE NO.: CV-19-00614629-00CL
DATE: 20190220

RE: SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: **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 PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.

Applicants

BEFORE: Regional Senior Justice G. B. Morawetz

COUNSEL: *J. Dietrich and S. Kukulowicz and R. Jacobs,* for the Applicants

S. Zweig and A. Nelms, for FTI Consulting Canada Inc., Proposed Monitor

S. Brotman and D. Chochla, for the Ad Hoc Group of Term Lenders

S. Kour, for Term Loan Agent, Cortland Products Corp.

T. Reyes for Wells Fargo, ABL Agent

HEARD AND ENDORSED: February 19, 2019

REASONS: February 20, 2019

ENDORSEMENT

OVERVIEW

[1] At the conclusion of argument, the record was endorsed as follows:

> CCAA application has been brought by Applicants. Initial Order granted. Order signed. Applicants will serve parties today and return to court for further directions on Thursday, February 21, 2019 at 9:30 a.m. Reasons will follow.

[2] These are the Reasons.

[3] This application is brought by Payless ShoeSource Canada Inc. ("Payless Canada Inc.") and Payless ShoeSource Canada GP Inc. ("Payless Canada GP") for relief under the Companies' Creditors Arrangement Act ("CCAA"), including an initial stay of proceedings. The Applicants also seek to have the stay of proceedings and the other benefits of the Initial Order extended to Payless ShoeSource Canada LP ("Payless Canada LP", together with the Applicants, the "Payless Canada Entities"), a limited partnership which carries on substantially all of the operations of the Payless Canada Entities. The requested relief is not opposed.

[4] The evidence provided in the affidavit of Stephen Marotta, Managing Director at Ankura Consulting Group LLC, the Chief Restructuring Organization ("CRO") establishes that each of the Payless Canada Entities is insolvent and unable to meet its liabilities as they become due. The Applicants seek relief provided by the proposed Initial Order under the CCAA in order to provide a stable environment for the Payless Canada Entities to undertake the Canadian Liquidation.

[5] On February 18, 2019, a number of Payless Entities in the United States (the "U.S. Debtors") (including the Payless Canada Entities) commenced cases under chapter 11 of title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri (the "U.S. Bankruptcy Court") (the "U.S. Proceedings"). The U.S. Debtors' "First Day Motions" are scheduled to be heard by the U.S. Bankruptcy Court on February 19, 2019.

[6] Counsel to the Applicants advises that the orders to be sought by the U.S. Debtors from the U.S. Bankruptcy Court at the First Day Motions contain language providing that if there are inconsistencies between any order made in the U.S. Proceedings and in this court, the orders of this court will govern with respect to the Payless Canada Entities and their business.

FACTS

[7] The Applicants are indirect wholly owned subsidiaries of a U.S. Debtor, Payless Holdings LLC. Both Payless Canada Inc. and Payless Canada GP are governed by the *Canada Business Corporations Act* (the "CBCA").

[8] Payless Canada LP is a limited partnership organized under the laws of Ontario. The general partner and limited partner of Payless Canada LP are Payless Canada GP and Payless Canada Inc., respectively. Payless Canada LP is the primary vehicle conducting the business operations of the Payless Canada Entities.

[9] The Payless Canada Entities operate 248 retail stores in 10 provinces throughout Canada. The retail locations are leased from commercial landlords.

[10] The Payless Canada Entities also have a corporate office at leased premises located in Toronto, Ontario.

[11] There are approximately 2,400 employees in Canada of which 12 are corporate office employees. The remainder work at the retail locations.

[12] The Payless Canada Entities rely on the infrastructure of the U.S. Debtors for substantially all head office functions. These services are provided by certain U.S. Debtors pursuant to intercompany agreements.

[13] The assets of the Payless Canada Entities primarily consist of inventory and an intercompany promissory note receivable which was reported on the balance sheet in the amount of approximately USD $110 million. Given that the issuer of the note is a U.S. Debtor, the Applicants advise that it is doubtful that the full value can be realized.

[14] The liabilities of the consolidated Payless Canada Entities include, among other things, outstanding gift cards, leased payments, trade and other accounts payable, taxes, accrued salary benefits, long term liabilities, and intercompany service payables.

[15] The Payless Canada Entities are also guarantors under two credit facilities, the ABL Credit Facility and the Term Loan Credit Facility. There is approximately USD $156.7 million outstanding under the ABL Credit Facility and USD $277.2 million outstanding under the Term Loan Credit Facility.

[16] The total amount of liabilities of the Payless Canada Entities inclusive of obligations under the guarantees of the ABL Credit Facility and the Term Loan Credit Facility is in excess of USD $500 million.

[17] In December 2018, Payless engaged an investment bank, PJ Solomon L.P., to review strategic alternatives. In consultation with its advisers, the Payless Canada Entities decided to take steps to monetize or preserve its Latin America business and liquidate its North American operations.

[18] The Payless Canada Entities have determined that there is no practical way for the company to operate on a standalone basis. The Payless Canada Entities have decided that it was in their best interest and in the best interest of their stakeholders to complete the Canadian Liquidation.

ISSUES

[19] Counsel to the Payless Canada Entities state that the issues to be determined on this application are as follows:

(a) Whether the CCAA applies in respect of the Applicants;

(b) Whether a stay of proceedings is appropriate;

(c) Whether the Monitor should be appointed;

(d) Whether the CRO should be appointed;

(e) Whether the Administration Charge should be approved;

(f) Whether the Directors' Charge should be approved;

(g) Whether the Cross-Border Protocol should be approved.

LAW

[20] The CCAA applies to a company where the aggregate claims against it or its affiliated debtor companies are more than five million dollars. I am satisfied that both of the Applicants meet the definition of a "company" under section 2(1) of the CCAA.

[21] The evidence is such that I am able to conclude that the Payless Canada Entities have failed to pay their February rent for a number of Canadian stores. In addition, defaults have occurred under the ABL Credit Facility and the Term Loan Credit Facility, and the ABL Agent has issued a Cash Dominion Direction.

[22] It has been demonstrated that the Payless Canada Entities have insufficient assets to discharge their liabilities and insufficient cash flow to meet their obligations as they come due.

[23] Accordingly, I find that the Applicants are insolvent debtor companies under the CCAA.

[24] Counsel for the Applicants submits that the Payless Canada Entities require a stay of proceedings in order to prevent enforcement actions by various creditors including landlords and other contractual counterparties. I accept this submission and in my view, it is appropriate to grant the requested stay of proceedings.

[25] I am also of the view that it is appropriate that the stay of proceedings apply not only in respect of the Applicants' themselves, but that it extend to the partnership Payless Canada LP.

[26] Although the definition of "debtor company" in the CCAA does not include partnerships, this court has previously held that where a limited partnership is significantly interrelated to the business of the applicants and forms an integral part of its operations, the CCAA Court may extend the stay of proceedings accordingly. (See: *Re Lehndorff General Partner Ltd.*, (1993) 9 BLR (2d) 975 (Ont. S.C); *Re Priszm Income Fund*, 2011 ONSC 2061; *Re Urbancorp Toronto Management Inc.*, 2016 ONSC 3288; and *Re Target Canada Co.*, 2015 ONSC 303).

[27] In these circumstances, and in order to ensure that the objectives of the CCAA are achieved, I am satisfied that it is appropriate to grant the requested stay of proceedings to Payless Canada LP.

[28] In addition, the Payless Canada Entities also seek a stay of proceedings against the Directors and Officers. I am satisfied that the stay against to the Directors and Officers is

appropriate as it will allow such parties to focus their time and energies on maximizing recoveries for the benefit of stakeholders.

[29] The Applicants propose FTI Consulting Canada Inc. as Monitor. I am satisfied that FTI is qualified to act as Monitor in these proceedings.

[30] The proposed Initial Order also provides for the appointment of Ankura as CRO. Counsel to the Applicants submits that the proposed CRO is necessary to assist with the Canadian liquidation and is particularly critical given the number of departures by senior management.

[31] The Proposed CRO Engagement Letter has been heavily negotiated and no parties, including the ABL agent and the term lenders, voice objection to the Engagement Letter.

[32] I am satisfied that the CRO should be appointed and the CRO Engagement Letter should be approved.

[33] I am also satisfied that it is appropriate to grant a charge on the Property in priority to all other charges to protect the CRO, Proposed Monitor, counsel to the Proposed Monitor, and Canadian counsel to the Payless Canada Entities, up to a maximum amount of USD $2 million (the "Administration Charge"). In arriving at this conclusion, I have taken into account the provisions of section 11.52 of the CCAA and the appropriate considerations which include:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[34] I am also of the view that the requested Directors' Charge is appropriate in the circumstances and it is approved in the maximum amount of USD $4 million that will reduce to USD $2 million after March 21, 2019. It is noted that the Directors' Charge only applies with respect to amounts not otherwise covered under the Payless Canada Entities directors' and officers' liability insurance policies.

[35] In order to facilitate the orderly administration of the Payless Canada Entities and in recognition of their reliance upon the U.S. Debtors, the Applicants propose that these proceedings be coordinated with the U.S. Proceedings and accordingly the proposed Initial Order includes the approval of a cross-border protocol.

[36] I am satisfied that the proposed cross-border protocol establishes appropriate principles for dealing with international jurisdictional issues and procedures to file materials and conduct joint hearings. It is my understanding that the U.S. Debtors will also be seeking the approval of the proposed protocol by the U.S. Bankruptcy Court as part of their First Day Motions.

[37] Counsel advises that the form of the Cross-Border Protocol is consistent with this court's decision in *Re Aralez* (25 October 2018), Toronto CV-18-603054-00CL (Ont. S.C) which is based on the Judicial Insolvency Network ("JIN Guidelines"). As stated on the JIN website:

> The JIN held its inaugural conference in Singapore on 10 and 11 October 2016 which concluded with the issuance of a set of guidelines titled "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" also known as the JIN Guidelines…The JIN Guidelines address key aspects and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs.

[38] The JIN Guidelines have been endorsed by the Commercial List Users' Committee of this court.

[39] I also note that the JIN Guidelines have been recognized in a number of jurisdictions globally, including the United Kingdom, United States (New York, Delaware and Florida), Singapore, Bermuda, Australia (New South Wales), Korea (Seoul Bankruptcy Court), and the Cayman Islands.

[40] The JIN Guidelines have received international recognition and acceptance. As noted, the aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs, an objective that all parties should strive to achieve in every insolvency proceeding.

[41] Counsel to the Applicants advised that this application will be served on a number of interested parties, including the landlords of the leased premises.

[42] It is both necessary and appropriate to schedule a Comeback Hearing in order to provide affected parties with the opportunity to respond to this application. Counsel to the Applicants propose that the Comeback Hearing be held on Thursday, February 21, 2019.

[43] It is expected that the following will be considered at the Comeback Hearing:

(a) Whether the Liquidation Consulting Agreement and Sale Guidelines should be approved; and

(b) Whether an extension of the stay of proceedings is appropriate.

[44] I am not certain as to whether this schedule will provide interested parties with adequate time to respond to the issues raised in this application. The Comeback Hearing will proceed on

February 21, 2019 on the understanding that certain matters may not be addressed at that time, if it is determined that parties have not had adequate time to respond to the issues raised in the application.

[45] The Initial Order has been signed by me.

Morawetz R.S.J.

Date: February 20, 2019

Unofficial English Translation

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-049320-159

DATE: SEPTEMBER 14, 2015

THE HONOURABLE MARTIN CASTONGUAY, J.S.C., PRESIDING

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

PASCAN AVIATION INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

LES STRUCTURES & COMPOSANTES AVTECH INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

3939421 CANADA INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

8039879 CANADA INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

PASCAN EXPRESS INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

8039895 CANADA INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

LES CARBURANTS AVTECH INC., a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

Debtors

- and -

BUSINESS DEVELOPMENT BANK OF CANADA, a legal person having a place of business at 5 Place Ville-Marie, Montreal, Province of Quebec, H3B 5E7

- and -

INVESTISSEMENT QUÉBEC, a legal person having a place of business at 413 Saint-Jacques Street, Suite 500, Montreal, Province of Quebec, H2Y 1N9

Petitioners

- and -

PRICE WATERHOUSE COOPERS INC., a legal person having a place of business at 1250 René-Lévesque Boulevard, Suite 3500, Montreal, Province of Quebec, H3B 2G4

Impleaded party / Monitor

- and -

ROYAL BANK OF CANADA, a chartered bank
having a place of business at 1 Place Ville-Marie, Ground Floor,
Montreal, Province of Quebec, H3C 3B5

Impleaded party

JUDGMENT

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[1] On August 31, 2015, the Business Development Bank of Canada and Investissement Québec (hereinafter the "Petitioners") asked the Court to make an initial order under the terms of sections 4, 5 and 11 of the *Companies' Creditors Arrangement Act* (hereinafter "the Act")[1] with regard to the following debtors:

- Pascan Aviation Inc.
- Pascan Express Inc.
- 8039879 Canada Inc.
- 3939421 Canada Inc.
- Les Structures & Composantes Avtech Inc.
- 8039895 Canada Inc.
- Les Carburants Avtech Inc.

(hereinafter the "Pascan Group")

[2] The motion for an initial order also sought to set up interim financing of $1,000,000.00, the funds coming from the Petitioners themselves, the whole accompanied by the related fees.

[3] The Petitioners also asked that Dominic Deveaux (hereinafter "Deveaux") be appointed Chief Restructuring Officer (hereinafter "CRO") of the Pascan Group. The Court sees fit to reproduce the allegations in the motion dealing with this point.

[TRANSLATION]

Appointment of the CRO

129. The Petitioners propose that the Court appoint Dominic Deveaux to act as Chief Restructuring Officer of the Pascan Group;

130. The appointment of the CRO is necessary because the Petitioners have lost confidence in the current management and administration of the Pascan Group;

131. The appointment of the CRO is an essential condition for granting the interim financing offered by the Petitioners;

132. The CRO is already familiar with the operations of the Pascan Group given his involvement in recent months, and he, along with the key employees of the Pascan Group, will make it possible to continue its operations.

133. The Petitioners therefore request that the CRO be appointed by the Court to act as Chief Restructuring Officer of the Pascan Group under the terms of an offer of management services made to the Pascan Group and filed as Exhibit **R-24;**

134. The Petitioners further propose that the CRO have all the powers described in the draft initial order and that he enjoy the protections required to maintain the operations of the Pascan Group;

[4] As is usual for such a motion in view of an initial order, a draft order was attached, providing, *inter alia*, the following concerning the powers of the CRO:

[TRANSLATION]

30. - Declares that the CRO may exercise, without the intervention of the directors, all the powers described in the service proposal that are not incompatible with the following powers.

[5] The service proposal was the one prepared by Deveaux.[2] In addition to his emoluments, set at $40,000.00 a month, this document set out the powers and objectives of the CRO. The Court sees fit to reproduce them in their entirety.

[TRANSLATION]

POWERS

In the context of his role referred to hereinabove and in view of promoting the achievement of the objectives described hereinbelow, the Manager shall have all the powers necessary to:

- Conduct, manage, operate and oversee the company, commercial operations and financial affairs of the CLIENT and perform any and all acts in this regard or in connection with the restructuring of the CLIENT.

- Take all measures to maintain control over the receipts and disbursements of the CLIENT including, without limiting the generality of the foregoing, all measures to control and use all the bank accounts of the CLIENT.

- Maintain or terminate, dismiss or lay off, temporarily or permanently, the employees of the CLIENT or of its agents or consultants and take any and all other measures for human resources management and any other administrative decision related thereto.

- Represent the CLIENT in all negotiations with any person whomsoever.

- Communicate with and provide information to the Monitor concerning the business of the CLIENT.

- Take any and all measures, sign any and all documents or agreements and incur any and all expenses and obligations necessary or incident to the powers of the Manager.

OBJECTIVES

The strategic objectives pursued by the Manager are as follows:

1. **Financial restructuring**

   a. File and obtain approval of a plan of arrangement under the *Companies' Creditors Arrangement Act* for the unsecured creditors of the CLIENT.

2. **Operating performance**

   a. Improve the financial performance and profitability of the CLIENT so that the CLIENT can meet its current obligations, provide for the engine reserve and investments in maintenance required for the operating fleet and pay the interest specified in the loan agreements.

   b. Set up a management team to reduce and eventually terminate the Manager's mandate on a monthly basis.

3. **Sale/recapitalization of operating entities**

a. Solicit offers for the operating assets and activities of the CLIENT and interest potential purchasers, partners or investors such that the loans on the operating assets are assumed or repaid to the satisfaction of the lenders.

4. **Sale/disposition of surplus assets**

Solicit offers in order to proceed with the sale of the surplus assets of the CLIENT such that these offers meet the minimum conditions established by the lenders according to the agreements in place with the CLIENT.

[6] The Pascan Group, while theoretically in agreement with an initial order, filed a written opposition in the record with four specific points, although only two were debated before the Court. They were as follows:

- Identity and compensation of the CRO

- Powers of the CRO

[7] For a full understanding of the grounds for the opposition, some background is essential.

[8] The Pascan Group operates in passenger air transportation services, charter freight and certain airport services. Two directors look after its management, namely Serge Charron (hereinafter “Charron”) and Denis Charest (hereinafter “Charest”).

[9] Until very recently, the Pascan Group operated a fleet of twenty-one airplanes and one helicopter, serving some fifteen destinations (Rouyn-Noranda, Val-d'Or, Gatineau, Montreal, Quebec City, Bagotville, Mont-Joli, Bonaventure, Baie-Comeau, Sept-Îles, Havre-Saint-Pierre and the Magdalen Islands), Newfoundland and Labrador (Wabush and Goose Bay) and New Brunswick (Bathurst).[3]

[10] The Pascan Group had experienced a decline of some 50% in its sales in the past two years and as a result has sustained significant losses which it attributes to the following factors:

(a) The slowdown in the Plan Nord which began in May of 2011;

(b) The economic difficulties that have adversely affected companies working in Quebec’s mining industry;

(c) The volatility of oil and iron ore prices in the past two years;

(d) The austerity measures brought in by the Quebec government;

(e) The loss of a number of contracts because of increased competition; and

(f) The erosion of certain sectors of the Quebec economy, more specifically in the north of the province.[4]

[11] Until February of 2015, the Pascan Group had a $1,500,000.00 credit line from Royal Bank of Canada.

[12] Because of the Pascan Group's financial difficulties and following a breakdown in negotiations, Royal Bank of Canada withdrew its financial support from the Pascan Group, and as a result the Pascan Group no longer has the credit line.

[13] In fact, the only institutional creditors are the Petitioners, which have granted credit for the financing of assets and for part of the working capital in the amount of $21,069,903.00 as at August 17, 2015.

[14] The difficulties encountered by the Pascan Group led the Petitioners to designate specialized managers on their staff to take charge of problem accounts, namely Dany Couillard (hereinafter "Couillard").

[15] Couillard testified that during meetings with the Pascan Group in the winter of 2015, Pascan saw only one possible solution to its liquidity problem, and that was to obtain government assistance.

[16] In the spring of 2015, when it became clear that the Pascan Group could not meet its obligations vis-à-vis the Petitioners, the Petitioners required the Pascan Group to retain the services of restructuring consultants, namely PricewaterhouseCoopers (hereinafter "PwC") and Evology Management Inc. (Deveaux).[5]

[17] The uncontradicted evidence reveals that from the very start the Pascan Group was against the level of compensation for Deveaux, which it considered too costly in light of its financial situation.

[18] In any case, as often occurs in such situations, the Pascan Group nonetheless gave Deveaux a mandate.

[19] On arriving at the Pascan Group, Deveaux ordered an evaluation of the airplanes operated by the Pascan Group. The evaluation showed that they had declined considerably in value because of two factors.

- Absence or major deficit in the engine reserve[6]

- Cannibalization of certain aircraft[7]

[20] Naturally, the Petitioners were very dismayed when the situation was revealed to them.

[21] At the same time, beyond the difficulties the Pascan Group was having in meeting its obligations to the Petitioners, it was also late in paying its landing fees at some of the airports it served.

[22] What is more, lawsuits had arisen concerning the aircraft leased and operated by the Pascan Group.

[23] In particular, two lawsuits existed between the Pascan Group and two lessors of the airplanes currently operated or in the possession of the Pascan Group. These involved:

Coast to Coast Helicopter Inc.

and

Danish Air Transport Leasing

This is an important detail in the decision the Court must make.

[24] In short, the situation was catastrophic.

[25] Deveaux, together with Charron and Charest, the directors of the Pascan Group, came up with a program to rationalize the air routes, such that the Pascan Group needed only eight airplanes to operate, with the fourteen others to be sold.

[26] At the same time, Deveaux and the Pascan Group directors were negotiating with some of the Pascan Group's suppliers to spread out the payment of its debts.

[27] After Deveaux's arrival and until the end of May, the parties held discussions and tried to establish debt tolerance conditions that would be acceptable to the Petitioners.

[28] The parties could not come to an agreement, and the fact that Charest, the main spokesman for the Pascan Group, left for two weeks to look after other matters was the straw that broke the camel's back.

[29] In June 2015, tired of fighting, the Petitioners sent a notice to the Pascan Group under section 244 of the BIA[8] indicating that they intended to realize on their security.

[30] On June 12, 2015, the expiry date of the notice under section 244 BIA, the Pascan Group terminated Deveaux's mandate.

[31] On July 19, 2015, Deveaux, without the knowledge of the Pascan Group, gave the Petitioners, PwC and Lavery, counsel for the Petitioners, a document entitled "Memorandum". This document laid out several strategies including having the entities holding the airplanes declare bankruptcy as well as [TRANSLATION] "having the lenders take control of the three (3) entities (the Pascan Group "2.0").

[32] It was not until later that the directors found out about the existence of this "Memorandum".

[33] In spite of the notice under section 244 BIA, the parties continued to talk to each other and at the beginning of July 2015, the Pascan Group submitted a business plan showing a possible return to profitability. Even so, a cash injection of $1,000,000.00 was necessary for this purpose.

[34] Discussions therefore began on this basis between the Petitioners and the directors, including Charest.

[35] It should be mentioned that of the two Pascan Group directors, Charest was the only one who had the financial capacity to inject funds.

[36] Right away, Charest indicated that he had no intention of injecting any new funds and so the solution would be a loan from the Petitioners, and the discussion started moving in that direction.

[37] Thus the Petitioners, persuaded that there was a chance that the Pascan Group could be turned around, were ready to advance $1,000,000.00 on an interim basis, subject to certain conditions, including the involvement of Deveaux and the disengagement of the current directors, who for all intents and purposes would be stripped of their powers. Couillard, an account and restructuring manager at the BDC, invoked the following elements to justify this approach.

- Loss of confidence.

- Management team unable to manage the crisis, notably the Pascan Group's inability to sell five (5) airplanes since January 2014.

- Threats of lawsuits.

[38] While Charron was willing to sign the agreement suggested by the Petitioners, Charest refused.

[39] At that point, the situation began to deteriorate.

[40] The motion for an initial order was served and filed on August 26, 2015.

[41] Part of the motion was addressed on August 31, 2015, such that an initial order was issued without dealing with the issue of appointing a CRO. Here is why.

[42] As we have seen, the Petitioners suggested Deveaux, while the Pascan Group suggested another candidate in its written opposition, namely Hélène Zakaib (hereinafter "Zakaib"), a lawyer by training, former Member of the National Assembly and Deputy Finance Minister responsible for industrial policy and the Banque de développement économique du Québec.

[43] Because of the oppositions from both sides, the Court conducted a brief review of the credentials of Deveaux and Zakaib to find that neither had worked in a highly regulated environment such as civil aviation whether for purposes of restructuring or any other purpose.

[44] Furthermore, in his much talked-about *Memorandum* dated July 19, 2015, Deveaux made a remark, which, although it appears innocuous at first glance , has serious consequences.

> [TRANSLATION]
>
> Transport Canada authorities have already been questioning the Pascan Group officers' compliance with regulations and are closely monitoring the situation.

[45] In addition, the emoluments requested by both, namely $40,000.00 a month for Deveaux and $30,000.00 a month for Zakaib, seem excessive under the circumstances.

[46] In view of the candidates proposed by both sides, who have never worked in such a highly regulated industry and are asking for significant fees, the Court can and must intervene.

[47] The Court therefore suggested to the parties that they try to agree on a candidate with the necessary credentials to carry out a restructuring in the civil aviation industry, as that such a candidate would certainly reassure Transport Canada. The Court also asked the parties to consider a more realistic form of compensation given the circumstances.

[48] This having been done, all that remained for the Court was to determine the scope of the powers to be given to the CRO.

[49] Unfortunately, once again, the parties were unable to agree on the choice of candidate. This disagreement revolved more around the independence that a CRO should have in the performance of his duties.

[50] The Court must make a short digression here. Despite the law, we are all human.

[51] Clearly there is no trust between Charest, who represents the Pascan Group, and Couillard, who acts on behalf of the Petitioners.

[52] Charest has testified twice before the Court. He is an intelligent and accomplished businessman but, above all, he has a strong character.

[53] As a result, chances are that his choice of candidates for the CRO position are people over whom, rightly or wrongly, he thinks he could wield some influence.

[54] On the other hand, the Petitioners are attempting to avoid this problem by asking that the Court confer on the CRO powers that are exceptional for such a position.

[55] Indeed, a spade is a spade even if you call it a pitchfork. The scope of the powers sought by the Petitioners for the CRO is more like the powers of a receiver than those normally vested in a CRO.

[56] Before tackling the profile of the best candidate for the CRO position, it is important to review the Court's basic guiding principles.

[57] The author Janis Sarra perfectly summarizes the circumstances that lead to the appointment of a CRO:

> In the past two decades, there has been the growing use of chief restructuring officers (CRO) in CCAA workouts, frequently appointed in the initial stay order. This development is a governance response to creditor concerns that directors and officers that may have skills appropriate to oversight of financially healthy corporations may not have the skills or expertise to deal with a turnaround situation.

[58] This is the most important criterion that should guide the Court. The existing directors, who are quite knowledgeable about their industry, are normally the best qualified to carry out the restructuring. That being said, however, even the best directors can be overwhelmed by a crisis situation.

[59] In the present case, although Charron and Charest knew how to run their business during the profitable years, the evidence shows that they lost control in a crisis situation. The following points demonstrate this:

- Five unsold airplanes even though they had been declared surplus since January 2014

- Cannibalization of certain aircraft.

- Lack of engine reserve.

[60] Nevertheless, the directors of the Pascan Group showed that with adequate guidance, they were able to make good decisions.

[61] In this particular case, the appointment of a CRO, uncontested the Pascan Group, is advisable.

[62] A court-appointed CRO for a restructuring under the Act is nothing new in law.

[63] It is necessary, however, to recall, if not define the objectives sought when a court-appointed CRO is required.

[64] It goes without saying that the situation or powers of a CRO when a company is being wound up are quite different from those of a CRO who will be involved in working out a plan of arrangement.[9]

[65] In the present case, representations were made to the Court that a plan of arrangement would in fact ultimately be filed, with the result that negotiations have already been initiated with certain creditors.

[66] In such a case, to fulfil his or her mandate, the CRO must identify the action to be taken for the financial turnaround of the company; namely the disposal of assets or the creation of a new business plan, or both. The CRO must then, together with the Monitor and the Board of Directors, prepare a viable plan of arrangement that will be acceptable to all the parties involved, whether they are shareholders or secured or unsecured creditors, and ultimately see to its implementation and completion. Moreover, since the CRO is court-appointed, he or she must report to the Court.

[67] Even though the appointment of a CRO can be reassuring to all stakeholders, the aim of such an appointment is not to look out for the interests of a single category of stakeholders.

[68] Certain qualities are therefore required, including independence vis-à-vis these same parties, in addition to a solid reputation and expertise in the civil aviation industry as well as in restructuring.

[69] Selecting the best possible CRO is vital to a company's restructuring process. When a CRO is court-appointed because of differences between the parties, the guiding criteria are the following:

- A good knowledge of the industry in which the company operates so that the CRO's presence is reassuring to all the industry stakeholders, namely, the creditors, clients and competent authorities.

- Independence.[10]

- Experience in restructuring.

- Reasonable cost.

[70] These criteria are not cumulative, but their analysis can lead to the identification of the ideal candidate from among those proposed.

[71] Now that the selection criteria have been established, what should be determined with respect to the powers requested by the Petitioners?

[72] To justify the powers requested, the Petitioners refer to the breach of trust without taking into consideration that a Monitor has already been appointed.

[73] The Petitioners also cite the order issued by Schrager J. of the Quebec Superior Court, as he then was, in *Aveos Fleet Performance*,[11] by which all the powers of administration were conferred on the CRO, to the exclusion of the existing directors.

[74] There are no reasons provided for this order, as is generally the case for emergency orders issued under the Act.

[75] Counsel for the Pascan Group, judicial officers well informed about the Aveos case, told the Court that the scope of powers conferred on the CRO was prompted by the resignation or absence of Aveos directors.

[76] This same order specifies the degree of collaboration to be shown by shareholders and directors. The Court deems it useful to reproduce it here.

> **ORDER** that the Petitioners and their shareholders, direct and indirect subsidiaries, former and current officers, directors, employees, servants, agents and representatives (the "**Company Persons**") shall cooperate fully with the CRO in the exercise of his powers and the discharge of his obligations. Without limiting the generality of the foregoing, the Company Persons shall provide the CRO with such access to the Petitioners' and their direct and indirect subsidiaries' books, records, assets and premise as the CRO requires to exercise his powers and perform his obligations under this Order.

[77] The Court is of the opinion that, at this stage, collaboration is required, not coercion, especially since the Court will ensure the independence of the candidate selected.

[78] The Court does not challenge the Petitioners' decision to use the mechanisms provided by the Act, especially since the Petitioners firmly believe in the Pascan Group's capacity for financial rehabilitation.

[79] This being the case, the Petitioners must live with the consequences of their choices; stripping the directors of their powers in favour of a CRO, however, is not the standard applied by the courts.

[80] This decision is not set in stone and may be reviewed by the Court if it becomes obvious that the directors are not cooperating with the CRO. In such a scenario, the Court would not hesitate to consent to increased powers for the CRO, as in the form used by Schrager J. in *Aveos*.

[81] Let us now look at the candidates. Each one has filed a résumé, and Messrs. Deveaux, Nice and Simard have testified about their past experiences.

[82] The Court would like to point out that this exercise does not make a value judgment with regard to the candidates not selected but rather consists of the application of the criteria presented earlier.

[83] Deveaux has a great deal of experience in restructuring, but none in the civil aviation industry.

[84] Moreover, his "Memorandum" dated July 19, 2015, which was transmitted to the Petitioners, PwC and counsel for the Petitioners while his fees were being paid by the Pascan Group, raises questions for the Court about his independence. In addition, as a result of the animosity which ensued, the relationship between Deveaux and the directors of the Pascan Group would be dysfunctional.

[85] Therefore, Deveaux cannot be considered for the appointment.

[86] Zakaib also cannot be considered for the position.

[87] Despite impressive academic credentials and a remarkable professional career, Zakaib has no knowledge of the aviation industry and her knowledge of restructuring is quite limited.

[88] Simard's application will also be rejected.

[89] Although his knowledge of the civil aviation industry is impressive, he has never participated in any restructuring under the Act.

[90] What is more, scarcely even a few months ago, he started up a company headed by the same person who is the driving force behind Coast to Coast Helicopters Inc., which is currently involved in a dispute with the Pascan Group. Under the circumstances, the criterion of independence or the appearance of independence is not met.

[91] Derek Nice is selected to perform the duties of CRO for the following reasons:

- Solid experience in civil aviation.

- Participation in restructurings under the Act in the civil aviation industry.

- More than reasonable cost under the circumstances.

[92] Regarding the last point, the Court can only suggest that managers involved in restructurings should show more creativity in their choice of consultants.

[93] The costs related to such external consultants are similar to legal costs much decried by litigants.

[94] In this case, a CRO at almost half the cost[12] of that proposed in the initial motion would have been selected simply through competition.

[95] The Petitioners and the Monitor have ask the Court that it be the Monitor that controls, and not just oversees, the Pascan Group's receipts and disbursements.

[96] Once again, the Court does not see the need for such a measure since no evidence of misappropriation, negligence or incompetence in regard thereto has been presented to the Court.

[97] In closing, the evidence shows that Charron has lost interest in his role as director, giving complete leeway to Charest. Charest, however, may need to be absent because of his other obligations. Therefore, if Charest's absences end up amounting to a lack of collaboration on his part, a motion may be filed with the Court to review the powers of the CRO.

FOR THESE REASONS, THE COURT:

ALLOWS the component regarding the appointment of the Chief Restructuring Officer in the motion for the issue of an initial order dated August 26, 2015.

APPOINTS Derek Nice as Chief Restructuring Officer for all the entities of the Pascan Group on the terms and conditions in his offer dated September 10, 2015, to PricewaterhouseCoopers, reflecting the undertakings to which Nice subscribed during his testimony.

ORDERS the Debtors and their shareholders, directors, employees and/or representatives to collaborate fully with the Chief Restructuring Officer in the performance of his duties and in the exercise of his powers, notably by providing him access to all the books of account and/or financial information as well as to all premises and equipment currently operated and used by the Debtors.

DECLARES that the CRO may exercise all the powers described in the service proposal, the whole subject to the agreement of the director of the Debtors and of the Monitor for any decision or act that may have a major impact on the Debtors, namely:

(a) Represent the Debtors in all negotiations with the parties concerned (whether creditors, suppliers, investors, etc.);

(b) Ensure the transition of the role of accountable executive between Serge Charron and Julian Roberts;

(c) Ensure the proper maintenance of aircraft and passenger security;

(d) Find new clients, maintain relationships with existing clients and promote the services of the Debtors;

(e) Make decisions regarding employee retention, including the continued employment of key employees;

(f) Streamline the operations of one or more operating units of the Debtors, including the sale of the surplus fleet;

(g) Terminate or repudiate any contract, agreement or arrangement pursuant to CCAA terms and conditions;

(h) Communicate with and provide information concerning the Debtors to the Monitor at the request of the latter in the performance of its duties; and

(i) Any other power, responsibility or duty that the CRO may agree to exercise, discharge or perform at the request of the Debtors following an order from this Court.

DECLARES that all the powers exercised by the CRO pursuant to this order and the service proposal shall be deemed to have been exercised by the CRO for and on behalf of the Debtors, and not by the CRO in his own personal capacity.

ORDERS that the CRO shall, in the exercise of his powers, consult and report to the Debtors and their director.

DECLARES that the CRO shall benefit from the indemnification obligation provided for in paragraph 25 of the initial order and from the directors' charge as security for this indemnification obligation with regard to the obligations and liabilities that the CRO may incur when acting in such capacity as of the date of this order.

ORDERS the Debtors to pay the reasonable fees and disbursements of the CRO directly related to these proceedings, the plan and the restructuring that he incurred after the date of this order.

DECLARES that, as security for the professional fees and disbursements of the CRO incurred after the date of this order with regard to these proceedings, the plan and the restructuring, the same shall benefit from the administrative charge determined in paragraph 39 of the initial order in order of the priority determined in paragraphs 40 and 41 of the initial order.

ORDERS that no person shall institute or continue proceedings nor cause proceedings to be instituted against the CRO, in relation to the business or property of the Debtors, without first obtaining the prior permission of the Court by way of a prior written notice of five (5) days to counsel for the Debtors and to all those mentioned in this paragraph who are proposed to be named in these proceedings.

ORDERS that this order and all the provisions thereof take effect at or after 00:01 a.m., Montreal time, Province of Quebec, on the date of this order.

[98] **THE WHOLE,** without costs.

_____
Martin Castonguay, J.S.C.

Mtre Jean Legault
Mtre Mathieu Thibault
LAVERY, DE BILLY
Counsel for Business Development Bank of Canada and Investissement Québec

Mtre Guy P. Martel
Mtre Joseph Reynaud
STIKEMAN ELLIOTT
Counsel for the Pascan Group

Mtre Alain Tardif
McCARTHY TÉTRAULT
Counsel for Fiducie Denis Charest

Mtre Martin Desrosiers
OSLER, HOSKIN & HARCOURT
Counsel for the Monitor, PricewaterhouseCoopers

Date of hearing: September 9, 2015

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[1] *An Act to facilitate compromises and arrangements between companies and their creditors*, R.S.C., 1985, c. C-36.
[2] Exhibit R-24.
[3] Paragraph 22 of the motion.
[4] Paragraph 26 of the written opposition.
[5] Even if the mandate is signed by the Pascan Group and Evology Management Inc./Gestion Evologie inc., because it is a mandate *intuitu personae,* the Court will refer only to Mr. Deveaux.
[6] An engine reserve is required from the lenders and consists of a certain sum of money set aside for every hour of flight time to constitute a reserve that will be used to recondition the engine or engines when their regulatory life has expired.
[7] Cannibalization consists of removing operating parts from one aircraft without replacing them and installing them in another aircraft.
[8] *Bankruptcy and Insolvency Act*, R.S.C. (1985) c. B-3.
[9] Janis Sarra: Rescue: *The Companies' Creditors Arrangement Act* (Thomson Carswell) at 160-161.
[10] Janis Sarra: Rescue: *The Companies' Creditors Arrangement Act,* "If the CRO is court-appointed, arguably it has obligations to the court and must act neutrally with respect to stakeholders," at 161.
[11] *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à*) (20 March 2012) 500-11-042345-120.
[12] Fees of Mr. Nice set at $23,000.00 a month, excluding the addition of certain resource persons and expenses, whereas Mr. Deveaux required $40,000.00 a month, as presented in the initial motion. It should be noted that in the evidence adduced with regard to the choice of CRO, Mr. Deveaux agreed to reduce his emoluments to $32,000.00 a month.

CITATION: JTI-Macdonald Corp., Re, 2019 ONSC 1625
COURT FILE NO.: CV-19-615862-00CL
DATE: 2019/03/12

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERIAL LIST

RE: **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 JTI-MACDONALD CORP.

Applicant

BEFORE: Hainey J.

COUNSEL: *Robert I. Thornton, Leanne M. Williams, Rachel Bengino and Mitch Grossell*, for the Applicant

Scott A. Bomhof and Adam M. Slavens, for Respondents JT Canada LLC, and PWC, in its capacity as Receiver of JTI-MacDonald TM

Pamela L.J.Huff, Linc A. Rogers and Christopher Burr, for the Proposed Monitor, Deloitte Restructuring Inc.

HEARD: March 8, 2019

ENDORSEMENT

Background

[1] On March 8, 2019 JTI-Macdonald Corp. ("JTIM" or "Applicant") sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* ("CCAA"). I granted the Initial Order and endorsed the record as follows:

> I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

[2] These are my Reasons.

Facts

[3] As a result of a judgment of the Quebec Court of Appeal released on March 1, 2019 in a class proceeding ("Quebec Class Action"), JTIM and two other defendants are liable for damages totaling $13.5 billion ("Quebec Judgment"). If this judgment is not stayed, its enforcement could destroy the company because JTIM does not have sufficient funds to satisfy the judgment.

[4] According to JTIM, enforcement of the Quebec Judgment would destroy the company's value for its 500 employees and 1,300 suppliers. It would also impact approximately 28,000 retailers that sell JTIM's products and 790,000 consumers of its products. Enforcement of the Quebec Judgment would also jeopardize federal and provincial taxes and duties in excess of $1.3 billion paid annually in connection with JTIM's operations (of which $500 million per year is paid directly by JTIM and another $800 million per year is paid by third parties and consumers).

[5] JTIM is also a defendant in a number of significant health care costs recovery actions ("HCCR Actions"). The total claims in the HCCR Actions exceed $500 billion.

[6] JTIM wishes to seek a "collective solution" to the Quebec Judgment and the HCCR Actions for the benefit of all of its stakeholders. It is for this reason that it seeks a stay of all proceedings in its application for an Initial Order pursuant to the CCAA.

[7] In its application JTIM seeks protection from its creditors and the following additional relief under the CCAA:

(a) declaring that it is a company to which the CCAA applies;

(b) granting a stay of proceedings against it, and the Other Defendants in the Pending Litigation, as defined and described in the Notice of Application;

(c) appointing Deloitte Restructuring Inc. ("Proposed Monitor") as Monitor in these CCAA proceedings;

(d) granting an Administrative Charge, Directors' Charge and Tax Charge;

(e) authorizing the Applicant to pay its pre-filing and post-filing obligations in respect of suppliers, trade creditors, taxes, duties, employees (including outstanding and future pension plan contributions, other post-employment benefits and severance packages) and royalty payments and to pay post-filing interest of certain of its secured obligations in the ordinary course of business in order to minimize any disruption of the Applicant's business;

(f) approving the engagement letter dated April 23, 2018 (the "CRO Engagement Letter") appointing Blue Tree Advisors Inc. as the Applicant's Chief Restructuring Officer ("CRO");

(g) authorizing it to apply for leave and, if successful, to appeal the Quebec Judgment to the Supreme Court of Canada; and

(h) sealing Confidential Exhibit "1" of Robert Master's affidavit.

Issues

[8] I must decide the following issues:

(a) Should the Court grant protection to JTIM under the CCAA?

(b) Is it appropriate to grant the requested stay of proceedings?

(c) Should the Proposed Monitor be appointed as Monitor in these proceedings?

(d) Should the Court grant the requested charges?

(e) Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

(f) Should Blue Tree Advisors be appointed as CRO?

(g) Should JTIM be authorized to continue its application for leave to appeal of the Quebec Judgment to the Supreme Court of Canada?

Analysis

Should the Court grant protection to JTIM under the CCAA?

[9] The CCAA applies to an insolvent company whose liabilities exceed $5 million.

[10] JTIM is a company incorporated pursuant to the *Canada Business Corporations Act*.

[11] JTIM's liabilities clearly exceed $5 million. It faces a judgment for $13.5 billion. According to Robert McMaster, JTIM's Director, Taxation and Treasury, the company does not have sufficient funds to satisfy the Quebec Judgment which is currently payable. Accordingly, JTIM is an insolvent company to which the CCAA applies.

Is it appropriate to grant the requested stay of proceedings?

[12] The Court may grant a stay of proceedings pursuant to s. 11.02 of the CCAA in respect of a debtor company if it is satisfied that circumstances exist that make the order appropriate. In order to determine whether a stay order is appropriate the Court should consider the purpose behind the CCAA. The primary purpose of the CCAA is to maintain the *status quo* for a period while the debtor company consults with its creditors and stakeholders with a view to continuing the company's operations for the benefit of the company and its creditors.

[13] JTIM cannot pay the amount of the Quebec Judgment. Any steps to enforce the judgment could cause serious harm to JTIM's business to the detriment of all of its stakeholders. In my view, it is appropriate for this reason to grant the requested stay of proceedings in favour of JTIM.

[14] JTIM also requests a stay of proceedings in favour of the other defendants in other litigation relating to tobacco claims in which JTIM is a defendant, including the Quebec Class Action and the HCCR Actions. The Court has discretion under s. 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties. In *Tamerlane Ventures Inc., Re,* 2013 ONSC 5461, Newbould J stated as follows at para. 21:

> Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, where it is just and reasonable to do so.

[15] I came to the same conclusion in *Pacific Exploration & Production Corp., Re,* 2016 ONSC 5429, where at para. 26 I set out the following list of factors that courts have considered in deciding whether to extend a stay of proceedings to non-applicant third parties:

(a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

(b) extending the stay to the third party would help maintain stability and value during the CCAA process;

(c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party.

[16] Having considered these factors, I am satisfied that granting the requested stay of proceedings to the other defendants will allow JTIM to attempt to arrive at a collective solution with respect to the Quebec Class Action and the HCCR actions. If these actions continue to

proceed against the other defendants but not JTIM there could be significant economic harm for all of JTIM's stakeholders.

[17] Accordingly, I have concluded that the balance of convenience favours exercising my discretion under the CCAA to grant a stay of proceedings to the other defendants.

Should the Proposed Monitor be appointed as the Monitor?

[18] I am satisfied that Deloitte Restructuring Inc. ("Deloitte") should be appointed the Monitor in these proceedings pursuant to s. 11.7 of the CCAA. Deloitte regularly acts as the Monitor in CCAA proceedings and it is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

Should the requested charges be granted?

Administrative Charge

[19] JTIM requests that I grant an administrative charge in favour of JTIM's counsel, the CRO, the Monitor and its legal counsel in the amount of $3 million.

[20] The Court has jurisdiction to grant an administrative charge pursuant to s. 11.52 of the CCAA. In *Canwest Global Publishing Inc.*, 2012 ONSC 633, Pepall J. set out the following list of factors the Court should consider when granting an administrative charge:

(a) the size and the complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[21] Having considered these factors, I am satisfied that the requested administration charge should be granted for the following reasons:

(a) JTIM's restructuring will require extensive involvement by the professional advisors who are subject to the administrative charge;

(b) the professionals subject to the administration charge have contributed, and will continue to contribute, to the restructuring of JTIM;

(c) there is no unwarranted duplication of roles so that the professional fees associated with these proceedings will be minimized;

(d) the administrative charge will rank in priority to the directors' charge and the tax charge. The only secured creditors that will be affected by the administrative charge are JTIM's parent companies and certain other secured related party suppliers, each of which support the granting of the administrative charge; and

(e) the Proposed Monitor believes that the amount of the administration charge is reasonable

Directors' Charge

[22] I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of $4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

Tax Charge

[23] JTIM is also seeking a third-ranking super-priority charge in the amount of $127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

[24] In *Cinram International Inc., Re,* 2012 ONSC 3767 Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

(a) whether the goods and services were integral to the business of the applicants;

(b) the debtors' need for the uninterrupted supply of the goods or services;

(c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and

(d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[25] JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing

obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

Should Blue Tree Advisors be appointed as CRO?

[26] According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and necessary skills to oversee and assist JTIM with its complex negotiations during the CCAA proceedings. With the assistance of the CRO, JTIM's management can focus on the company's operations which should maximize value for its stakeholders.

[27] I am satisfied that Mr. Aziz should be appointed as CRO pursuant to the terms of the CRO Engagement Letter which the Monitor supports.

[28] JTIM requests an order sealing the unredacted copy of the CRO Engagement Letter. Section 137(2) of the *Courts of Justice Act* gives the Court jurisdiction to order that a document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[29] The CRO Engagement Letter sets out the commercial terms of the CRO's engagement. This is commercially sensitive information. In my view JTIM's request for a sealing order meets the test set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 because it will protect a commercial interest and the salutary effects of sealing the CRO's Engagement Letter outweighs any deleterious effects since this is the type of information that a private company outside of a CCAA proceeding would treat as confidential.

Should JTIM be authorized to continue its appeal to the Supreme Court of Canada?

[30] At para. 75 of its Factum, JTIM submits as follows:

> 75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

[31] In my view, based on this submission it is reasonable to permit JTIM to continue its leave to appeal application to the Supreme Court of Canada.

Conclusion

[32] For the reasons set out above the Application is granted.

HAINEY J.

Date Released: March 12, 2019

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2007 SKQB 121**

Date: **2007 04 09**
Docket: Q.B.G. No. 8 of 2006
Judicial Centre: Saskatoon

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

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE CREDITORS OF BRICORE LAND GROUP LTD., BRICORE INVESTMENT GROUP LTD., 624796 SASKATCHEWAN LTD., 603767 SASKATCHEWAN LTD., 583261 SASKATCHEWAN LTD. and HORIZON WEST MANAGEMENT LTD.

BETWEEN:

ICR COMMERCIAL REAL ESTATE (REGINA) LTD.

APPLICANT

- and -

BRICORE LAND GROUP LTD., BRICORE INVESTMENT GROUP LTD., 624796 SASKATCHEWAN LTD., 603767 SASKATCHEWAN LTD., 583261 SASKATCHEWAN LTD. and HORIZON WEST MANAGEMENT LTD.

RESPONDENTS

- and -

MAURICE DUVAL

RESPONDENT

Counsel: Fred C. Zinkhan, by telephone for the proposed plaintiff, ICR Commercial Real Estate (Regina) Ltd.
Jeffrey M. Lee, by telephone for the respondents, Bricore Land Group Ltd. et al.
M. Kim Anderson, for the Monitor, Ernst & Young Inc.
Gordon Berscheid, by telephone for Canada Revenue Agency
Maurice Duval, Chief Restructuring Officer, in person

FIAT KOCH J.
April 9, 2007

[1] On January 4, 2006, I granted an initial order pursuant to the *Companies'*

Creditors Arrangement Act, R.S.C. 1985, c. C-36, (the "*CCAA*")protecting the respondent corporations Bricore Land Group Ltd. et al. (collectively "Bricore"), from claims of their respective creditors. The order (paragraph 5) explicitly provides in accordance with the authority conferred upon the Court pursuant to s. 11(3) of the *CCAA* that "no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property". The initial period of 30 days has been extended many times. The stay of proceedings continues in effect. Ernst & Young Inc. was appointed monitor. That appointment continues.

[2] Pursuant to an order of May 23, 2006, Maurice Duval, C.A., of Saskatoon, Saskatchewan, was appointed to serve as an officer of the Court as Chief Restructuring Officer ("CRO") of Bricore. The term of his appointment has been extended from time to time and remains in effect.

[3] The order of May 23, 2006, included the following with respect to the liability of the Chief Restructuring Officer:

> 20 (c) The CRO shall incur no liability or obligation as a result of his appointment or as a result of the fulfillment of his powers and duties as CRO, except as a result of instances of fraud, gross negligence or wilful misconduct on his part; and
>
> (d) No proceeding shall be commenced against the CRO as a result of or relating in any way to his appointment or to the fulfillment of his powers and duties as CRO without prior leave of the Court on at least seven days notice to Bricore Group the CRO and legal counsel to Bricore Group.

[4] On June 1, 2006, Bricore received an offer to purchase the major assets of the Bricore companies, seven commercial real estate properties in Saskatoon and Regina,

which offer was accepted by Bricore on June 9, 2006. The offer targeted a closing date of September 1, 2006, but there was room for flexibility.

[5] There were difficulties associated with the closing. On August 15, 2006, the purchaser and Bricore entered into an amending agreement which varied the offer to purchase in two material respects. One of the Saskatoon properties was withdrawn from the sale. The Regina property situated at 1500 - 4th Avenue, referred to as the "Department of Education Building", owned by Bricore Land Group Ltd., was to be sold separately to a new company, 101086849 Saskatchewan Ltd., as assignee of the original offeror.

[6] The present applicant, ICR Commercial Real Estate (Regina) Ltd. ("ICR"), on the strength of previous dealings with Larry Ruf of Horizon West Management Ltd. on behalf of the Bricore companies, wrote to Mr. Ruf over the signature of Jim Thompson under date September 27, 2006, that it had negotiations going with the City of Regina for the sale of the Department of Education Building to the City and that it had entered into discussions with prospective tenants of two other Bricore properties in Regina. The letter concluded as follows:

> The purpose of this memo is to reinforce our ongoing efforts to market and represent the Bricore assets in Regina. We are aware that the properties are under contract to sell and request that ICR be protected in the specific situations as outlined.
>
> In the event we are not able to carry on in a formal fashion, we would ask that you sign where indicated to acknowledge that ICR is protected as the agent of record for the Tenants/Buyers noted herein for a period to extend to December 31, 2006.

[7] Maurice Duval, in his capacity as Chief Restructuring Officer, signed a duplicate copy of this letter to affirm his acceptance. He deleted the date December 31,

2006, and entered in handwriting "date of closing of a sale or December 31, 2006, whichever is earlier."

[8] The sale of the six remaining buildings, including the Department of Education Building, closed in January 2007 effective November 30, 2006. The purchasers were as described in the amended agreement for sale, the original offeror as to five of the properties, and the assignee of the original offeror, 101086849 Saskatchewan Ltd., as to the Department of Education Building sold by Bricore Land Group Ltd.

[9] Title to the Department of Education Building property in the name of the purchaser issued on January 3, 2007. On January 29, 2007, a subsequent title issued in the name of the City of Regina. ICR contends that it introduced the City of Regina to Duval as a prospective purchaser, and that it was in this context that the letter of September 27, 2006 was prepared.

[10] The Chief Restructuring Officer, Mr. Duval, in a formal report to the Court on March 27, 2007, states in part:

> 6. At the time of my review of the September 27, 2006 letter from ICR Regina, I was working very hard to attempt to negotiate and conclude the final closing of the sale of the Bricore Properties to the purchasers identified in the Accepted Offer to Purchase. I fully expected that sale to close (as it ultimately did effective November 30, 2006). However, I determined that, in the event that such sale failed to close, Bricore Group would need to identify other potential purchasers of the Bricore Properties very quickly. I therefore decided that it would be appropriate for Bricore Group, by the CRO, to agree to protect ICR Regina for a commission in the unlikely event that the sale contemplated by the Accepted Offer to Purchase did not close, and it subsequently became necessary for Bricore Group instead to conclude a sale of the Bricore Properties to one or more

> of the prospective purchasers of the three Bricore Properties located in Regina (as specifically identified in Mr. Thompson's September 27, 2006 letter). For that reason, and that reason only, I agreed to sign the September 27, 2006 letter.
>
> 7. In signing the September 27, 2006 letter, my intention, as court-appointed CRO of Bricore Group, was to strike an agreement that, in the unlikely event that:
>
> (a) the sale of the Bricore Properties identified in the Accepted Offer to Purchase fell apart; and
>
> (b) it subsequently became necessary for Bricore Group to sell the Bricore Properties to one or more of the prospective purchasers identified in the September 27, 2006 letter;
>
> then Bricore Group would agree to pay a commission to ICR Regina. In regard to the Department of Education Building located at 1500 - 4th Avenue in Regina (the "Department of Education Building"), the two prospective purchasers in respect of which ICR Regina was protected for a commission were the City of Regina and Alford's Furniture and Flooring. The reference to closing date was to the closing of the Avenue Sale, which occurred effective November 30, 2006.
>
> ...
>
> 9. It was subsequently brought to my attention that the numbered company which purchased the Department of Education Building had promptly "flipped" such property to the City of Regina. I knew nothing of such a proposed flip prior to learning of it from ICR Regina.

[11] ICR now seeks leave to sue Bricore and Duval. The proposed defendants, as well as the Monitor, oppose the application. Section 11.3 of the *CCAA* provides:

> **11.3** No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.

[12] ICR contends that it does not require leave of the Court to commence its proposed action against the Bricore companies and Duval because s. 11.3 of the *CCAA* overrides paragraph 5 of the initial order. In the alternative, ICR seeks leave of the Court to commence the proposed action, in effect exempting the proposed action from the provisions of paragraph 5 of the initial order.

[13] As to the first contention on behalf of ICR, s. 11.3 confirms what appears to have previously been the common law that an order pursuant to s. 11 does not prohibit a claimant "from requiring immediate payment for goods, services ... provided [to a restructuring company]". Section 11.3 is obviously intended to address substantive rights of creditors for obligations incurred by or on behalf of restructuring companies after an initial order. Paragraph 5 of the initial order does not take away any substantive rights of creditors. It merely stays proceedings against a restructuring company, unless otherwise ordered by the Court. Therefore s. 11.3 does not serve to override the order. In accordance with the order, leave is required to commence an action for a s. 11.3 claim.

[14] In its proposed action against the Bricore companies and Duval, ICR's claim is based in substance on a contract arising out of the September 26, 2006, letter whereby ICR would be protected as agent of record for a realtor's commission on a sale of the Department of Education Building to the City of Regina. ICR contends that it is entitled to a commission of 5 percent of the sale price to the City of Regina. The sale price to the City of Regina is somewhat higher than the Bricore Land Group Ltd. price to 101086849 Saskatchewan Ltd.

[15] The ICR application is difficult to understand for several reasons:

(a) ICR seeks leave to sue Bricore, notwithstanding its contention that pursuant to s. 11.3(a) of the *CCAA*, leave is not required (see paragraphs 13 and 14 *supra*).

(b) Why does ICR seek to advance its claim against all of the Bricore companies? The vendor of the Department of Education property was Bricore Land Group Ltd. ICR does not allege that any other Bricore company had any beneficial interest in that property.

(c) How the contract ICR alleges not be subject to the limitation in the letter of September 27, 2006, "We are aware that the properties are under contract to sell ...."?

(d) ICR offers no basis upon which to except or exempt the transaction it alleges from s. 66 of *The Real Estate Act*, S.S. 1995, c. R-1.3, if indeed that is possible. Section 66 provides:

> **66**(1) In this section:
>
> (a) **"lump sum"** means an amount of commission or remuneration to be paid to a brokerage by a buyer or seller with respect to a trade in real estate that is not based directly on the price at which the real estate is listed for sale, its sale price or any combination of the price at which it is listed for sale and its sale price;
>
> (b) **"sale price"** means the payment agreed on between a buyer and a seller with respect to a trade in real estate.
>
> (2) Any commission or other remuneration payable to a brokerage with respect to a trade in real estate is to be expressed as a lump sum or as a

> percentage of the sale price.
>
> (3) No brokerage shall enter into an arrangement for or retain any commission or other remuneration unless it is computed in a manner permitted by this section and is agreed to in writing by the person liable to pay it.

[16] Although the interpretation of s. 11.3 of the *CCAA* is not necessarily well settled in all aspects, it appears that the import of s. 11.3, which was introduced as an amendment to the Act in 1997, is this:

(a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. If s. 11.3 is interpreted too literally, it can render the stay provisions ineffective, leaving the collective good of the restructuring process subservient to the self-interest of a single creditor. Clearly, s. 11.3 must be construed so as not to defeat the overall objectives of the Act. See *Smith Brothers Contracting Ltd. (Re)* (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.).

(b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re),* [2006] O.J. No. 5029

(Ont. S.C.J.).

(c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re), supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. Counsel have cited the case of *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, 2006 SCC 35. The circumstances in that case are somewhat analogous but it is of limited assistance because the *CCAA* does not contain a provision equivalent to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which expressly provides that no action lies against the superintendent, an official receiver, an interim receiver or a trustee in certain circumstances without leave of the Court.

[17] For reasons outlined *supra*, I do not find the cause of action ICR asserts against Bricore to be tenable, not even as against Bricore Land Group Ltd. Therefore, the application to lift the stay of proceedings to permit the proposed action against Bricore is dismissed.

[18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court-appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell.

Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.

[19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.

[20] Accordingly, the application is dismissed against Maurice Duval.

[21] Mr. Lee, on behalf of Bricore, requested an opportunity to speak to costs. He can make appropriate arrangements with the Registrar. If counsel wish to appear by telephone, that will be satisfactory.

J.

J.D. Koch

CITATION: Danier Leather Inc. (Re), 2016 ONSC 1044
COURT FILE NO.: 31-CL-2084381
DATE: 20160210

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC.

BEFORE: Penny J.

COUNSEL: *Jay Swartz* and *Natalie Renner* for Danier

Sean Zweig for the Proposal Trustee

Harvey Chaiton for the Directors and Officers

Jeffrey Levine for GA Retail Canada

David Bish for Cadillac Fairview

Linda Galessiere for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge

Clifton Prophet for CIBC

HEARD: February 8, 2016

ENDORSEMENT

The Motion

[1] On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

[2] Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to :

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

Background

[3] Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

[4] Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

[5] In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

[6] As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

[7] Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow

negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

[8] Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

[9] The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

[10] On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

[11] The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

[12] The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

[13] The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

The SISP

[14] Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

[15] Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

[16] Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

[17] The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

[18] The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

[19] Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

[20] The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies*, 2012 ONSC 1750 at para. 7 [Commercial List].

[21] The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 22-26 (S.C.J.).

[22] A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

[23] In *Re Brainhunter*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

Re Brainhunter, 2009 CarswellOnt 8207 at paras. 13-17 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 at para. 49 (S.C.J. [Commercial List]).

[24] While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60 at para 24; *Re Indalex Ltd.*, [2013] 1 S.C.R. 271 at paras. 50-51.

[25] Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Re Mustang GP Ltd.*, 2015 CarswellOnt 16398 at paras. 37-38 (S.C.J.).

[26] These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

[27] The SISP is warranted at this time for a number of reasons.

[28] First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

[29] Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

[30] Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

[31] Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

[32] There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

[33] Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

[34] Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[35] In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

[36] The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

[37] The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

[38] The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

[39] A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

[40] Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

[41] Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

[42] Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Re Nortel Networks Corp.*, [2009] O.J. No. 4293 at paras. 12 and 26 (S.C.J. [Commercial List]); *Re W.C. Wood Corp. Ltd.*, [2009] O.J. No. 4808 at para. 3 (S.C.J. [Commercial List], where a 4% break fee was approved.

[43] The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

[44] In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

[45] I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

[46] Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

[47] Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Re Sino-Forest Corp., 2012 ONSC 2063 at paras. 46-47 [Commercial List]; *Re Colossus Minerals Inc.*,*supra*.

[48] The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

[49] The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

[50] In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

[51] Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

[52] Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

[53] Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

[54] A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

[55] In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

[56] Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

[57] Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.).

[58] This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

D&O Charge

[59] The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

[60] Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

[61] Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

[62] Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

[63] The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

[64] The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

[65] In *Colossus Minerals* and *Mustang, supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

[66] I approve the D&O Charge for the following reasons.

[67] The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

[68] The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

[69] The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

[70] The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

[71] Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

[72] Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

[73] Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

[74] Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

[75] Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Re Nortel Networks Corp. supra.*

[76] In *Re Grant Forest Products Inc.*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

Re Grant Forest Products Inc., [2009] O.J. No. 3344 at paras. 8-22 (S.C.J. [Commercial List]).

[77] While *Re Grant Forest Products Inc*. involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

[78] The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

[79] There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

[80] Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

[81] In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 at para. 53 (S.C.C.).

[82] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, *supra*.

[83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

[84] The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

[85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

[86] As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Penny J.

Date: February 10, 2016

CITATION: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., 2020 ONSC 3565
COURT FILE NO.: CV-20-00641220-00CL
DATE: 20200617

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED	)	*Ashley Taylor* and *Sanja Sopic*, for the Applicants
	)	*Marc Wasserman* and *Mary Paterson*, for the Monitor
	)	*Wael Rostom, Stephen Brown-Okruhlik, Guneev Bhinder*, for All Js Greenspace LLC
	)	*Wojtek Jaskiewicz*, for the Capital Transfer Agency, ULC
Applicants	)	*Graham Phoenix* and *Thomas Lambert*, for WMB Resources LLC and Green Ops Group LLC
	)	*Lou Brzezinski*, *Stephen Gaudreau*, *Eric Golden* and *Varoujan Arman*, for Michael D. Horvitz Revocable Trust
	)	*Joe Groia* and *Martin Mendelzon*, for Chiron Ventures Inc.
	)	**HEARD:** May 29 and June 1, 2020

ENDORSEMENT

MCEWEN J.

[1] On May 20, 2020 I granted the Initial Order sought by the Applicants, Green Growth Brands Inc. ("GGB"), GGB Canada Inc., Green Growth Brands Realty Ltd., and Xanthic Biopharma Limited (collectively, "the Applicants"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, As Amended ("*CCAA*"). The Initial Order provided for,

amongst other things, a stay of proceedings to allow GGB, the parent entity, an opportunity to market the sale of its business.

[2] At that time, I also appointed Ernst & Young Inc. as the Monitor (the "Monitor") and approved a stay of proceedings for the initial 10-day period. I further approved certain court ordered charges and interim financing (the "DIP Financing") to be provided by All Js Green Space LLC ("All Js").

[3] The comeback motion was scheduled for May 29, 2020 and ultimately was heard on May 29 and June 1, 2020.

[4] Due to the COVID-19 crisis, the comeback motion proceeded by way of video conference. It was held in accordance with the Notices to the Profession issued by Morawetz C.J. and the Commercial List Advisory.

[5] At the comeback motion, I granted the orders sought, being an Amended and Restated Initial Order, and a Sale and Investment Solicitation Process ("SISP") Order, the latter of which approved the SISP and the fully binding and conditional Acquisition Agreement dated May 19, 2020 (the "Stalking Horse Agreement"). I further granted a sealing order with respect to a Term Sheet and the Florida LOI that will be referred to in the body of this endorsement, on an unopposed basis, as the criteria set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, were met. I dismissed the cross-motion brought by Mr. Michael D. Horvitz.

[6] I indicated at the comeback motion that I would provide a more detailed endorsement. This is my endorsement.

BACKGROUND

[7] The Applicants are part of a corporate group ("GGB Group"). The GGB Group is in the business of growing, processing and selling cannabis. GGB is the parent entity of the GGB Group.

[8] The GGB Group, until recently, operated two distinct lines of business. The first involves cannabis cultivation, processing, and production, and the distribution of certain tetrahydrocannabinol (commonly referred to as THC) products through wholesale and retail channels in medical and adult-use dispensaries in Florida, Massachusetts and Nevada (the "MSO Business"). The second concerned cannabidiol (commonly referred to as CBD)-infused consumer product production, wholesale and retail operations online and through a mall-based kiosk shop system (the "CBD Business").

[9] The MSO Business continues to operate through indirect, wholly-owned subsidiaries of GGB. Operations of the CBD Business, however, were indefinitely suspended at the outset of the COVID-19 crisis. Thereafter, an Ohio court appointed a Receiver over the CBD Business to wind-down their operations.

[10] I note from the outset that Mr. Horvitz, an investor in GGB, makes significant allegations against the GGB Group and other significant stakeholders, particularly Jay, Joseph and Jean Schottenstein and Wayne Boich.

[11] In order to put this dispute between Mr. Horvitz, GGB and some of the other stakeholders in context, it is important to understand the relationship between the relevant stakeholders with respect to the secured debt that was in place at the time of the Initial Order, which secured debt included:

- A promissory note issued by GA Opportunities Corp. (the "GAOC Note") in the amount of CAD $39,000,000. It was held by an arm's-length investor, Aphria Inc. Shortly before the May 20, 2020 motion the GAOC Note was acquired by Green Ops Group LLC ("Green Ops").

- Secured convertible debentures issued in May 2019 in the aggregate principal amount of US $45,500,000 (the "May Debentures"). The May Debentures were issued pursuant to the terms of a Debenture Indenture (the "May Debenture Indenture") between GGB and Capital Transfer Agency, ULC ("CTA").

- Secured convertible debentures issued pursuant to equity commitment letters with All Js and Chiron Ventures Inc. ("Chiron") (the "Backstop Debentures"). All Js and Chiron committed to subscribe for the Backstop Debentures in the aggregate principal amounts of US $57,350,000 and US $10,000,000, respectively, although not all of these funds had been fully drawn. The Backstop Debentures, too, were issued pursuant to the terms of a Debenture Indenture (the "Backstop Debenture Indenture") between GGB and CTA.

- Two promissory notes issued to All Js in May 2020, each in the amount of US $400,000.

[12] Mr. Horvitz, as Grantor and Trustee for and on behalf of the Michael D. Horvitz Revocable Trust, owns US $5 million of the May Debentures.

[13] Mr. Wayne Boich, generally speaking, controls Green Ops, which purchased the GAOC Note. He also controls WMB Resources LLC ("WMB"), which owns US $5 million in the May Debentures. In addition to the above, Green Ops also acquired the "Spring Oaks Notes" from GGB Florida LLC ("GGB Florida") in May 2020. I will comment more about this transaction later in this endorsement.

[14] Jay Schottenstein and his sons, Joseph and Jean Schottenstein, generally speaking, control a trust that owns All Js. As noted, All Js owns a majority of the Backstop Debentures. All Js also owns a significant number of shares in GGB and is the Debtor-in-possession ("DIP") Lender.

[15] Messrs. Schottenstein also control LS Green Investments LLC and Delancey Financial LLC, which own US $20 million and US $10 million of the May Debentures, respectively.

[16] As can be seen from the above, Messrs. Schottenstein and Mr. Boich, through companies controlled by them, own a great deal of GGB's debt (and, in fact, the majority of that debt) with All Js also being a significant shareholder in GGB.[1]

[17] The Stalking Horse Agreement contemplates the purchase of GGB's assets, as defined, by All Js and CTA, in its capacity as the Debenture Trustee of the May Debentures and the Backstop Debentures (collectively, the "Stalking Horse Bidder"). The purchase is comprised of a credit bid of all of the secured debt held by All Js, the May Debentures, the Backstop Debentures and certain assumed liabilities totaling approximately US $106 million. It does not involve any cash consideration.

[18] The Schottensteins' and Mr. Boich's controlled companies, All Js and Green Ops, respectively, have entered into a Term Sheet for the capitalization of a company ("AcquireCo") to ultimately purchase the shares and inter-company debt of GGB as set out in the Term Sheet. Accordingly, the Term Sheet, amongst other things, sets out how the May Debentures will be treated.

[19] Mr. Horvitz' complaints essentially surround two events. The first was an Extraordinary Resolution that was passed by the holders of the May Debentures on May 3, 2020 without notice to him, which permitted the incurrence of new senior indebtedness and related security which allowed the All Js Secured Notes to rank in priority to the security held by the holders of the May Debentures. The second event involves another Extraordinary Resolution that was passed on May 18, 2020, again without notice, which approved the provisions of the Term Sheet that further diluted the value of his ownership in the May Debentures by removing any priority the May Debentures had over the Backstop Debentures (amongst other things). Mr. Horvitz also submits that provisions of the Term Sheet ensure that the Stalking Horse Bid is unbeatable.

[20] As a result, Mr. Horvitz raised a number of objections to the proposed SISP and the Stalking Horse Agreement. Mr. Horvitz' position was not supported by any of the other stakeholders. All of the significant stakeholders who attended at the comeback motion supported the relief sought by GGB. The Monitor also supported the relief sought.

[21] I also pause to note that Mr. Horvitz' counsel in his submissions conceded that the provisions of the May Debentures allowed the requisite majority to pass the Extraordinary Resolutions without notice to Mr. Horvitz. Mr. Horvitz' submission, however, is that the majority of the holders of the May Debentures, the corporations controlled by Messrs.

[1] The exact nature of Messrs. Schottensteins' and Mr. Boich's involvement in the above companies was not disclosed. No one, however, objected to the above general description.

Schottenstein, failed to act in good faith towards Mr. Horvitz as did others, notably companies controlled by Mr. Boich, with respect to the creation of AcquireCo and the related Term Sheet.

THE RELIEF SOUGHT BY THE APPLICANTS AND MR. HORVITZ

The Applicants

[22] As noted, the Applicants sought an extension of the stay period to August 15, 2020 as well as approval of the SISP and the Stalking Horse Agreement entered into between GGB and CTA/All Js.

Mr. Horvitz

[23] Mr. Horvitz, at the initial return of the motion on May 29, 2020, sought the following relief:

- an order setting aside my Initial Order of May 20, 2020 granting the Applicants protection under the *CCAA* for failure to make full and fair disclosure;

- an order adjourning the comeback motion of GGB for 14 days so that he could obtain an order pursuant to s. 11.9 of the *CCAA* requiring the production of financial records of several persons and corporations including GGB, Jay, Joseph and Jean Schottenstein, Mr. Boich, All Js, WMB, Chiron and others;

- compliance, within three days, with a Request to Inspect he served on May 25, 2020 and with a cross-examination of GGB's interim chief executive officer, Raymond Whitaker III; and

- an order requiring, within seven days, Messrs. Schottenstein and Mr. Boich to attend a r. 39.03 examination.

[24] After hearing submissions, I adjourned the motion to June 1, 2020 and ordered that the examination of Mr. Whitaker (which GGB had agreed to) take place in the interim and that there be fulsome production of relevant documents without ordering any particular documents be produced (All Js agreed to produce the Term Sheet on a confidential basis).

[25] Mr. Whitaker's examination was completed and documents produced to Mr. Horvitz. When the matter returned before me on June 1, 2020, Mr. Horvitz, as per para. 3 of his Supplementary Factum, pursued only the following relief:

- an order dismissing the Applicants' motion approving the SISP, the Stalking Horse Agreement and DIP Financing;

- an order requiring the Applicants to resubmit a revised process that is fair and meets the purpose and policies of the *CCAA*;

- an order directing the Monitor to investigate the following: Green Ops' acquisition of the GAOC Note; the Term Sheet (as being a preference); Green Ops' purchase of the Spring Oaks Notes (as being a preference); the Spring Oaks Forbearance Agreement (as being a preference); and whether certain of these transactions should be set aside; and

- additional disclosure of documentation and examination of witnesses, as requested.

ANALYSIS

The Abandoned Relief

[26] I wish to deal briefly with the relief originally sought by Mr. Horvitz but that was abandoned upon the return of the motion on June 1, 2020.

[27] At the return of the motion, Mr. Horvitz did not pursue the relief originally sought setting aside the Initial Order on the basis that the Applicants failed to act in good faith. This is a serious accusation, however, that merits comment.

[28] Had Mr. Horvitz continued to pursue this relief, such a request would have been dismissed.

[29] The Applicants, at the initial hearing, provided the court with the necessary information needed to consider whether the Initial Order should be granted. All relevant agreements were attached. Mr. Horvitz' complaints concerning lack of good faith and disclosure deal with his own disputes with Messrs. Schottenstein and Mr. Boich, the companies they control and how he was treated with respect to his ownership of the May Debentures and the provisions of the Term Sheet. They do not involve the Applicants. While knowledge of the interaction between the investors and GGB would have helped add context it would not have affected the granting of the Initial Order.

[30] Mr. Horvitz' complaints concerning his treatment, as I will outline below, constitute inter-creditor disputes and ought to be dealt with outside of the parameters of this *CCAA* proceeding.

Discovery

[31] As noted, Mr. Whitaker was examined and documentary discovery was made in advance of the June 1, 2020 hearing date. The documentary production that was made, or refused, is set out in the Second Report of the Monitor dated May 31, 2020 (the "Second Report") at paras. 65-78. No further documentation was requested on the return of the motion. In any event, it is my view that adequate production was made to Mr. Horvitz.

[32] With respect to the examinations, Mr. Horvitz did not pursue the examinations of Messrs. Schottenstein or Mr. Boich. I would not have granted the order in any event. They were not properly served with the motion record and reside in the United States of America. They were not represented at the motion. At the May 29, 2020 motion, I questioned Mr. Horvitz' counsel as

to whether I had jurisdiction to make the orders sought and whether letters rogatory were appropriate. Mr. Horvitz did not take the necessary steps to attempt to comply with the letters rogatory process. I therefore considered this issue to be at an end.

Mr. Horvitz' Complaints Concerning the May Debentures and the Term Sheet

[33] In my view, as noted, Mr. Horvitz' objections with respect to the way his investment in the May Debentures was treated, and the provisions of the Term Sheet, are inter-creditor issues that fall outside of the context of this *CCAA* proceeding.

[34] Notwithstanding the fact that counsel conceded at the motion that the other May Debentures holders had the legal right to pass the Extraordinary Resolutions, without notice to Mr. Horvitz, Mr. Horvitz nonetheless alleges that the May Debentures holders who passed the Extraordinary Resolutions failed to act in good faith. He makes the same claim with respect to the parties to the Term Sheet.

[35] This issue was considered by the Court of Appeal for Ontario in *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (C.A.), at para. 32, wherein the court stated:

> First, as the supervising judge noted, the CCAA itself is more compendiously styled "An Act to facilitate compromises and arrangements between companies and their creditors." There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (QL), 110 A.C.W.S. (3d) 259 (B.C.S.C.), at para. 24 (after referring to the full style of the legislation):
>
> > [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, **it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company**. [Emphasis added.]

[36] The objections raised by Mr. Horvitz concerning the May Debentures and the Term Sheet all constitute inter-creditor disputes. The terms of the May Debentures and the capitalization of AcquireCo, set out in the Term Sheet, do not involve the Applicants. Accordingly, these *CCAA* proceedings are not the proper venue for Mr. Horvitz to seek these remedies.

[37] As I have noted, Mr. Horvitz conceded at this motion that the Extraordinary Resolutions were passed in accordance with the terms of the May Debenture Indenture. Similarly, the terms of the AcquireCo Term Sheet involved matters concerning the May Debentures holders that have

been determined by the aforementioned requisite majority. While All Js owns a significant amount of GGB shares, Mr. Horvitz' complaints, with respect to the May Debentures and the Term Sheet, do not lie with GGB but rather with the way he feels he has been treated by the other investors, primarily Messrs. Schottenstein and Mr. Boich.

Mr. Horvitz' Request for the Monitor's Investigation

[38] I am not prepared to order that the Monitor conduct investigations concerning Green Ops' acquisition of the GAOC Note, the Term Sheet (as being a preference) and Green Ops' purchase of the Spring Oaks Notes (as being a preference). This relief was not contained in the Notice of Motion and only arose in Mr. Horvitz' Supplementary Factum. While I would not dismiss the request for this relief on this ground alone, it typifies the shifting nature of the relief that Mr. Horvitz sought during the hearings.

[39] These investigations, sought by Mr. Horvitz, relate to inter-creditor issues between Mr. Horvitz and others. None of the proposed investigations involve the Applicants. The focus of this motion should be on the *CCAA*-related issues, primarily the SISP and the Stalking Horse Agreement. The issues surrounding the May Debentures and the Term Sheet should only be considered to the extent that they are germane to the *CCAA* proceeding.

[40] The Monitor does not believe that it is appropriate to carry out these investigations based on the materials that it has reviewed. I accept the Monitor's submission that it would not be appropriate in a *CCAA* proceeding to have it carry out an investigation of transfers for value between American corporations which are non-debtors. I further agree with the Monitor that the case upon which Mr. Horvitz relies, *Cash Store Financial Services, Re*, 2014 ONSC 4326, 31 B.L.R. (5th) 313, is entirely distinguishable since it dealt with a transfer of value from the debtor to an unsecured creditor.

[41] I also do not believe the Monitor ought to conduct the investigation requested by Mr. Horvitz with respect to the Spring Oaks Forbearance Agreement (as being a preference).

[42] Mr. Horvitz' complaint in this regard essentially involves two issues. The first being that the SISP should include the Florida Assets to maximize value. The second involves his complaint concerning Mr. Boich. Mr. Boich's company, Green Ops, as noted, purchased the Spring Oaks Notes which holds unsecured debt as security for the Florida Assets. Mr. Horvitz claims that this is another example of self-dealing and lack of transparency.

[43] While I agree that the Florida Assets would add value to the *CCAA* process, it is not practicable to add them to the SISP. Prior to the Initial Order being granted Green Ops could have foreclosed on the debt. GGB looked for another solution and has obtained an LOI from a third-party buyer in excess of the debt held by Green Ops. If the transaction is not completed by mid-June, Green Ops has the right to foreclose. While the situation is not ideal, the mid-June deadline precludes rolling the Florida Assets into the SISP. It seems to me, however, that GGB has followed a reasonable path to deal with the Florida Assets, which is subject to its agreement with Green Ops which had the right to foreclose and granted a Forbearance Agreement to see if the Florida Assets can be sold. The Monitor concurs. In this regard, I am reminded of the

observation in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115, at para. 5, that "insolvency proceedings typically involve what is feasible, not what is flawless".

[44] I will now turn to the complaints Mr. Horvitz makes concerning the SISP and the Stalking Horse Agreement.

The SISP

[45] Mr. Horvitz makes a number of complaints concerning the SISP and I will deal with each in turn.

[46] First, Mr. Horvitz complains that the SISP does not include the retention of an investment banker to market the assets of GGB. A separate investment banker is not required. It is certainly not unusual for the Court-appointed Monitor to run a SISP. The Monitor has the necessary experience and has acted in this capacity as Monitor in at least one other cannabis case before this court, AgMedica Bioscience Inc. As set out at para. 28 of the Second Report, the Monitor is well-qualified to run the SISP in this case.

[47] Second, Mr. Horvitz complains that the SISP does not include the preparation of a "teaser" or other short description of the proposed acquisition opportunity. As noted by the Monitor in para. 29 of the Second Report, it is, in fact, in the process of forming such a document which will be made available along with other information included in a data room. It is virtually complete at this time.

[48] Third, Mr. Horvitz complains that the Monitor has failed to develop a list of likely strategic and financial buyers. This has, in fact, been done, with 243 potential parties being identified. This includes all of the typical types of businesses one would expect in the cannabis space.

[49] Fourth, Mr. Horvitz complains about the lack of Non-disclosure Agreements, telephone calls, "transparent and market-based compensation arrangements", preliminary indications of interest and management presentations. In my view, all of these complaints are unfounded and the Second Report, once again, deals with these complaints comprehensively in paras. 29-34.

The Stalking Horse Agreement

[50] Mr. Horvitz raises a number of issues with respect to the Stalking Horse Agreement.

[51] First, he complains of a number of features that are typical in Stalking Horse Agreements. Particularly, he objects to the US $2 million Break Fee; the US $150,000 Expense Reimbursement to All Js; the overbid increment of US $250,000; and a refundable 5 percent deposit that has to be paid by bidders. In my view, none of these provisions in the Stalking Horse Agreement are problematic.

[52] While the Break Fee and Expense Reimbursement are not itemized, they represent approximately 1.9 percent of the purchase price that is set out in the Stalking Horse Agreement. This is well within the range of payments that have been approved by this court on numerous occasions. The fees, in addition to compensating Stalking Horse purchasers for the time, resources and risk taken in developing the agreement, also represent the price of stability. Therefore, some premium over simply providing for expenses may be expected: *Danier Leather Inc. (Re)*, 2016 ONSC 1044, 33 C.B.R. (6th) 221, at paras. 40-42; *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750, 90 C.B.R. (5th) 74. This *CCAA* process, given the nature, size and location of GGB's operations, has been and will continue to be significant.

[53] Similarly, the overbid increment, which is typical in a large auction, is well within the range of reasonableness. Insofar as the 5 percent deposit is concerned, Mr. Horvitz complains that such an obligation is not placed upon the Stalking Horse Bidder. This is not surprising since the Stalking Horse Agreement provides for a credit bid of the secured debt held by All Js and the holders of the May Debentures and the Backstop Debentures, as well as some certain assumed liabilities. It does not involve cash consideration and therefore it is not necessary to seek a deposit.

[54] Second, Mr. Horvitz further complains that a third-party bidder can impose no conditions which are not in the Stalking Horse Agreement and that overall the DIP Financing and Stalking Horse Agreement make it impractical, if not impossible, for any arm's-length party to make a bid that would properly reflect the market value of the cannabis licence that GGB holds through its subsidiaries. Mr. Horvitz further complains that an outside bidder must pay off the GAOC Note in full, whereas the Stalking Horse Bidder can assume the obligation for later payment.

[55] With respect to the complaint concerning the inability to impose conditions, I do not read the SISP in this way. There is nothing in the SISP that prevents an alternative transaction from containing conditions that are not in the Stalking Horse Agreement. The SISP provides for a range of different transaction structures and it is designed to find the highest and/or best offer for a restructuring or refinancing of GGB. The wording of the SISP does not prevent a bidder from attempting to propose different terms or conditions than those found in the Stalking Horse Agreement. The Monitor has opined that the conditions in the SISP dealing with alternative transactions are standard in SISPs to protect the debtor's estate and ensure that the outside buyer has limited exit rights from the deal, all of which is reasonable. I accept this view.

[56] I also do not accept Mr. Horvitz' allegation that the DIP Financing and the Stalking Horse Agreement make it impractical, if not impossible, to reflect the market value of the cannabis licences and in particular the valuable Nevada licences. The Stalking Horse Agreement is structured in such a way that the successful purchaser would obtain the shares of GGB and the relevant licences, including the Nevada licences. This assists in the sale price process since it would help facilitate the transfer of the cannabis licences, which is difficult to do, and help facilitate a sale. Further, the value of the Nevada licences (and indeed all licences) are subject to a fluctuating market. The best way to determine the value is to run the SISP and determine if there is interest in the marketplace. In any event, a credit bid need not be limited to the fair market value of the corresponding encumbered assets; otherwise it would require an evaluation

of such encumbered assets which is a difficult, complex and costly exercise which can also result in unwarranted delay: see *Whitebirch Paper Holding Co., Re*, 2010 QCCS 4915, 72 C.B.R. (5th) 49, at para. 34. In order to facilitate this process, the Monitor has included, in its First Report, a table entitled "Illustrative Value of the Stalking Horse Agreement" to assist bidders in understanding the value of the consideration contained in the Stalking Horse Agreement.

[57] Further, in response to Mr. Horvitz' complaint that the SISP treats the Stalking Horse Bidder and Qualified Bidders differently with respect to the GAOC Note, GGB has revised the proposed SISP, which now allows Qualified Bidders to negotiate an agreement with Green Ops, which holds the GAOC Note. Now, both the Stalking Horse Bidder and Qualified Bidders may assume the GAOC Note while at the same time not precluding a Qualified Bidder from proposing to pay off the GAOC Note. Mr. Horvitz complains that Green Ops would be more likely to strike a deal with the Stalking Horse Bidder. This may prove to be the case but, of course, much depends on the offer put forth by the Qualified Bidder. The structure proposed by GGB, however, presents a level playing field.

[58] Similarly, I do not see any difficulty with the proposed DIP Financing. It is not unique to this case and the amount proposed is reasonable. It will help support the SISP process which, in my view, provides the best possible chance for a sale and the potential retention of approximately 170 employees. Further, insofar as the DIP Financing is concerned, Mr. Horvitz also complains that it is being used, in part, to pay for prefiling GGB debt contrary to s. 11.2 of the *CCAA*. When one looks closely at GGB's operations, however, it is clear that GGB has not paid any of the prefiling expenses in Canada. The DIP Financing has been used to pay some relatively modest prefiling expenses for the operating companies in the United States of America that cannot avail themselves of relief given the nature of the cannabis industry in that country. Further, in any event, it is in everyone's best interest that these expenses be paid since the value of GGB exists in these licences and, obviously, in keeping those licences current for the purposes of the SISP.

[59] Last, Mr. Horvitz makes a number of what I would consider to be lesser, additional complaints including a vague closing date, a requirement that Qualified Bidders hold cannabis licences (since removed from the SISP), "bad faith inclusive arrangements" and other related arguments. I have considered each and every one of these arguments and do not find them to be persuasive.

[60] Clearly, Mr. Horvitz does not like the way he has been treated with respect to his ownership of the May Debentures. He is particularly upset with the provisions of the Term Sheet. At the same time, Mr. Horvitz proposes no alternative to the existing process. It bears noting that the Monitor has been significantly involved in the process and agrees that there is no better, viable alternative. As I have noted, Mr. Horvitz' complaints largely involve inter-creditor disputes and only become relevant if the Stalking Horse Bidder is the successful bidder. Mr. Horvitz, presumably, retains his legal rights and can bring an action against those whom he believes have caused him legal harm.

[61] In the interim, in my view, the SISP and the Stalking Horse Agreement satisfy the criteria set out in s. 36(3) of the *CCAA* and the factors set out by this court in *Nortel Networks Corporation (Re)*, 55 C.B.R. (5th) 229 (Ont. S.C.), at para. 49. The process is supported by the Monitor and no other creditor, aside from Mr. Horvitz, objects. For all of the reasons above, I believe Mr. Horvitz' complaints are misplaced.

DISPOSITION

[62] For these reasons I granted the Amended and Restated Initial Order and the SISP Order approving the SISP and the Stalking Horse Agreement on June 2, 2020 and dismissed Mr. Horvitz' motion.

McEwen J.

Released: June 17, 2020

CITATION: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., 2020 ONSC 3565
COURT FILE NO.: CV-20-00641220-00CL
DATE: 20200617

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Applicants

ENDORSEMENT

McEwen J.

Released: June 17, 2020

CITATION: Cannapiece Group Inc v. Carmela Marzili, 2022 ONSC 6379
COURT FILE NO.: CV-22-00689631-00CL
DATE: 20221114

SUPERIOR COURT OF JUSTICE – ONTARIO

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 CANNAPIECE GROUP INC., CANNAPIECE CORP., CANADIAN CRAFT GROWERS CORP., 2666222 ONTARIO LTD., 2580385 ONTARIO INC. AND 2669673 ONTARIO INC.

RE: **CANNAPIECE GROUP INC**, Plaintiff

AND:

CARMELA MARZILI, Defendant

BEFORE: Penny, J.

COUNSEL: *David S. Ward* and *Jennifer Quick* Counsel, for the Plaintiff

Robert Kennedy Counsel, for BDO Canada LLP

Clifton Prophet Counsel, for 2125028 Ontario Inc

John Peddle Counsel, for Carmela Marzilli

Vincent Pion Counsel, for Solid Packaging Robotik Group Inc

Robert McDonald Counsel, for 2726398 Ontario Inc.

Philippe Tremblay Counsel, for Solid Packaging Robotik

Russell Bennett Counsel, for certain unnamed investors

Clark Lonergan, trustee in bankruptcy at BDO, Canada Limited

Rory McGovern Counsel, to Cardinal Advisory Limited

HEARD: November 10, 2022

[1] On November 3, 2022, I made an Initial Order in this matter under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The relief granted in the Initial Order was limited to that which was reasonably necessary for continued operations during the initial ten-day stay of proceedings.

[2] At the comeback hearing on November 10, 2022, the applicants sought:

(a) an amended and restated initial order:

(i) extending the stay of proceedings granted pursuant to Initial Order to February 3, 2023;

(ii) extending the scope of the stay of proceedings to include claims against directors and officers in respect of their potential liability under personal guarantees of corporate obligations;

(iii) approving a key employee retention plan and authorizing the applicants to make payments in accordance with its terms;

(iv) authorizing the Company to make payments to certain third party suppliers for pre-filing expenses which are necessary to facilitate the applicants' ongoing operations; and

(v) approving an increase to the Administration Charge to the maximum amount of $500,000; and

(b) a sale process approval order:

(i) approving a sale and investment solicitation process;

(ii) authorizing a stalking horse purchase agreement; and

(iii) approving the payment of a break fee, professional fee, and the deposit repayment.

[3] On November 10, 2022 I issued an amended and restated initial order and took under reserve certain aspects of the proposed sales process order, with reasons to follow. These are my reasons on all issues.

Sales Process

The Stalking Horse Agreement

[4] Stalking horse agreements are recognized by the court as a reasonable and useful component of a sales process. Here, the stalking horse agreement provides some certainty that the applicants' business will continue as a going concern. If the stalking horse agreement is not approved, the applicants will not have sufficient funds to continue operating, to the detriment of

their stakeholders. The baseline price in the stalking horse agreement will assist in maximizing the value of the applicants' business by canvassing the market to obtain the best bids available. Importantly, no better or other alternative has been identified. Despite the applicants' efforts, they were unable to source other rescue financing or purchase proposals, either inside or outside of the filing.

[5] The reasonableness of the break fee ($175,000) is subject to the exercise of the applicants' business judgment so long as it lies within a range of reasonable alternatives. In my view it does. The Monitor is satisfied that the break fee is reasonable in the circumstances. It has noted, among other things, that: (a) the applicants were insolvent and did not have sufficient cash to continue beyond the week of the Initial Order without the DIP Loan that was provided by the stalking horse bidder; (b) the applicants made significant efforts to improve their financial situation prior to commencing the CCAA proceedings; (c) the stalking horse bidder required the break fee as compensation for its efforts; and (d) the stalking horse bidder was the only party showing any interest in acquiring the applicants' business, funding the stalking horse sales process and these CCAA proceedings. I accept the Monitor's recommendations on this issue.

The Sales Process

[6] Both by way judicial precedent and under the CCAA, a number of factors have been developed to assist in deciding whether to approve a proposed sales process. Having regard to those factors, I am satisfied that the sales process contemplated here is appropriate.

[7] A sale transaction is warranted at this time. The applicants are insolvent and unable to continue operations without restructuring the Company's debt. A sale of the business is the only option available at this time.

[8] The sale transaction will benefit a wide range of stakeholders. The stalking horse agreement sets a minimum price and the bidding procedures in the stalking horse sales process is designed to test the market by soliciting the best bids available, thereby maximizing value for stakeholders. Importantly, it is anticipated under the stalking horse agreement that, if the stalking horse bidder is the ultimate purchaser in the process, the purchaser will maintain the employment of the vast majority of employees.

[9] The senior secured creditor of the applicants, Carmela Marzilli, and the equipment financer, 2125028 Ontario Inc., are supportive of the stalking horse sales process and no other creditor has indicated that they object.

[10] There is no other, better, or viable alternative. The applicants, in consultation with their advisors, pursued a number of strategic initiatives to improve their operations and financial position. Despite their attempts, no other alternative to the stalking horse sales process has materialized. The stalking horse bidder is the only party who showed any interest in acquiring the applicants' business to date.

[11] The Monitor was consulted about and will administer the stalking horse sales process in consultation with its sales agent and the applicants. The Monitor is supportive of the process, including the stalking horse agreement acting as the minimum bid. The Monitor will also have

certain consent rights in connection with material decisions, including extending timelines, dispensing with bid requirements, and terminating the stalking horse sales process. The Monitor is not aware of any stakeholders who will be prejudiced by the stalking horse sales process.

[12] During the initial stay period, the applicants have communicated with various stakeholders, including secured and unsecured creditors, to provide information and answer questions. There is support from key customers and critical suppliers for a stalking horse sales process as well.

[13] On the evidence, the stalking horse sales process is the best and only value-maximizing option available to the debtor. The sales process is intended to avoid the value destruction that would follow from a cessation of manufacturing operations and customer order fulfilment. The process provides interested parties with sufficient time to evaluate the opportunity presented by the process and to submit a bid before the deadline.

Critical Suppliers

[14] The court may grant a request for approval of payment of pre-filing liabilities to critical suppliers. This is because one of the purposes of the CCAA is to permit an insolvent corporation to remain in business. The court has broad jurisdiction to make orders that will facilitate a restructuring of a business as a going concern. The Monitor supports the need for this order in the circumstances of this case.

[15] The applicants' request for an order granting approval to make payments to critical suppliers advances the goal of allowing the applicants to continue operating in the ordinary course of business throughout the stalking horse sales process. This will benefit the applicants' stakeholders.

The KERP

[16] The Court has jurisdiction to approve a key employee retention plan under s. 11 of the CCAA to make any order it considers appropriate.

[17] The purpose of a KERP is to retain employees who are important to the management or operations of the debtor company in order to keep their skills within the company at a time when, because of the company's financial distress, they might otherwise look for alternate employment. KERPs have been approved in numerous insolvency proceedings where the retention of certain employees was deemed critical to a successful restructuring.

[18] I accept that a KERP is warranted in the circumstances of this case. The eleven identified employees have senior level roles and responsibilities that are essential to ensure the stability of the business, enhance effectiveness of the sale process, and facilitate an effective restructuring. These key employees have specialized experience and unique knowledge about the operations of the Company. Their involvement in the sale process appears to be important to the success of the restructuring. The potential KERP beneficiaries may well seek other employment if the KERP is not authorized. The applicants developed the KERP with input from the Monitor and the Monitor supports the proposed KERP in this case.

Administration Charge

[19] The amount of the Administration Charge in the Initial Order was limited to the estimated professional fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants during the initial stay period. The applicants seek to increase the Administration Charge from $250,000 to $500,000 in order to remain current with the projected fees and disbursements of the professionals during the proposed extended stay period.

[20] Section 11.52 of the CCAA provides for the grant of an administration charge. On the evidence, I find the increase in the Administration Charge is appropriate. The cannabis industry is complex, highly regulated and subject to many statutory and regulatory restrictions and requirements. Successful restructuring will require the extensive input of the professionals who have been retained. The beneficiaries of the Administration Charge have and will continue to contribute to these CCAA proceedings and assist the applicants with achieving the restructuring objectives. Each of the proposed beneficiaries of the Administration Charge is performing unique functions without duplication of roles. The quantum of the proposed increase to the Administration Charge appears to be fair and reasonable and is in line with the nature and size of the applicants' business and the involvement required by the professionals. The Monitor, the DIP Lender, and the applicants' senior secured lender, Ms. Marzilli, are supportive of the increase in the Administration Charge.

Stay of Claims Against Directors

[21] The applicants seek to extend the Initial Order stay to include a stay of an action on guarantees of unpaid Company debt given by three directors. The stay is opposed by the plaintiff/creditor in that action. This was the only issue of controversy before the Court on this motion. The controversy arises in the following context.

[22] 2726398 Ontario Inc. is an unsecured creditor of the Company, having originally loaned the principal sum of $7,000,000. As security for its loan, 272 received mortgage security over property as well as personal guarantees from certain officers and directors of the Company. This included guarantees from Ali Etemadi, Afshin Souzankar and Reza Khadem Shahreza. These three individuals are all founders, directors and senior officers of the Company.

[23] In August 2022 the Company sold the mortgaged property in Clarington, Ontario. However, the sale did not generate sufficient funds to pay the entire debt owing to 272. 272 agreed to accept the total sum of $7,000,000 in exchange for a discharge of its mortgage security, without prejudice to its right to claim the balance of the debt owing from the Company and the guarantors. Following the sale of the property, $7,000,000 was delivered to 272. 272 granted discharges of its mortgage security, leaving a balance owing to it of about $815,000.

[24] On October 18, 2022, 272 issued a statement of claim in the Superior Court of Justice for payment of the remaining balance on its loan plus additional accrued interest. The Company and each of the guarantors are named as defendants in that proceeding. I was advised that service on all defendants has not yet been completed, and that no defences have yet been filed.

[25] The applicants started this proceeding on November 2, 2022. The supporting affidavit on the motion for the Initial Order acknowledged the existence of the guarantees given to 272, the shortfall 272 suffered when its mortgage security was discharged, and that 272's discharge of its mortgage security was without prejudice to its right to claim the balance outstanding to it.

[26] My Initial Order in this proceeding included a limited stay of proceedings against the Company's directors. The order stipulated that "*except as permitted by subsection 11.03(2) of the CCAA*, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants [emphasis added]" whereby the directors or officers were alleged to be liable for the payment or performance of the Company's obligations.

[27] The present motion seeks to extend the stay of proceedings by excluding the limitation contained in the "except as permitted by subsection 11.03(2) of the CCAA" proviso in the Initial Order. The issue turns on the interpretation of ss. 11, 11.02 and 11.03 of the CCAA.

The CCAA Provisions

[28] Section 11 of the CCAA provides that, "subject to the restrictions set out in this Act" the court may "make any order that it considers appropriate in the circumstances".

[29] Section 11.02 provides that the court may make an order staying all proceedings taken "in respect of the company".

[30] Section 11.03(1) states that an order under s. 11.02 may prohibit "any action against a director of the company" that arose before the commencement of the CCAA proceedings and that relates to an obligation of the company "if directors are under any law liable *in their capacity as directors* for the payment of those obligations [emphasis added]". Section 11.03(2) contains an exception to 11.03(1), however. It provides that s. 11.03(1) "does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations".

[31] Thus, s. 11.03 distinguishes between proceedings based on the director's personal liability under "any law" in his or her "capacity as a director" (s. 11.03(1)) and proceedings based on the director's personal liability arising out of a personal contract that he or she gave to guarantee the obligations of the company (11.03(2)): *Re Magasin Laura (PV) inc.*,2015 Carswell Que 9722, 31 C.B.R. (6th) 168 (Que. Bktcy).

Analysis

[32] The applicants submit that my jurisdiction to stay the action on the guarantees arises out of the broad general powers under s. 11. They further submit that this jurisdiction was exercised in *McEwan Enterprises Inc*., 2021 ONSC 6453, at para. 44(a), in parallel circumstances to those existing here.

[33] I am unable to accept these arguments.

[34] In my view, the CCAA, by its own terms, limits the general powers in s. 11 by expressly making the scope of those powers "subject to the restrictions set out in this Act". Section 11.03(1) permits the court to extend the stay power in s. 11.02 (regarding claims against the debtor company) to the directors of the company, if the director's personal liability arises under any law in his or her capacity as a director. However, s. 11.03(2) limits the power to order a stay by stipulating that s. 11.03(1) "does not apply" to an action against a director on a guarantee relating to the company's obligations. The use of the phrase "does not apply to" in s. 11.03(2) means that, although the court *may* make an order in the circumstances covered by s. 11.03(1), the court *may not* make such an order in the circumstances covered by s. 11.03(2). Since the 272 action is a claim against the directors under a personal contract given to guarantee the obligations of the company, the provisions of s. 11.03(2) apply. Accordingly, I conclude that I do not have jurisdiction to order a stay in these circumstances. Such an order is prohibited by the express language of s. 11.03(2).

[35] *McEwan Enterprises Inc*. does not support the applicants' argument. The passage they rely on in that decision makes it clear that the parties and the court were concerned with a guarantee given by Mr. McEwan in connection with obligations owed by another company, not the applicant debtor (a "non-filing party" which did not fall within the language of s. 11.03(2)). Although it may be the case as a matter of fact that Mr. McEwan also guaranteed obligations of the applicant debtor and that actions on those guarantees were also stayed, there is no indication that s. 11.03(2) was even raised with the court, much less considered by the court in its decision. It is, for example, (given Mr. McEwan's overarching importance to the business -- he *was* the business and all stakeholders understood that), entirely possible that potential plaintiffs in any actions on Mr. McEwan's guarantees were content to have those potential actions stayed, wagering that this was their only hope of recovery in the long run in any event. And, as para. 44(c) makes plain, the obligations which Mr. McEwan guaranteed were not anticipated to be impacted by the CCAA proceedings as they were be assumed as part of the proposed restructuring transaction. I simply cannot found my jurisdiction to make the order sought in the face of s. 11.03(2) on a decision in which the point in issue was neither raised nor ruled upon.

[36] Accordingly, for these reasons, I decline to order a stay of the 272 action against Messrs. Etemadi, Souzankar and Shahreza.

[37] This does not end the matter, however. The stay was only being sought until the end of the sales process; that is, February 3, 2023. I agree with the applicants that Messrs. Etemadi, Souzankar and Shahreza will be heavily engaged in the restructuring effort until the contemplated closing of the sales process. 272 has not even completed the necessary service on all defendants. The proceeding is in its infancy. It is an action on a debt/guarantee. There is no suggestion of urgency. 272's action has been brought for the benefit of one creditor. The sales process in these proceedings is calculated to benefit many stakeholders, including other creditors, employees and customers. While I have declined, for jurisdictional reasons, to order a stay of 272's action, it is appropriate in these circumstances to make a procedural order in the 272 action that these three defendants shall have until February 10, 2023 (one week after the forecast close of the sales process) to deliver their statements of defence.

The Temporal Extension of the Stay

[38] The Initial Order granted an initial 10-day stay of proceedings ending on November 10, 2022. The applicants seek an order extending the stay of proceedings to and including February 3, 2023. I am satisfied that the requested extension is justified. The evidence supports the conclusion that since the Initial Order, the applicants have acted and continue to act in good faith and with due diligence to communicate with stakeholders and to develop the sales process, while continuing to operate in the ordinary course of business to preserve the value of their business. The cash flow forecast appended to the Monitor's First Report shows sufficient liquidity during the extended stay period to fund obligations and the costs of the CCAA proceedings. The extension of the stay is required to complete the sales process without having return to Court to seek a further extension. There is no evidence that any creditor will suffer material prejudice as a result of the extension of the stay. And, the Monitor supports the requested extension of the stay of proceedings.

Conclusion

[39] For the forgoing reasons, the orders sought are approved and granted, other than the request for an order to extend the stay of proceedings to include the action on Messrs. Etemadi, Souzankar and Shahreza's personal guarantees, which is denied (subject to the procedural direction outlined in my reasons).

Other Matters

[40] Mr. Russell Bennett appeared on behalf of certain unnamed investors who claim to have invested in some aspect of this business. No material was filed on their behalf. Mr. Bennett described concerns these investors have about the propriety of Miller Thompson and BDO representing the applicants in these proceedings. He sought a two-week adjournment of the applicants' motion to enable the investors to decide whether to file material and pursue the matter. In the absence of any material and, given the highly time-sensitive nature of the proposed sales process/restructuring, I declined this request.

Penny J.

Date: November 14, 2022

COURT FILE NO.: 09-CL-7950
DATE: 20090723

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICANTS

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF

S. Philpott, for the Former Employees

K. Zych, for Noteholders

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

HEARD &
DECIDED: JUNE 29, 2009

E N D O R S E M E N T

INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[4] The following are my reasons for granting these orders.

[5] The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

[6] The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

[7] The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

BACKGROUND

[8] The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

[9] At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

[10] The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

[11] In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

[12] On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

[13] In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

[14] Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

[16] In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

[17] The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

[18] The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

[19] The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

[20] The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

[21] Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

[23] The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

[24] The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

[25] The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

[26] Counsel to the Applicants submitted a detailed factum which covered both issues.

[27] Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

[28] The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*. (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

[30] The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra,* at paras. 43-52.

[31] However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

[32] In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc*. (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

[33] Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

[34] Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc*. (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

Financial Services Ltd. v. Hardrock Paving Co. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

[36] In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> …we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

[37] Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

[38] Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

[39] In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not

> feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

[40] I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc*. (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc*. (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale…be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*. (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

[43] In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

[44] I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

[46] At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"…Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged…

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the <u>means</u> contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary…

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

[52] The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

[54] The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

[55] Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

[56] I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[57] Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

[58] In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

[59] Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

MORAWETZ J.

Heard and Decided: June 29, 2009

Reasons Released: July 23, 2009

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00700581-00CL **DATE:** 21 June 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: **Fire & Flower Holdings Corp., *et al.***

BEFORE: JUSTICE OSBORNE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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M. Katzman	Counsel for Commercial landlord 431-441 Spadina Investments Inc. and for the commercial landlord Queen and Brock Holdings Inc.	mkatzman@katzmanlitigation.com

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ENDORSEMENT OF JUSTICE OSBORNE:

1. At the comeback hearing in this matter on June 15, the Applicants sought approval of various heads of relief including a sales and investment solicitation process ("SISP") including a stalking horse bid agreement and related relief.

2. Green Acre Capital LP ("Green Acre") sought an adjournment of the approval of the SISP in order to explore alternatives. The balance of the relief sought on June 15, was unopposed by any party, and was granted. I granted the adjournment of the SISP approval motion until yesterday.

3. The Applicants, fully supported by ACT, the proposed stalking horse bidder, seek that approval now. The Court-appointed Monitor strongly recommends that approval be granted. Applicants rely and their motion record of June 14 and in particular the affidavit of Mr. Stephane Trudel sworn June 14, 2023 together with exhibits thereto, as well as the First Report of the Monitor dated June 14, 2023 and the Supplement thereto.

4. The Applicants also rely on the affidavit of Mr. Philip Yang sworn June 18, 2023, which confirms that ACT has agreed to amend the Subscription Agreement between the Applicants and ACT such that the Break Fee as defined in the Stalking Horse Agreement would be reduced from $750,000 to $550,000 inclusive of expense reimbursements.

5. Green Acre opposes approval of the S ISP and today brings a cross-motion for an order authorizing and directing the Applicants to execute a proposed interim facility loan agreement with Green Acre on behalf of a special purpose entity to be formed for the benefit of a syndicate of lenders, as a replacement DIP facility. Green Acre relies on the affidavit of Mr. Shawn Dym sworn June 19, 2023 and exhibits thereto. The position of Green Acre is supported by Mr. Gordon.

6. The motion of the Applicants is granted and the proposed SISP is approved. The cross motion of Green Acre is dismissed. Reasons to follow shortly.

7. Order to go in the form attached which is effective immediately and without the necessity of issuing and entering.

8. I also observe for completeness that, while the court attendance yesterday was scheduled for the purposes of considering approval of the proposed SISP, Turning Point Brands serve motion materials in respect of a proposed motion to lift the stay, terminate a distribution agreement between TPB Canada and the Applicants are one of them and repossess the Goods (as defined in the motion materials) in the possession power control of the Applicants.

9. On the consent of the parties, this motion may be scheduled if necessary during the week of July 3 through the Commercial List Office. The parties will continue to have cooperative discussions in the interim, such that the motion may not be necessary.

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ENDORSEMENT

COURT FILE NO.: CV-24-00715773-00CL **DATE:** March 8, 2024

NO. ON LIST: 2

TITLE OF PROCEEDING: **In the Matter of the *Companies' Creditors Arrangement Act***
and
In the Matter of a Plan of Compromise or Arrangement of BZAM Ltd.

BEFORE: **JUSTICE OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Joseph Bellissimo Natalie Levine	Cortland Credit Lending Corp.	jbellissimo@cassels.com nlevine@cassels.com
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Andrew Winton	Final Bell Holdings International	awinton@lolg.ca

Other:

Name of Person Appearing	Name of Party	Contact Info
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Jeffrey Rosenberg Kamran Hamidi	FTI Consulting Canada Inc., Monitor	Jeffrey.rosenberg@fticonsulting.com Kamran.hamidi@fticonsulting.com

ENDORSEMENT OF JUSTICE OSBORNE:

1. The Applicants seek at this comeback hearing an amended and restated Initial Order (the "ARIO") that:

    a. extends the stay of proceedings to and including May 25, 2024;

    b. increases the maximum principal amount that the Applicants can borrow under the DIP Loan to $41 million; and

    c. increases the quantum of each of the Administration Charge, the DIP Lender's Charge and the Directors' Charge to a maximum amount of $1 million, $41 million plus interest fees and expenses, and $12,900,000 respectively.

2. The Applicants also seek a SISP Approval Order that:

    a. authorizes and approves the Stalking Horse Purchase Agreement;

    b. grants a Court-ordered charge (the "Bid Protections Charge") in favour of the Stalking Horse Purchaser;

    c. approves the SISP including the Stalking Horse Bid; and

    d. authorizes and directs the Applicants and the Monitor to undertake the SISP.

3. Defined terms in this Endorsement have the meaning given to them in my earlier Endorsement made in this proceeding, the motion materials, and/or the First Report of the Monitor dated March 6, 2024, unless otherwise stated.

4. The Applicants rely on the Affidavit of Matthew Milich sworn March 1, 2024 together with Exhibits thereto, together with the First Report.

5. For the reasons that follow, I am satisfied that the relief should be granted.

6. I observe at the outset that the relief sought today is unopposed by any party. It is strongly supported by Cortland as senior secured creditor and DIP Lender, as well as by Stone Pine, a secured creditor and the proposed Stalking Horse Bidder. It is recommended by the Monitor. The Service List has been served with the motion materials and the First Report.

7. With respect to the proposed stay extension, I am satisfied that the Applicants have acted in good faith and with due diligence since the granting of the Initial Order and continue to do so. It is just, convenient and necessary as well as in the best interests of the Applicants and their stakeholders that the proposed extension until May 25, 2024 be granted as such will allow the Monitor, with the assistance of the Applicants, to complete the SISP all with a view to preserving and maximizing value for the stakeholders.

8. I observe that the cash flow forecast projects that the Applicants should have sufficient liquidity to fund their obligations and costs of these proceedings through the end of the extended stay period.

9. I am also satisfied that the increases to the maximum quantum permitted in each of the charges, and the priority of each of those charges, should be approved. In the Initial Order, the Administration Charge, the DIP Lenders' Charge and the Directors' Charge were each limited to only what was reasonably necessary during the initial 10 day period.

10. The basis for the proposed increased quantum of each charge is set out in the motion materials and in the First Report.

11. The increased quantum of the Directors' Charge is particularly large. I am satisfied, however, that it is appropriate in that it reflects potential exposure for excise tax obligations. Those obligations are significant given the nature of the business of the Applicants (in the cannabis sector) but also as a result of the timing of the filing for creditor protection on February 28. The result of that date was that there were excise tax obligations for both January, due but not yet paid, and February, accrued but not yet due. I am satisfied that the quantum, while large, is appropriate.

12. I also recognize that the priority of the charges is somewhat atypical in that both the Directors' Charge and the Bid Protections Charge (described below) are subordinate to the DIP Lender's Charge in favour of Cortland. Such was the condition of DIP financing to enable the continuation of the business as a going concern and, as noted above, the relative priority of the charges has the support of all of these parties.

13. The Applicants seek approval for the proposed SISP including the Stalking Horse Bid. The proposed Stalking Horse Bidder (1000816625 Ontario Inc.) is a company related to the largest shareholder of BZAM, Bassam Alghanim, the current Chairman and the individual that ultimately controls Stone Pine.

14. The mechanics of the proposed SISP are fully set out in the motion materials and the First Report. The timelines and key dates are relatively tight. I am satisfied, however, that they are appropriate, achievable, and are accretive to maximizing value for all stakeholders. The Monitor, with the assistance of the Applicants, is already well along in preparatory work.

15. I am satisfied that the factors identified by the Court to be considered in a determination of whether to approve a sales process as contemplated by ss. 11 and 36(3) of the CCAA are met here: *Nortel Networks Corporation (Re),* 2009 CanLII at paras. 47 – 48.

16. Given that, as noted above, the Stalking Horse Purchaser is a related party contemplated in section 36(5) of the CCAA, I have also considered the factors referred to in that subsection am satisfied that they have been met here.

17. I am further satisfied as to the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances of this case; and whether the sales process will optimize the chances, in the particular circumstances of securing the best possible price for the assets.

18. The Stalking Horse Purchase Agreement will serve as the basis for the Stalking Horse Bid as part of the SISP. It is contemplated to be structured as a reverse vesting transaction. While such structures remain the exception and not the norm, I am satisfied given the critical importance of maintaining the cannabis licences and regulatory permits that are so central to asset value in this case, that such a structure is appropriate here.

19. I also recognize that the Stalking Horse Purchase Agreement is the product of significant efforts and negotiations among the Stalking Horse Purchaser, the Company, the Monitor and the senior creditors of the Company, Stone Pine and Cortland.

20. If the Stalking Horse Bid is not the Successful Bid, the Stalking Horse Purchaser will be entitled to the payment of Bid Protections up to the maximum amount of $850,000 comprised of a break fee of $750,000 and an expense reimbursement of $100,000. These amounts are not insignificant, but I am satisfied are appropriate here and I observe that the maximum amount of the Bid Protections in the aggregate is approximately 2% of the purchase price and therefore within the range of such fees previously approved by this Court (see, for example, *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 at paras. 12 -14). The amount is also recommended and fully supported by the Monitor.

21. I also note that the Stalking Horse Bid is not a traditional credit bid in the circumstances of this case, but rather contemplates a bid that includes the Stone Pine indebtedness, but also either the assumption or payout of the Cortland Debt, at the option of Cortland. In particular, the subscription price includes the assumption of the Stone Pine Debt, and the Cash Consideration as fully described in the affidavit of Mr. Milich.

22. I observe again that the Stalking Horse Agreement is not being approved today as a purchase agreement, but rather only as a stalking horse bid. I am satisfied that it will facilitate potential transactions but also provide a floor or a minimum by establishing a baseline price and deal structure. It provides for the preservation and continuity of the core business of the Applicants as a going concern, including but not limited to the continued employment of employees as well as supplier and customer relationships.

23. For all of these reasons, the motion is granted and the relief sought is approved.

24. I observe one additional point in conclusion. Counsel for Final Bell Holdings International Ltd. appeared today in Court and made brief submissions to the effect that while Final Bell was specifically not opposing any of the relief sought (particularly including approval of the SISP and the timelines therein), it wished to advise the Court that it was in the process of investigating whether it would be bringing a motion to seek certain relief which could have an impact on the sales process approved today.

25. Final Bell was a company acquired by the Applicants very shortly prior to filing for creditor protection in this proceeding. The acquisition purchase price was satisfied by the issuance of equity and unsecured debt.

26. Final Bell apparently takes the position that financial disclosure provided to it in the course of due diligence was inconsistent with the financial state of the company as disclosed in this Application. Final Bell may seek rescission of its transaction. That issue is for another day. However, it is obviously imperative for potential bidders in the SISP to have clarity and certainty as to the assets and business on which they are bidding, with the result that, if Final Bell pursues a claim, and specifically pursues a claim seeking rescission, that may well have to be determined before bids are finalized.

27. I have implored the parties to continue the discussions I understand they are having, and I have specifically directed the Court-appointed Monitor to coordinate those discussions with a view to ensuring that all matters proceed on an expedited but fair basis and that the sales process is not undermined by outstanding issues.

28. Orders to go in the form signed by me today which orders are effective immediately and without the necessity of issuing and entering.

Osborne, J.

OSBORNE, J.

Date: March 8, 2024

COURT FILE NO.: 09-8482-00CL
DATE: 20091218

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC.

APPLICANTS

BEFORE: **MORAWETZ J.**

COUNSEL: **Jay Swartz and Jim Bunting, for the Applicants**

G. Moffat, for Deloitte & Touche Inc., Monitor

Joseph Bellissimo, for Roynat Capital Inc.

Peter J. Osborne, for R. N. Singh and Purchaser

Edmond Lamek, for the Toronto-Dominion Bank

D. Dowdall, for Noteholders

D. Ullmann, for Procom Consultants Group Inc.

HEARD & DECIDED: **DECEMBER 11, 2009**

E N D O R S E M E N T

[1] At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

[2] The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

[3] The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

[4] The Monitor recommends that the motion be granted.

[5] The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

[6] Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

[7] Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

[8] The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

[9] Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

[10] The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

[11] It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

[12] Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

[13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp*. [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(a) Is a sale transaction warranted at this time?

(b) Will the sale benefit the whole "economic community"?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?

[14] The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

[15] Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

[16] Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

[17] I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[18] In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

[19] In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

[20] With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue

has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

[21] For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

[22] For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

[23] The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

[24] Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

[25] An order shall issue to give effect to the foregoing.

MORAWETZ J.

DECIDED: December 11, 2009

REASONS: December 18, 2009

CITATION: CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750
COURT FILE NO.: CV-12-9622-00CL
DATE: 20120315

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: CCM Master Qualified Fund, Ltd., Applicant

AND:

blutip Power Technologies Ltd., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Rogers and C. Burr, for the Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb and A. Lockhart, for the Applicant

HEARD: March 15, 2012

REASONS FOR DECISION

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

[1] By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

[2] D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

[3] The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two

convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

[4] At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

[5] As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

[6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

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[1] (1991), 7 C.B.R. (3d) 1 (C.A.).

[7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[2] *BIA* proposals,[3] and *CCAA* proceedings.[4]

[8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to 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.[5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

[9] The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

[10] Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the

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[2] *Re Graceway Canada Co*., 2011 ONSC 6403, para. 2.
[3] *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 15.
[4] *Re Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13; *Re White Birch Paper Holding Co*., 2010 QCCS 4382, para. 3; *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 2, and (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.); *Re Indalex Ltd*., 2009 CarswellOnt 4262 (S.C.J.).
[5] Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding – Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

[11] The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

[12] The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

[13] The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.[6]

C. Analysis

[14] Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the

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[6] *Re Parlay Entertainment*, 2011 ONSC 3492, para. 12; *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, paras. 4 to 7; *Re Nortel Networks Corp.* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.), para. 12.

prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

[15] In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

[16] Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.[7]

[17] For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

[18] Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

[19] As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

[20] Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that

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[7] *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.), para. 7; *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 5; *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 58.

secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

[21] I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc. (Re)*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> …
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.[8]

[22] In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a

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[8] 2012 ONSC 1299 (CanLII).

receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

[23] In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

[24] The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

[25] May I conclude by thanking Receiver's counsel for a most helpful factum.

(original signed by)
D. M. Brown J.

Date: March 15, 2012

SUPREME COURT OF NOVA SCOTIA
Citation: ScoZinc Ltd. (Re), 2009 NSSC 136

Date: 20090403
Docket: Hfx No.305549
Registry: Halifax

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 ScoZinc Ltd.

Applicant

Judge: The Honourable Justice Duncan R. Beveridge

Heard: April 3, 2009 in Halifax, Nova Scotia

Written Reasons of Oral Decision: April 28, 2009

Counsel: John G. Stringer, Q.C., and Mr. Ben R. Durnford, for the applicant
Robert MacKeigan, Q.C., for Grant Thornton

By the Court:

[1] On December 22, 2008 ScoZinc Ltd. was granted protection by way of a stay of proceedings of all claims against it pursuant to s.11 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36. The stay has been extended from time to time. Grant Thornton was appointed as the Monitor of the business and financial affairs of ScoZinc pursuant to s.11.7 of the *CCAA.*

[2] The determination of creditors' claims was set by a Claims Procedure Order. This order set dates for the submission of claims to the Monitor, and for the Monitor to assess the claims. The Monitor brought a motion seeking directions from the court on whether it has the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the Monitor to complete its assessment of claims.

[3] The motion was heard on April 3, 2009. At the conclusion of the hearing of the motion I concluded that the Monitor did have the necessary authority. I granted the requested order with reasons to follow. These are my reasons.

BACKGROUND

[4] The procedure for the identification and quantification of claims was established pursuant to my order of February 18, 2009. Any persons asserting a claim was to deliver to the Monitor a Proof of Claim by 5:00 p.m. on March 16, 2009, including a statement of account setting out the full details of the claim. Any claimant that did not deliver a Proof of Claim by the claims bar date, subject to the Monitor's agreement or as the court may otherwise order, would have its claim forever extinguished and barred from making any claim against ScoZinc.

[5] The Monitor was directed to review all Proofs of Claim filed on or before March 16, 2009 and to accept, revise or disallow the claims. Any revision or disallowance was to be communicated by Notice of Revision or Disallowance, no later than March 27, 2009. If a creditor disagreed with the assessment of the Monitor, it could dispute the assessment before a Claims Officer and ultimately to a judge of the Supreme Court.

[6] The three claims that have triggered the Monitor's motion for directions were submitted by Acadian Mining Corporation, Royal Roads Corp., and Komatsu International (Canada) Inc.

[7] ScoZinc is 100% owned by Acadian Mining Corp. Theso two corporations share office space, managerial staff, and have common officers and directors. Acadian Mining is a substantial shareholder in Royal Roads and also have some common officers and directors.

[8] Originally Royal Roads asserted a claim as a secured creditor on the basis of a first charge security held by it on ScoZinc's assets for a loan in the amount of approximately $2.3 million. Acadian Mining also claimed to be a secured creditor due to a second charge on ScoZinc's assets securing approximately $23.5 million of debt. Both Royal Roads and Acadian Mining have released their security. Each company submitted Proofs of Claim dated March 4, 2009 as unsecured creditors.

[9] Royal Roads claim was for $579, 964.62. The claim by Acadian Mining was for $23,761.270.20. John Rawding, Financial Officer for Acadian Mining and ScoZinc, prepared the Proofs of Claim for both Royal Roads and Acadian Mining. It appears from the affidavit and materials submitted, and the Monitor's fifth report dated March 31, 2009 that there were errors in each of the Proofs of Claim.

[10] Mr. Rawding incorrectly attributed $1,720,035.38 as debt by Acadian Mining to Royal Roads when it should have been debt owed by ScoZinc to Royal Roads. In addition, during year end audit procedures for Royal Roads, Acadian Mining and ScoZinc, other erroneous entries were discovered. The total claim that should have been advanced by Royal Roads was $2,772,734.19.

[11] The appropriate claim that should have been submitted by Acadian Mining was $22,041,234.82, a reduction of $1,720,035.38. Both Royal Roads and Acadian Mining submitted revised Proofs of Claim on March 25, 2009 with supporting documentation.

[12] The third claim is by Komatsu. Its initial Proof of Claim was dated March 16, 2009 for both secured and unsecured claims of $4,245,663.78. The initial claim did not include a secured claim for the equipment that had been returned to Komatsu, nor include a claim for equipment that was still being used by ScoZinc. A revised Proof of Claim was filed by Komatsu on March 26, 2009.

[13] The Monitor, sets out in its fifth report dated March 31, 2009, that after reviewing the relevant books and records, the errors in the Proofs of Claim by Royal Roads, Acadian Mining and Komatsu were due to inadvertence. For all of these claims it issued a Notice of Revision or Disallowance on March 27, 2009, allowing the claims as revised "if it is determined by the court that the Monitor has the power to do so".

[14] The request for directions and the circumstances pose the following issue:

ISSUE

[15] Does the Monitor have the authority to allow the revision of a claim by increasing it based on evidence submitted by a claimant within the time period set for the monitor to carry out its assessment of claims?

ANALYSIS

[16] The jurisdiction of the Monitor stems from the jurisdiction of the court granted to it by the *CCAA*. Whenever an order is made under s.11 of the *CCAA* the court is required to appoint a monitor. Section 11.7 of the *CCAA* provides:

> 11.7 (1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.
>
> (2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.
>
> (3) The monitor shall
>
> (a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;

> (b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,
>
> > (i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,
> >
> > (ii) at least seven days before any meeting of creditors under section 4 or 5, or
> >
> > (iii) at such other times as the court may order;
>
> (c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and
>
> (d) carry out such other functions in relation to the company as the court may direct.
>
> ...

[17] It appears that the purpose of the *CCAA* is to grant to an insolvent company protection from its creditors in order to permit it a reasonable opportunity to restructure its affairs in order to reach a compromise or arrangement between the company and its creditors. The court has the power to order a meeting of the creditors or class of creditors for them to consider a compromise or arrangement proposed by the debtor company (s. 4, 5). Where a majority of the creditors representing two thirds value of the creditors or class of creditors agree to a compromise or arrangement, the court may sanction it and thereafter such compromise or arrangement is binding on all creditors, or class of creditors (s. 6).

[18] Section 12 of the *Act* defines a claim to mean "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." However, as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the *CCAA* does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order.

[19] The only guidance provided by the *CCAA* is that in the event of a disagreement the amount of a claim shall be determined by the court on summary application by the company or by the creditor. Section 12(2) of the *Act* provides:

> Determination of amount of claim
>
> (2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of an unsecured claim shall be the amount
>
> (i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,
>
> (ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or
>
> (iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and
>
> (b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

[20] The only parties who appeared on this motion were the Monitor, ScoZinc and Komatsu. No specific submissions were requested nor made by the parties with respect to the nature of the court's jurisdiction to determine the mechanism and time lines to classify and quantify claims against the debtor company.

[21] Under the *Bankruptcy and Insolvency Act* the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. The trustee may admit the claim or disallow it in whole or in part (s.135(2) *BIA)*. A creditor who is dissatisfied with a decision by the trustee may appeal to a judge of the Bankruptcy Court.

[22] In contrast, the *CCAA* does not set out the procedure beyond the language in s.12. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on "summary application".

[23] The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred.

[24] If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the *CCAA* proceedings.

[25] The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice (See for example *Federal Gypsum Co., (Re)* 2007 NSSC 384; *Olympia & York Developments Ltd. (Re)* (1993), 17 C.B.R. (3d) 1 (Ont. S.C.J.); *Air Canada, (Re)* (2004) 2 C.B.R. (5th) 23 (Ont.S.C.J.); *Triton Tubular Components v. Steelcase Inc*., [2005] O.J. No. 3926 (Ont.S.C.J.); *Muscletech Research & Development Inc.,(Re)*, [2006] O.J. No. 4087 (Ont.S.C.J.); *Pine Valley Mining Corp., (Re)* 2008 BCSC 356; *Blue Range Resource Corp.,* Re 2000 ABCA 285; *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th) 222 (N.B.Q.B.).)

[26] I could find no reported case that doubt the authority of the court to create a claims process. Kenneth Kraft in his article "The CCAA and the Claims Bar Process", (2000), 13 Commercial Insolvency Reporter 6, endorsed the utilization

of a claims process on the basis of reliance on the court's inherent jurisdiction, provided the process adhered to the specific mandates of the *CCAA*. In unrelated contexts, caution has been expressed with respect to reliance on the inherent jurisdiction of the superior court as the basis for dealing with the myriad issues that can arise under the *CCAA* (See: *Clear Creek Contracting v. Skeena Cellulous Inc*.,(2003), 43 C.B.R (4th) 187) (B.C.C.A.) and *Stelco Inc.(Re)*, [2005] O.J. No. 1171 (CA.)).

[27] Sir J.H. Jacob, Q.C. in his seminal article "The Inherent Jurisdiction of the Court", (1970) Current Legal Problems 23, concluded that it has been clear law from the earliest times that superior courts of justice, as part of their inherent jurisdiction, have the power to control their own proceedings and process. He wrote:

> Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods. Some of the instances of the exercise of this power have been of far-reaching importance, others have dealt with matters of detail or have been of transient value. Some have involved the exercise of administrative powers, others of judicial powers. Some have been turned into rules of law, others by long usage or custom may have acquired the force of law, and still others remain mere rules of practice. The exercise of this power has been pervasive throughout the whole legal machinery and has been extended to all stages of proceedings, pre-trial, trial and post-trial. Indeed, it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice.
>
> p. 32-33

[28] The *CCAA* gives no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. As noted earlier, the only reference is in s. 12 of the *Act* that if there is a dispute as to the amount of a claim, then the amount shall be determined by the court "on summary application". In *Re Freeman Estate*, [1922] N.S.J. No. 15, [1923] 1 D.L.R. 378 (en banc) the court considered the words "on summary application" as they appeared in the *Probate Act* R.S.N.S. 1900 c.158. Harris C.J. wrote:

> [17] The words "summary application" do not mean without notice, but simply imply that the proceedings before the Court are not to be conducted in the ordinary way, but in a concise way.
>
> [18] The Oxford Dictionary p. 140 gives as one of the meanings of "summary" dispensing with needless details or formalities-- done with despatch.
>
> [19] In the case of the Western &c R. Co. v. Atlanta (1901), 113 Ga. 537, the meaning of the words "summary proceeding" is discussed at some length and the Court held at pp. 543-544:--
>
> "In a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure."
>
> [20] I cite this not because it is a binding authority, but because its reasoning commends itself to my judgment and I adopt it.

[29] In my opinion, whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, the determination by the court that claims must initially be identified and assessed by the Monitor, and heard first by a Claims Officer, is a valid exercise of the court's inherent jurisdiction.

[30] The *CCAA* gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s.11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The *Act* mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor shall carry out such other functions in relation to the company as the court may direct (s.11.7(3)(d)).

[31] In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the *BIA*. The Claims Procedure Order of February 18, 2009 accomplishes this.

POWER OF THE MONITOR

[32] The Monitor was required by the Order to publish a notice to claimants in the newspaper regarding the claims procedure. It was also required to send a claims package to known potential claimants identified by the Monitor through its review of the books and records of ScoZinc. The claims bar date was set as March 16, 2009, or such later date as may be ordered by the court.

[33] The duties of the Monitor, once a claim was received by it, were set out in paragraphs 9 and 10 of the Claims Procedure Order. They provide as follows:

> 9. Upon receipt of a Proof of Claim:
>
> a. The Monitor is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which Proofs of Claim are completed and executed and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and the execution of a Proof of Claim. A Claim which is accepted by the Monitor shall constitute a Proven Claim;
>
> b. the Monitor and ScoZinc may attempt to consensually resolve the classification and amount of any Claim with the claimant prior to accepting, revising or disallowing such Claim; and
>
> ...
>
> 10. The Monitor shall review all Proofs of Claim filed on or before the Claims Bar Date. The Monitor shall accept, revise or disallow such Proofs of Claim as contemplated herein. The Monitor shall send a Notice of Revision or Disallowance and the form of Notice of Dispute to the Claimant as soon as the Claim has been revised or disallowed but in any event no later than 11:59 p.m. (Halifax time) on March 27, 2009 or such later date as the Court may order. Where the Monitor does not send a Notice of Revision or Disallowance by the aforementioned date to a Claimant who has submitted a Proof of Claim, the Monitor shall be deemed to have accepted such Claim.

[34] Any person who wished to dispute a Notice of Revision or Disallowance was required to file a notice to the monitor and to the Claims Officer no later than April 6, 2009. The Claims Officer was designated to be Richard Cregan, Q.C., serving in his personal capacity and not as Registrar in Bankruptcy. Subject to the direction of the court, the Claims Officer was given the power to determine how evidence would be brought before him and any other procedural matters that may arise with respect to the claim. A claimant or the Monitor may appeal the Claims Officer's decision to the court.

[35] The Monitor suggests that the power given to it under paragraph 9(a) and 10 is sufficient to permit it to accept the revised Proofs of Claim filed after the claim's bar date of March 16, 2009, but before its assessment date of March 27, 2009.

[36] Reliance is also placed on the decision of the Alberta Court of Appeal in *Blue Range Resource Corp.* 2000 ABCA 285. As noted by the Monitor, the decision in *Blue Range* did not directly deal with the issue on which the Monitor here seeks directions. In *Blue Range*, the claims procedure established by the court set the claims bar date of June 15, 1999. Claims of creditors not proven in accordance with the procedures set out were deemed to be forever barred. Some creditors filed their Notice of Claim after the claims bar date. The monitor disallowed their claims. There were a second group of creditors who filed their Notice of Claim prior to the applicable claims bar date, but then sought to amend their claims after the claims bar date had passed. The monitor also disallowed these claims as late. What is not clear from the reported decisions is whether this second group of creditors requested amendments of their claims during the time period granted to the Monitor to carry out its assessment.

[37] The chambers judge allowed the late and amended claims to be filed. Enron Capital Corp. and the creditor's committee sought leave to appeal that decision. Leave to appeal was granted on January 14, 2000 with respect to the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result?

[38] Wittmann J.A. delivered the judgment of the court. He noted that all counsel conceded that the court had the authority to allow the late filing of claims and that the appeal was really a matter of what criteria the court should use in exercising that power. Accordingly, a Claims Procedure Order that contains a claims bar date should not purport to forever bar a claim without a saving provision. Wittmann J.A. set out the test for determining when a late claim may be included to be as follows:

> [26] Therefore, the appropriate criteria to apply to the late claimants is as follows:
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
>
> [27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.
>
> 2000 ABCA 285

[39] The appellants claimed that they would be prejudiced if the late claims were allowed because if they had known the late claims would be allowed they would have voted differently. This assertion was rejected by the chambers judge. With respect to what is meant by prejudiced, Wittmann J.A. wrote:

> 40 In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is

> not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: Re Cohen (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in 312630 British Columbia Ltd. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

[40] In considering how the Monitor should carry out its duties and responsibilities under the Claims Procedure Order it is important to note that the Monitor is an officer of the court and is obliged to ensure that the interests of the stakeholders are considered including all creditors, the company and its shareholders (See *Laidlaw Inc Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J.).

[41] In a different context Turnball J.A. in *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3rd) 1 commented that the monitor is an agent of the court and as a result is responsible and accountable to the court, owing a fiduciary duty to all of the parties (para. 28).

[42] In my opinion, para. 9(a) is not of assistance in determining the authority of the Monitor to revise upward a claim filed after the claim's bar date but before the assessment date. Paragraph 9(a) authorizes the Monitor to use reasonable discretion as to the adequacy of compliance as to **the manner** to which Proofs of Claim are completed and executed. If it satisfied that the claim has been adequately proven it may waive strict compliance with the requirements of the order as to **completion** and the **execution** of a Proof of Claim.

[43] Paragraph 10 of the Claims Procedure Order mandates the Monitor shall review all Proofs of Claim filed on or before the claims bar date. It shall "accept, revise or disallow such Proofs of Claim as contemplated herein". While normally a monitor's revision would be to reduce a Proof of Claim, there is in fact nothing in the Claims Procedure Order that so restricts the Monitor's authority. It is obviously contemplated by para. 10 that the monitor is to carry out some assessment of the claims that are submitted.

[44] In my view, the Proofs of Claim that are filed act both as a form of pleading and an opportunity for the claimant to provide supporting documents to evidence its claim. In the case before me, the creditors discovered that the claims they had submitted were inaccurate and further evidence was tendered to the Monitor to demonstrate. The Monitor, after reviewing the evidence, accepted the validity of the claims.

[45] Courts in a general way are engaged in dispensing justice. They do so by setting up and applying procedural rules to ensure that litigants are afforded a fair hearing. The resolution of disputes through the litigation process, including the ultimate hearing, is fundamentally a truth-seeking process to determine the facts and to apply the law to those facts. Can it be any different where the process is not in the court but under its supervision pursuant to a claims process under the *CCAA.?*

[46] To suggest that the monitor does not have the authority to receive evidence and submissions and to consider them is to say that it does not have any real authority to carry out its court appointed role to assess the claims that have been submitted. The notion that the monitor cannot look at documentary evidence on its own initiative or at the instance of a claimant, and even consider submissions, is to deny it any real power to consider and make a preliminary determination of the merits of a claim.

[47] The Claims Procedure Order contains a number of provisions that anticipate the exchange of information between the Monitor, the company and a creditor. Paragraph 9(b) authorizes the Monitor and ScoZinc to attempt to consensually resolve the classification and the amount of any claim with a claimant prior to accepting, revising or disallowing such claim. Paragraph 17 of the Claims Procedure Order directs that the Monitor shall at all times be authorized to enter into negotiations with claimants and settle any claim on such terms as the Monitor may consider appropriate.

[48] In my opinion, it does not matter that revised claims were submitted after the claims bar date. In essence, the Monitor simply acted to revise the Proofs of Claim already submitted to conform with the evidence elicited by the Monitor, or submitted to it. The Monitor had the necessary authority to revise the claims, either as to classification or amount.

[49] If a claimant seeks to revise or amend its claim after the assessment date set out in the Claims Procedure Order, different considerations may come into play. The appropriate procedure will depend on the provisions of the Claims Procedure Order. In addition, the court, as the ultimate arbiter of disputed claims under s. 12 of the *CCAA*, should always be viewed as having the jurisdiction to permit appropriate revision of claims.

Beveridge, J.

CITATION: Re TOYS "R" US (CANADA) LTD., 2018 ONSC 609
COURT FILE NO.: CV-17-00582960-00CL
DATE: 20180125

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 TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

BEFORE: F.L. Myers J.

COUNSEL: *Brian F. Empey and Bradley Wiffen,* counsel for the applicant
Jane Dietrich, counsel for Grant Thornton Limited, the Monitor
Linc Rogers, counsel for JPMorgan Chase Bank, NA, DIP Agent
Jesse Mighton, counsel for Crayola Canada
Linda Galessiere, counsel for various landlords
Timothy R. Dunn, counsel for CentreCorp Management Services Limited
Adam Slavens and Jonathan Silver, counsel for LEGO
Sean Zweig, counsel for the Unsecured Creditors Committee of Toys "R" Us Inc. and other debtors in Chapter 11 proceedings before the United States Bankruptcy Court for the Eastern District of Virginia

HEARD: January 25, 2018

ENDORSEMENT

[1] Toys "R" Us (Canada) Ltd. Toys "R" Us (Canada) Ltee asks the court to extend the time that it remains under protection of the *CCAA* while it attempts to restructure. It also asks the court to approve a draft claims procedure by which the outstanding claims of its creditors can be recognized and quantified.

[2] No significant stakeholder opposed the relief sought and I have granted it accordingly.

[3] I am satisfied that the applicant is acting in good faith and with due diligence in pursuit of its restructuring process to date. These are the findings required for it to be entitled to an extension of time under the statute. The applicant's financial results through the holidays exceeded conservative forecasts. It reports that it has sufficient liquidity to operate in the normal course throughout the proposed extended period without drawing upon its extraordinary financing. The extension of time will allow the applicant to advance a going concern

restructuring process here and in coordination with its affiliates in the US. The Monitor supports the request. Accordingly the request for an extension of the proceedings is granted.

[4] The outcome of a successful restructuring process usually involves the applicant proposing a plan of compromise or arrangement to its creditors. The creditors have the opportunity to vote on whether they agree to the terms of the plan proposed. To approve a plan, the *CCAA* requires a vote of more than 50% of the creditors in number who hold collectively more than two-thirds of the claims measured by dollar value.

[5] In many cases, instead of a plan, the applicant proposes a value-maximizing liquidating transaction. After a liquidation, there will likely be distributions to creditors of the proceeds of liquidation in cash or other property *pari passu* by rank.

[6] In either case, whether a plan or a liquidating transaction is proposed, it is necessary to determine the precise number of creditors and the precise amount of their respective claims, so that the creditors can vote and/or receive distributions accordingly.

[7] In a bankruptcy governed by the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, creditors are required to prove their claims individually by delivering to the trustee in bankruptcy sworn proof of claim forms that are accompanied by supporting invoices and other relevant documentation. The *CCAA*, by contrast, does not set out a specific procedure for creditor claims to be proven and counted.

[8] Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the *CCAA*. Claims procedure orders are designed to create processes under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation. Claims procedures usually involve establishing a method to communicate to potential creditors that there is a process by which they must prove their claims by a specific date. The procedure usually includes an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors. If claims are not agreed upon and cannot be settled by negotiation, then the claims procedure orders may go on to establish an adjudication mechanism in court or, typically in Ontario, by arbitration that is then subject to an appeal to the court. Claims procedure orders will usually also establish a "claims bar date" by which claims must be submitted by creditors. Late claims may not be allowed as it can be necessary to establish a cut off to give accurate numbers for voting and distribution purposes.

[9] The claims processes in bankruptcy do not necessarily fit well in a *CCAA* proceeding. It is very unusual for a large corporation to go bankrupt and require proof of claims to be delivered by every single creditor under the *BIA* statutory claims process. Creditors of large companies can number in the thousands. It can be very time consuming and therefore very expensive for each of thousands of creditors to submit proof of claims and for the debtor or the Monitor to review, track, and deal with each claim individually. Managing claims processes for a large business can therefore be a very substantial undertaking that is often occurring behind the scenes throughout *CCAA* processes.

[10] Yet, experience shows that the vast majority of claims are usually dealt with consensually. At any given time, most large businesses have readily ascertainable payables outstanding that are carefully tracked electronically by the applicant's financial managers. Requiring each creditor to prove the state of its outstanding claims by submitting invoices then is often just a make work project that provides no real incremental value beyond the information available by just looking at a listing of outstanding trade payables on the debtor's financial systems.

[11] Toys "R" Us has submitted a draft form of claims procedure that addresses the unnecessary cost of requiring its thousands of trade creditors to prove their claims individually. It proposes to list creditor claims from the company's books and records and to provide each known creditor with a simple claim statement that sets out the amount of its claim that is already recognized by the company. If a creditor agrees with the amount that the company says it owes, the creditor need do nothing and the scheduled or listed claim will become the final proven claim at the claims bar date.

[12] The draft claims procedure allows creditors who disagree with the amounts set out in their claims statements to file notices of dispute with the Monitor by the claims bar date to engage an individualized review process.

[13] This negative option scheduled claim process will eliminate the need for filing proofs of claim and supporting evidence in the vast majority of cases. It also ensures that known claims are not lost in procedural uncertainty which always causes a certain percentage of creditors to fail to file their claims on a timely basis.

[14] This is certainly not the first case to use a negative option scheduled claims process like the one proposed here. Creative scheduled claims procedures, like this one, that streamline claims processes, make it easier for all known creditor claims to be recognized and counted, and save significant time and money, are encouraged. Each case must be responsive to its own facts and circumstances. What works in one case may be wholly inapt in another. But in all cases it is appropriate to make efforts to increase efficiency, affordability, and certainty as was done here. The overriding concern of the court is to ensure that any claims procedure process is both fair and reasonable. The negative option scheduled claim process proposed in this case meets both touchstones.

[15] Finally, the proposed minor amendment to the cross-border protocol has already been adopted by the US court. The change proposed is not opposed and it is reasonable to keep the terms of both orders consistent.

[16] Order signed accordingly.

F.L. Myers J.

Date: January 25, 2017

CITATION: U.S. Steel Canada Inc. (Re), 2017 ONSC 1967
COURT FILE NO.: CV-14-10695-00CL
DATE: 20170419

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *Heather Meredith* and *Sharon Kour*, for the Applicant, U.S. Steel Canada Inc.

Robert Staley and *Kevin J. Zych*, for the Monitor, Ernst & Young Inc.

Gale Rubenstein and *Melaney Wagner*, for the Superintendent of Financial Institutions and the Province of Ontario

Lily Harmer, for the United Steelworkers International Union and the United Steelworkers International Union, Local 8782

Sharon L.C. White, for the United Steelworkers International Union, Local 1005

James Harnum, Representative Counsel for the non-unionized active employees and retirees

Michael Barrack, *Mitch Grossell* and *Leanne Williams*, for United States Steel Corporation

Michael Kovacevic, for the City of Hamilton

Lou Brzezinski, for Robert and Sharon Milbourne

Patrick Riesterer, for Brookfield Capital Partners Ltd.

Mario Forte, for Bedrock Industries Canada LLC and Bedrock Industries L.P.

Vlad Calina, for USSCF, the Plan Advisor

HEARD: March 15, 2017

ENDORSEMENT

[1] The applicant, U.S. Steel Canada Inc. ("USSC"), sought a number of orders in respect of a proposed plan of arrangement and compromise (the "Plan") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Plan contemplates the acquisition of substantially all of USSC's operating business and assets on a going-concern basis by Bedrock Industries Canada LLC ("Bedrock") through the acquisition of all of USSC's outstanding shares. At the conclusion of the hearing of the motions, I advised the parties that the motions were granted for written reasons to follow. This Endorsement sets out the reasons for such relief.

[2] As a preliminary matter, it should be noted that the motions were supported by Her Majesty the Queen in Right of the Province of Ontario ("Ontario") and the United States Steel Corporation ("USS") and were not opposed by Representative Counsel for the current and former non-unionized employees of USSC or by the United Steelworkers International Union (the "USW"), USW Local 8782 or USW Local 1005. In addition, in its thirty-seventh report, dated March 13, 2017 (the "Monitor's Report"), the Monitor recommended approval of each of the motions for the reasons set out therein. Such level of support constituted an important consideration in the Court's approval of each of the motions, in addition to the specific considerations set out below.

The Supplementary Claims Process Order

[3] USSC seeks approval of an order providing for a process to identify and determine claims not previously determined pursuant to the order dated November 13, 2014 (the "General Claims Process Order"). The General Claims Process Order excluded claims of current and former employees respecting outstanding wages, salaries and benefits, claims relating to USSC's retirement plans, claims relating to non-pension post-employment benefits ("OPEB"s), and claims against the directors and officers of USSC.

[4] The purpose of the order sought is to crystallize the pool of claims that will be affected under the Plan. The proposed supplementary claims process would pertain to a subset of the creditors whose claims were excluded from the General Claims Process Order, being: (1) current and former non-unionized employees with pension claims, OPEB claims and supplemental pension claims; (2) former non-unionized employees with claims pertaining to the termination of their employment; (3) persons with claims against the directors and officers of USSC; and (4) persons who filed a claim after December 22, 2014 but before March 1, 2017.

[5] The Court has the authority under s. 11 of the CCAA to make orders it considers appropriate in the circumstances, subject to restrictions set out in the CCAA. It is not disputed that such authority includes the authority to approve a process to solicit and determine claims against a debtor company and its directors and officers.

[6] In this case, the claims process sought is necessary for the approval and implementation of the Plan, both for voting purposes and in order to determine the universe of claims subject to the releases contemplated by the Plan. There is no suggestion from the stakeholders appearing on this motion that the proposed claims process is not fair to the potential claimants in terms of notice or process. The timeline provided for the determination of the relevant claims is also expedient in as much as it is consistent with the timing of the proposed meetings of creditors dealt with below. In this regard, the Monitor has advised in the Monitor's Report that it believes

the proposed claims process provides sufficient and timely notification to allow creditors to submit proofs of claim or dispute notices, as applicable, prior to the claims bar date under the proposed order, being April 20, 2017, particularly in view of the fact that non-unionized employees and retirees will not need to file individual proofs of claim in most circumstances. Further, the Monitor will have a supervisory role to ensure that claimants are dealt with reasonably and fairly. In respect of the late-filed claims in item (4) above, the Monitor does not believe their inclusion in the claims process will materially prejudice the other creditors in view of the *de minimus* amount of these claims and the current status of the Plan.

[7] Based on the foregoing, including the support for the motion and the absence of any objections thereto as set out above, I am satisfied that the proposed supplementary claims process order should be approved.

The Meetings Order

[8] USSC seeks an order accepting the filing of the Plan; authorizing USSC to convene creditors meetings to vote on the Plan; approving the classification of creditors as set out in the Plan for the purposes of the meetings and voting on the Plan; approving the distribution of the notice of meeting and materials pertaining to the Plan; approving the procedures to be followed at the meetings; and setting May 9, 2017 as the date for the hearing of USSC's motion for an order of the Court sanctioning the Plan.

[9] The Plan is the outcome of an initial sales and restructuring/recapitalization process and a subsequent sale and investment solicitation process. These activities have been addressed fully in other endorsements of the Court, and are summarized in the affidavit of the chief restructuring officer of USSC, William Aziz, sworn March 10, 2017, and therefore need not be repeated here.

[10] There are two classes of "affected creditors" pursuant to the Plan:

(1) General unsecured creditors, which for this purpose do not include Ontario and USS, who would receive a cash distribution in respect of their claims which would be released, discharged and barred; and

(2) Creditors having claims for non-unionized pension benefits and OPEBs, which would be replaced by new non-unionized pension benefits and OPEBs, with these creditors' existing claims to be released, discharged and barred.

[11] USSC proposes that the meetings of these two classes of creditors be held on April 27, 2017.

[12] In determining whether the Court should approve the filing of the Plan under paragraph 3 of the initial order in these proceedings under the CCAA (the "Initial Order") and order the convening of a meeting of creditors to vote upon the Plan, the Court must be satisfied that the Plan is not doomed to failure. This standard is amply satisfied in the present circumstances, given the level of support for the motion and the absence of any objections as described above. The Court is not to determine the fairness and reasonableness of the Plan at this stage, such issues being reserved for the sanction hearing after the creditors meetings.

[13] Section 22 of the CCAA requires approval by the Court of the division of creditors into the classes contemplated by the Plan. The two classes of creditors contemplated by the Plan have been described above. For clarity, the Plan leaves the treatment of the claims of other creditors to be addressed pursuant to contractual arrangements to be negotiated between those creditors and USSC.

[14] I am satisfied that the creditors in each of the classes contemplated have the necessary commonality of interest required by s. 22(2) of the CCAA. The creditors in class (1) will receive a cash distribution in respect of their claims. The creditors in class (2) will not receive a cash distribution but will instead receive replacement benefits. Accordingly, the two classes of creditors receive different treatment under the Plan while each of the creditors within each class is an unsecured creditor who receives similar treatment under the Plan and would have similar remedies if the Plan is not accepted. I note as well that the Monitor supports the proposed classification of creditors as being appropriate based on the fact that the two classes have different interests and are treated differently under the Plan.

[15] Further, I am satisfied that it is appropriate that Representative Counsel act as the deemed proxy for the administrator for the non-unionized pension plans and for the current and former non-unionized employees having OPEB claims, given the active involvement of Representative Counsel in these proceedings to date on behalf of, and the commonality of interest of, the current and former non-unionized employees. I note as well that a procedure exists for individuals who have opted to represent themselves, and for individuals who have been represented by Representative Counsel but who choose to participate directly at the creditors meetings, to appoint an alternative proxy or to attend and vote in person at the creditors meetings.

[16] The other terms of the proposed meetings order regarding the notice of the meetings, the conduct of the meetings, and voting at the meetings do not otherwise raise any substantive issues of fairness and reasonableness.

[17] Based on the foregoing, the proposed meetings order is approved.

Amendment of the Plan Support Agreement

[18] USSC also seeks an order authorizing USSC to enter into:

(1) An agreement (the "PSA Amending Agreement") amending the "CCAA Acquisition and Plan Sponsor Agreement" dated December 9, 2016 between USSC, Bedrock and Bedrock Industries L.P. (the "PSA"); and

(2) An agreement (the "Support Amending Agreement") amending the "Support Agreement" made December 9, 2016 between USSC and Ontario.

[19] The Court has the authority under ss. 11 and 11.02(2) to approve a debtor company entering into an agreement to facilitate a restructuring. The Court has previously authorized the PSA and the Support Agreement pursuant to such powers.

[20] The PSA Amending Agreement and the Support Amending Agreement, among other things, amend the timetable for various milestones to reflect the timetable contemplated by the meetings order. They also amend the existing agreements to reflect the term sheets as finalized to date respecting various aspects of the Plan arrangements.

[21] I am satisfied that the PSA Amending Agreement and the Support Amending Agreement should be approved as necessary for, and as furthering the purposes of, the proposed restructuring of USSC pursuant to the Plan.

Extension of the Stay Period

[22] Lastly, USSC seeks an order extending the stay of proceedings under the Initial Order in these proceedings to May 31, 2017.

[23] Section 11.02(2) of the CCAA gives the Court the discretion to extend the stay of proceedings if the requirements of s. 11.02(3) are satisfied.

[24] In this case, USSC has established that it has acted, and is acting, in good faith and with due diligence to implement a plan of restructuring and compromise. The proposed stay extension provides USSC with the time required to allow the creditors to vote on the Plan at the creditors meetings and, if approved, to seek the Court's approval at the sanction hearing. It also grants USSC sufficient time to negotiate the necessary agreements and to finalize the necessary arrangements that are conditions to implementation of the Plan. The Monitor advises in the Monitor's Report that the revised cash flow forecast of USSC contemplates that USSC will have sufficient liquidity to continue to operate throughout the proposed stay extension period.

[25] Accordingly, I am satisfied that it is appropriate to approve the extension of the stay of proceedings under the Initial Order to May 31, 2017.

Wilton-Siegel, J.

Date: April 19, 2017

CITATION: Timminco Limited (Re), 2014 ONSC 3393
COURT FILE NO.: CV-12-9539-00CL
DATE: 2014-07-07

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jane Dietrich* and *Kate Stigler*, for the Board of Directors, except John Walsh

Kenneth D. Kraft, for Chubb Insurance Company of Canada

James C. Orr, for St. Clair Pennyfeather, Plaintiff in the Class Action

Maria Konyukhova, for Timminco Entities

Robert Staley, for John Walsh

Linc Rogers, for the Monitor

HEARD: July 22, 2013

SUPPLEMENTARY WRITTEN SUBMISSIONS RECEIVED MARCH 2014

ENDORSEMENT

Introduction

[1] On May 14, 2009, Kim Orr Barristers PC, counsel to the representative plaintiff Mr. St. Clair Pennyfeather ("Plaintiff's Counsel"), initiated the proposed class action (the "Class Action"), which names as defendants Timminco Limited ("Timminco"), a third party, Photon Consulting LLC, and certain of the directors and officers of Timminco, (the "Directors").

[2] The Class Action focusses on alleged public misrepresentations that Timminco possessed a proprietary metallurgical process that provided a significant cost advantage in manufacturing solar grade silicon for use in manufacturing solar cells.

[3] Mr. Pennyfeather alleges that the representations were first made in March 2008, after which the shares of Timminco gained rapidly in value to more than $18 per share by June 5,

2008. Subsequently, Mr. Pennyfeather alleges that as Timminco began to acknowledge problems with the alleged proprietary process, the share price fell to the point where the equity was described as "penny stock" prior to its delisting in January 2012.

[4] In the initial order, granted January 3, 2012 in the *Companies' Creditors Arrangement Act*., R.S.C. 1985, c. C-36, as amended (the "CCAA") proceedings, Timminco sought and obtained stays of all proceedings including the Class Action as against Timminco and the Directors (the "Initial Order").

[5] Timminco also obtained a Claims Procedure Order on June 15, 2012 (the "CPO"). Among other things, the CPO established a claims-bar date of July 23, 2012 for claims against the Directors. Mr. Pennyfeather did not file a proof of claim by this date.

[6] No CCAA plan has been put forward by Timminco and there is no intention to advance a CCAA plan.

[7] Mr. Pennyfeather moves to lift the stay to allow the Class Action to be dealt with on the merits against all named defendants and, if necessary, for an order amending the CPO to exclude the Class Action from the CPO or to allow the filing of a proof of claim relating to those claims.

[8] The Class Action seeks to access insurance moneys and potentially the assets of Directors.

[9] The respondents on this motion, (the Directors named in the Class Action), contend that the failure to file a claim under the CPO bars any claim against officers and directors or insurance proceeds.

[10] Neither Timminco nor the Monitor take any position on this motion.

[11] For the reasons that follow, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action.

The Stay and CPO

[12] The Initial Order contains the relevant stay provision (as extended in subsequent orders):

> 24. This Court Orders that during the Stay Period… no Proceeding may be commenced or continued against any former, current or future directors or officers of the Timminco Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Timminco Entities whereby the directors or officers are alleged under any law to be liable in their capacities as directors or officers for the payment or performance of such obligations, **until a compromise or arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this court or is refused by the creditors of the Timminco Entities or this Court.**

[emphasis added]

[13] In May and June 2012, The Court approved sales transactions comprising substantially all of the Timminco Entities' assets. In their June 7, 2012 Motion, the Timminco Entities sought an extension of the Stay Period to "give the Timminco Entities sufficient time to, among other things, close the transactions relating to the Successful Bid and carry out the Claims Procedure". The Timminco Entities sought court approval of a proposed claims procedure to "identify claims which may be entitled to distributions of potential proceeds of the … transactions…" The Timminco entities took the position that the Claims Procedure was "a fair and reasonable method of determining the potential distribution rights of creditors of the Timminco Entities".

[14] The mechanics of the CPO are as follows. Paragraph 2(h) of the CPO defines the Claims Bar Date as 5:00 p.m. on July 23, 2012. "D&O Claims" are defined in para. 2(f)(iii):

> Any existing or future right or claim of any person against one or more of the directors and/or officers of the Timminco Entity which arose or arises as a result of such directors or officers position, supervision, management or involvement as a director or officer of a Timminco Entity, whether such right, or the circumstances giving rise to it arose before or after the Initial Order up to and including this Claims Procedure whether enforceable in any civil, administrative, or criminal proceeding (each a "D&O Claim") (and collectively the "D&O Claims"), including any right:
>
> a. relating to any of the categories of obligations described in paragraph 9 of the Initial Order, whether accrued or falling due before or after the Initial Order, in respect of which a director or officer may be liable in his or her capacity as such;
>
> b. in respect of which a director or officer may be liable in his or her capacity as such concerning employee entitlements to wages or other debts for services rendered to the Timminco Entities or any one of them or for vacation pay, pension contributions, benefits or other amounts related to employment or pension plan rights or benefits or for taxes owing by the Timminco Entities or amounts which were required by law to be withheld by the Timminco Entities;
>
> c. in respect of which a director or officer may be liable in his or her capacity as such as a result of any act, omission or breach of duty; or
>
> d. that is or is related to a penalty, fine or claim for damages or costs.
>
> Provided however that in any case "Claim" shall not include an Excluded Claim.

[15] The CPO appears to bar a person who fails to file a D&O Claim by the Claims Bar Date from asserting or enforcing the claim:

> 19. This Court orders that any Person who does not file a proof of a D&O Claim in accordance with this order by the claims-bar date **or such other later date as may be**

> **ordered by the Court**, shall be forever barred from asserting or enforcing such D&O Claim against the directors and officers and the directors and officers shall not have any liability whatsoever in respect of such D&O Claim and such D&O Claim shall be extinguished without any further act or notification. [emphasis added]

Mr. Pennyfeather's Position

[16] Mr. Pennyfeather advances a number of arguments. Most significantly, he argues that it is not fair and reasonable to allow the defendants to bar and extinguish the Class Actions claims through the use of an interim and procedural court order. He submits that the respondents attempt to use the CCAA in a tactical and technical fashion to achieve a result unrelated to any legitimate aspect of either a restructuring or orderly liquidation. The operation of the fair and reasonable standard under the CCAA calls for the exercise of the Court's discretion to lift the stay and, if necessary, amend the CPO to either exclude the Class Action claims or permit submissions of a class proof of claim.

[17] In support of this argument, Mr. Pennyfeather adds that there is no evidence that any of the Directors who are defendants in the class action contributed anything to the CCAA process, and that the targeted insurance proceeds are not available to other creditors. Thus, he submits, a bar against pursuing these funds benefits only the insurance companies who are not stakeholders in the restructuring or liquidation.

[18] Mr. Pennyfeather advances a number of additional arguments. Because I am persuaded by this first submission, it is not necessary to discuss the additional arguments in great detail. However, I will give a brief summary of these additional arguments below.

[19] First, Mr. Pennyfeather submits, since the stay was ordered, he has attempted to have the stay lifted as it relates to the Class Action.

[20] Second, Mr. Pennyfeather submits that the CPO did not permit the filing of representative claims, unlike, for example, claims processed in *Labourers' Pension Fund of Canada and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078, 100 C.B.R. (5th) 30. Representative claims are generally not permitted under the CCAA and the solicitors for the representative plaintiff do not act for class members prior to certification (see: *Muscletech Research and Development Inc. (Re)* (2006), 25 C.B.R. (5th) 218 (Ont. S.C.)). Therefore, Mr. Pennyfeather submits that the omission in the order obtained by the Timminco entities, of the type of provision contained in the *Sino-Forest* Claims Order, precluded the action that they now assert should have been taken.

[21] Third, Mr. Pennyfeather responds to the significant argument made by the responding parties that the CPO bars the claim. He submits that the Class Action, which alleges, *inter alia*, misrepresentations and breaches of the *Securities Act*, R.S.O. 1990, c. S.5, is unaffected by the CPO. There are several reasons for this. First, the CPO excludes claims that cannot be compromised as a result of the provisions of s. 5.1(2) of the CCAA. Alternatively, even if Mr. Pennyfeather and other class members are not creditors pursuant to section 5.1(2), he submits that Parliament has clearly intended to exclude claims for misrepresentation by directors

regardless of who brought them. In addition, insofar as the Class Action seeks to recover insurance proceeds, the CPO did not, according to Mr. Pennyfeather, affect that claim.

[22] In summary, Mr. Pennyfeather's most significant argument is that the CCAA process should not be used in a tactical manner to achieve a result collateral to the proper purposes of the legislation. The rights of putative class members should be determined on the merits of the Class Action, which are considerable given the evidence. Further, the lifting of the stay is fair and reasonable in all of the circumstances.

Directors' Position

[23] Counsel to directors and officers named in the proposed class action, other than Mr. Walsh (the "Defendant Directors") submit there are three issues to be considered on the motion: (a) should the CPO be amended to grant Mr. Pennyfeather the authority to file a claim on behalf of the class members in the D&O Claims Procedure? (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, should the claims-bar date be extended to allow him the opportunity to file a late claim against the Defendant Directors? and (c) if Mr. Pennyfeather is permitted to file a late claim against the Defendant Directors, should the D&O stay be lifted to allow the proposed class action to proceed against the Defendant Directors?

[24] The Defendant Directors take the position that: (a) Mr. Pennyfeather does not have the requisite authority and/or right to file a claim on behalf of the class action members and the CPO and should not be amended to permit such; (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, the claims-bar date should not be extended to allow Mr. Pennyfeather to file a late claim; and (c) if Mr. Pennyfeather is permitted to file a late claim, the D&O stay should not be lifted to allow the proposed class action to proceed against the Defendant Directors.

[25] The Defendant Directors counter Mr. Pennyfeather's arguments with a number of points. They take the position that while they were holding office, they assisted with every aspect of the CCAA process, including (i) the sales process through which the Timminco Entities sold substantially all of their assets and obtained recoveries for the benefit of their creditors; and (ii) the establishment of the claims procedure, resigning only after the claims-bar date passed.

[26] The Defendant Directors also submit that Mr. Pennyfeather has been aware of, and participated in, the CCAA proceedings since the weeks following the granting of the Initial Order. They submit that at no time prior to this motion did Mr. Pennyfeather take any position on the claims procedures established to seek the authority to file a claim on behalf of the class members. They submit that, at this point, Mr. Pennyfeather is asking the court to exercise its discretion to (i) amend the CPO to grant him the authority to file a claim on behalf of the class members; (ii) extend the claims-bar date to allow him to file such claim; and (iii) lift the stay of proceedings. They submit that Mr. Pennyfeather asks this discretion be exercised to allow him to pursue a claim against the Defendant Directors which remains uncertified, is in part statute barred, and lacks merit.

[27] Counsel to the Defendant Directors submits that the D&O Claims Procedure was initiated for the purpose of determining, with finality, the claims against the directors and officers. They submit that the D&O Claims Procedure has at no time been contingent on, tied to, or dependent on the filing of a Plan of Arrangement by the Timminco Entities.

[28] Simply put, the Defendant Directors submit that the CPO sets a claims-bar date of July 23, 2012 for claims against Directors and Mr. Pennyfeather did not file any Proof of Claim against the Defendant Directors by the claims-bar date. Accordingly, they submit that the claims against the Defendant Directors contemplated by the Class Action are currently barred and extinguished by the CPO.

[29] The arguments put forward by Mr. Walsh are similar.

[30] Counsel to Mr. Walsh attempts to draw similarities between this case and *Sino-Forest*. Counsel submits this is a case where Mr. Pennyfeather intentionally refused to file a Proof of Claim in support of a securities misrepresentation claim against Timminco and its directors and officers.

[31] They further submit that Mr. Pennyfeather is asking for the Court to exercise its discretion in his favour to lift the stay of proceedings, in order to allow him to pursue a proceeding which has been largely, if not entirely neutered by the Court of Appeal (leave to appeal to the Supreme Court of Canada dismissed). They point out that just like in *Sino-Forest*, to lift the stay would be an exercise in futility where the Court commented that "there is no right to opt out of any CCAA process…by virtue of deciding, on their own volition, not to participate in the CCAA process", the objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

[32] Counsel to Mr. Walsh also takes the position that Mr. Pennyfeather's only argument is a strained effort to avoid the plain language of the CPO in an effort to say that his claim is an "excluded claim" and therefore a Proof of Claim was never required. Even if Mr. Pennyfeather was right, counsel to Mr. Walsh submits that Mr. Pennyfeather still would have been required to file a Proof of Claim, failing which his claim would have been barred. Under the CPO, proofs of such claims were still called for, even if they were not to be adjudicated.

[33] They note that Mr. Pennyfeather was aware of the CCAA proceeding and the Initial Order. As early as January 17, 2012, counsel to Mr. Pennyfeather contacted counsel for Timminco, asking for consent to lift the Stay.

[34] Counsel contends that the "excluded claim" language that Mr. Pennyfeather relies on is not found in the definition of D&O Claim. Under the terms of the CPO, the language is a carve-out from the larger definition of "claim", not the subset definition of D&O Claim. As a result, counsel submits that proofs of claim are still required for D&O Claims, regardless of whether they are excluded claims. In that way, the universe of D&O Claims would be known, even if excluded claims would ultimately not be part of a plan.

[35] Mr. Walsh also takes the position that Mr. Pennyfeather made an intentional decision not to file a claim. Mr. Walsh emphasizes that Mr. Pennyfeather had full notice of the motion for the CPO and chose not to oppose or appear on the motion. Further, at no time did Mr. Pennyfeather request the Monitor apply to court for directions with respect to the terms of the CPO.

[36] Mr. Walsh submits he is prejudiced by the continuation of the Class Action and he wants to get on with his life but is unable to do so while the claim is extant.

Law and Analysis

[37] For the purposes of this motion, I must decide whether the CPO bars Mr. Pennyfeather from proceeding with the Class Action and whether I should lift the stay of proceedings as it applies to the Class Action. For the reasons that follow, I conclude that the CPO should not serve as a bar to proceeding with the Class Action and that the stay should be lifted.

[38] As I explain below, the application of the claims bar order and lifting the stay are discretionary. This discretion should be exercised in light of the purposes of both claims-bar orders and stays under the CCAA. A claim bar order and a stay under the CCAA are intended to assist the debtor in the restructuring process, which may encompass asset realizations. At this point, Timminco's assets have been sold, distributions made to secured creditors, no CCAA plan has been put forward by Timminco, and there is no intention to advance a CCAA plan. It seems to me that neither the stay, nor the claims bar order continue to serve their functional purposes in these CCAA proceedings by barring the Class Action. In these circumstances, I fail to see why the stay and the claim bar order should be utilized to obstruct the plaintiff from proceeding with its Class Action.

The Purpose of Stay Orders and Claims-Bar Orders

[39] For the purposes of this motion, it is necessary to consider the objective of the CCAA stay order. The stay of proceedings restrains judicial and extra-judicial conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to focus and concentrate its efforts on negotiating of a compromise or arrangement: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. S.C.).

[40] Sections 2, 12 and 19 of the CCAA provide the definition of a "Claim" for the purposes of the CCAA and also provide guidance as to how claims are to be determined. Section 12 of the CCAA states

> 12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

The use of the word "may" in s. 12 indicates that fixing deadlines, which includes granting a claims bar order, is discretionary. Additionally, as noted above the CPO provided at para. 19 that a D&O Claim could be filed on "such other later date as may be ordered by the Court".

[41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

[42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".

[43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[44] Stakeholders in this context can also include directors and officers, as it is not uncommon for debtor applicants to propose a plan under the CCAA that compromises certain claims against directors and officers. In this context, the provisions of s. 5.1 of the CCAA must be respected.

[45] In the case of Timminco, there have been distributions to secured creditors which are not the subject of challenge. The Class Action claim is subordinate in ranking to the claims of the secured creditors and has no impact on the distributions made to secured creditors. Further, there is no CCAA plan. There will be no compromise of claims against directors and officers. I accept that at the outset of the CCAA proceedings there may very well have been an intention on the part of the debtor to formulate a CCAA plan and further, that plan may have contemplated the compromise of certain claims against directors and officers. However, these plans did not come to fruition. What we are left with is to determine the consequence of failing to file a timely claim in these circumstances.

[46] In the circumstances of this case, i.e., in the absence of a plan, the purpose of the claims bar procedure is questionable. Specifically, in this case, should the claims bar procedure be used to determine the Class Action?

[47] In my view, it is not the function of the court on this motion to determine the merits of Mr. Pennyfeather's claim. Rather, it is to determine whether or not the claims-bar order operates as a bar to Mr. Pennyfeather being able to put forth a claim. It does not act as such a bar.

[48] It seems to me that CCAA proceedings should not be used, in these circumstances, as a tool to bar Mr. Pennyfeather from proceeding with the Class Action claim. In the absence of a CCAA proceeding, Mr. Pennyfeather would be in position to move forward with the Class Action in the usual course. On a principled basis, a claims bar order in a CCAA proceeding,

where there will be no CCAA plan, should not be used in such a way as to defeat the claim of Mr. Pennyfeather. The determination of the claim should be made on the merits in the proper forum. In these circumstances, where there is no CCAA plan, the CCAA proceeding is, in my view, not the proper forum.

[49] Similar considerations apply to the Stay Order. With no prospect of a compromise or arrangement, and with the sales process completed, there is no need to maintain the status quo to allow the debtor to focus and concentrate its efforts on negotiating a compromise or arrangement. In this regard, the fact that neither Timminco nor the Monitor take a position on this motion or argue prejudice is instructive.

Applicability of Established Tests

[50] The lifting of a stay is discretionary. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of (a) the balance of convenience; (b) the relative prejudice to the parties; and (c) where relevant, the merits of the proposed action: *Canwest Global Communications Corp., Re*, 2011 ONSC 2215, 75 C.B.R. (5th) 156, at para. 27.

[51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay; (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[52] These are factors that have been considered by the courts on numerous occasions (see, for example, *Sino-Forest*; *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), *Blue Range Resource Corp. (Re)*, 2000 ABCA 285, 193 D.L.R. (4th) 314, leave to appeal to S.C.C. refused, [2000] SCCA No. 648; *Canadian Red Cross Society (Re)* (2000), 48 C.B.R. (5th) 41 (Ont. S.C.); and *Ivorylane Corp.* v. *Country Style Realty Ltd.*, [2004] O.J. No. 2662 (S.C.)).

[53] However, it should be noted that all of these cases involved a CCAA Plan that was considered by creditors.

[54] In the present circumstances, it seems to me there is an additional factor to take into account: there is no CCAA Plan.

[55] I have noted above that certain delay can be attributed to the CCAA proceedings and the impact of *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, at the Court of Appeal. That is not a full answer for the delay but a partial explanation.

[56] The prejudice experienced by a director not having a final resolution to the proposed Class Action has to be weighed as against the rights of the class action plaintiff to have this matter heard in court. To the extent that time constitutes a degree of prejudice to the defendants, it can be alleviated by requiring the parties to agree upon a timetable to have this matter addressed on a timely basis with case management.

[57] I have not addressed in great detail whether the CPO requires excluded claims to be filed. In my view, it is not necessary to embark on an analysis of this issue, nor have I embarked on a review of the merits. Rather, the principles of equity and fairness dictate that the class action plaintiff can move forward with the claim. The claim may face many hurdles. Some of these have been outlined in the factum submitted by counsel to Mr. Walsh. However, that does not necessarily mean that the class action plaintiff should be disentitled from proceeding.

[58] In the result, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action. The CPO is modified so as to allow Mr. Pennyfeather to file his claim.

Morawetz, R.S.J.

Date: July 7, 2014

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

COUNSEL: *Douglas J. Wray and Jesse B. Kugler*, counsel for the Applicant, Communications, Energy and Paperworkers Union of Canada ("CEP")
David Byers and Maria Konyukhova, counsel for the Monitor

PEPALL J.

REASONS FOR DECISION

Introduction

[1] The Communications, Energy and Paperworkers Union of Canada ("CEP") requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

[2] On October 6, 2009, the CMI Entities obtained an initial order pursuant to the *CCAA* staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

> **NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY**

> force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.
>
> 33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

[38] Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the *CCAA* in *White Birch Paper Holding Company*[14]. He stated that the fact that a collective agreement remains in force under a *CCAA* proceeding does not have the effect of "excluding the entire collective labour relations process from the application of the *CCAA*." [15] He went on to write that:

> It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.[16]

[39] In *Canwest Global Communications Corp.*[17], I wrote that section 33 of the *CCAA* "maintains the terms and obligations contained in the collective agreement but does not alter priorities or status."[18] In that case when dealing with the issue of immediate payment of severance payments, I wrote:

> There are certain provisions in the amendments that expressly mandate certain employee related payments. In those

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[14] 2010, Q.C.C.S. 2590.

[15] *Ibid*, at para. 31.

[16] *Ibid*, at para. 35.

[17] [2010] O.J. No. 2544.

[18] *Ibid*, at para. 32.

> instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.[19]

[40] I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the *CCAA* and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the *CCAA* or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the *Act*.

[41] Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

[42] CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the

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[19] *Ibid*, at para. 33.

following observations. Firstly, this argument was not advanced when the claims procedure order was granted. Secondly, CEP is not challenging the validity of any section of the *CCAA*. Thirdly, nothing in the statute or the claims procedure inhibits the ability to collectively bargain. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*[20], the Supreme Court of Canada stated:

> We conclude that section 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particularly statutory regime. …
>
> In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.[21]

[43] In my view, nothing in the claims procedure or the *CCAA* impacts the procedure known as collective bargaining.

Conclusion

[44] Under the circumstances, the request to lift the stay as requested by CEP is granted. Had it been necessary to do so, I would have dismissed the alternative relief requested.

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[20] *Supra*, note 3.

[21] *Ibid*, at at paras. 19 and 29.

Pepall J.

Released: April 7, 2011

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

REASONS FOR DECISION

Pepall J.

Released: April 7, 2011

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate *Appellants*

v.

Kevin Donovan and Toronto Star Newspapers Ltd. *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee *Interveners*

Succession de Bernard Sherman et fiduciaires de la succession et Succession de Honey Sherman et fiduciaires de la succession *Appelants*

c.

Kevin Donovan et Toronto Star Newspapers Ltd. *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association canadienne des libertés civiles, Centre d'action pour la sécurité du revenu, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, Réseau juridique VIH et Mental Health Legal Committee *Intervenants*

INDEXED AS: SHERMAN ESTATE *v.* DONOVAN

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public

RÉPERTORIÉ : SHERMAN (SUCCESSION) *c.* DONOVAN

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Principe de la publicité des débats judiciaires — Ordonnances de mise sous scellés — Limites

interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at

discrétionnaires à la publicité des débats judiciaires — Intérêt public important — Vie privée — Dignité — Sécurité physique — Décès inexpliqué d'un couple important suscitant une vive attention chez le public et amenant les fiduciaires des successions à demander la mise sous scellés des dossiers d'homologation — Les préoccupations en matière de vie privée et de sécurité physique soulevées par les fiduciaires des successions constituent-elles des intérêts publics importants qui sont à ce point sérieusement menacés qu'ils justifient le prononcé d'ordonnances de mise sous scellés?

Un couple important a été retrouvé mort dans sa résidence. Les décès apparemment inexpliqués ont suscité un vif intérêt chez le public. À ce jour, l'identité et le mobile des personnes responsables demeurent inconnus, et les décès font l'objet d'une enquête pour homicides. Les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense provoquée par les événements en sollicitant des ordonnances visant à mettre sous scellés les dossiers d'homologation. Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par un journaliste qui avait rédigé des articles sur le décès du couple, ainsi que par le journal pour lequel il écrivait. Le juge de première instance a fait placer sous scellés les dossiers d'homologation, concluant que les effets bénéfiques des ordonnances de mise sous scellés sur les intérêts en matière de vie privée et de sécurité physique l'emportaient sensiblement sur leurs effets préjudiciables. La Cour d'appel à l'unanimité a accueilli l'appel et levé les ordonnances de mise sous scellés. Elle a conclu que l'intérêt en matière de vie privée qui avait été soulevé ne comportait pas la qualité d'intérêt public, et qu'il n'y avait aucun élément de preuve d'un risque réel pour la sécurité physique de quiconque.

Arrêt : Le pourvoi est rejeté.

Les fiduciaires des successions n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important en vertu du test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires. Par conséquent, les ordonnances de mise sous scellés n'auraient pas dû être rendues. La publicité des débats judiciaires peut être source d'inconvénients et d'embarras, mais ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption de publicité des débats. Cela dit, la diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte

serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them.

à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important et un tribunal peut faire une exception au principe de la publicité des débats judiciaires si elle est sérieusement menacée. Dans la présente affaire, on ne peut pas dire que le risque pour la vie privée et pour la sécurité physique est suffisamment sérieux.

Les procédures judiciaires sont présumées accessibles au public. La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de la démocratie canadienne. On dit souvent de la liberté de la presse de rendre compte des procédures judiciaires qu'elle est indissociable du principe de publicité. Le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature. Les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire qui met en cause la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence —, de sorte que la forte présomption de publicité s'applique.

Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir la présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger d'autres intérêts publics lorsqu'ils entrent en jeu. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir ce qui suit : (1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et (3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps et s'étend désormais en général aux intérêts publics importants. L'étendue de cette catégorie transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer. Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants, les tribunaux doivent faire preuve de prudence

Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their

et avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires lorsqu'ils les constatent. Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné. En revanche, la conclusion sur la question de savoir si un risque sérieux menace cet intérêt est une conclusion factuelle qui est nécessairement prise eu égard au contexte. Le fait de constater un intérêt important et celui de constater le caractère sérieux du risque auquel cet intérêt est exposé sont donc en théorie des opérations séparées et qualitativement distinctes.

La vie privée a été défendue en tant que considération fondamentale d'une société libre et son importance pour le public a été reconnue dans divers contextes. Bien que la vie privée d'une personne soit d'une importance primordiale pour celle-ci, la protection de la vie privée est également dans l'intérêt de la société dans son ensemble. La vie privée ne saurait donc être rejetée en tant que simple préoccupation personnelle : il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public.

Cependant, si la vie privée est définie trop largement, la reconnaissance d'un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité. La vie privée des personnes sera menacée dans de nombreuses procédures judiciaires. De plus, la vie privée est une notion complexe et contextuelle, de sorte qu'il est difficile pour les tribunaux de la mesurer. La reconnaissance d'un intérêt important à l'égard de la notion générale de vie privée serait donc irréalisable.

Le caractère public de l'intérêt en matière de vie privée consiste plutôt à protéger les gens contre la menace à leur dignité. La dignité en ce sens comporte le droit de présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée; il s'agit de l'expression de la personnalité ou de l'identité unique d'une personne. Cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée, tout en permettant de maintenir la forte présomption de publicité des débats.

Se fondant sur la dignité, la vie privée sera sérieusement menacée dans des circonstances limitées. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte à la publicité des débats judiciaires. La dignité ne sera sérieusement menacée que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats sont suffisamment sensibles ou privés pour que l'on puisse démontrer que la publicité porte atteinte de

integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. Il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. La mesure dans laquelle les renseignements sont diffusés et font déjà partie du domaine public, ainsi que la probabilité que la diffusion se produise réellement, peuvent avoir une incidence sur le caractère sérieux du risque. Il incombe au demandeur de démontrer que la vie privée, considérée au regard de la dignité, est sérieusement menacée; cela permet d'établir un seuil, tributaire des faits, compatible avec la présomption de publicité des débats.

Il existe également un intérêt public important dans la protection des personnes contre un préjudice physique, mais une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour cet intérêt public important. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt public important est sérieusement menacé, car il est possible d'établir l'existence d'un préjudice objectivement discernable sur la base d'inférences logiques. Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. Le simple fait d'invoquer un préjudice physique grave n'est donc pas suffisant.

Il faut démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

Cases Cited

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R.

En l'espèce, le risque pour l'intérêt public important en matière de vie privée, défini au regard de la dignité, n'est pas sérieux. Les renseignements contenus dans les dossiers d'homologation ne révèlent rien de particulièrement privé ni de très sensible. Il n'a pas été démontré qu'ils toucheraient au cœur même des renseignements biographiques des personnes touchées d'une manière qui minerait leur contrôle sur l'expression de leur identité. De plus, le dossier ne démontre pas l'existence d'un risque sérieux de préjudice physique. Les fiduciaires des successions ont demandé au juge de première instance d'inférer non seulement le fait qu'un préjudice serait causé aux personnes touchées, mais également qu'il existe une ou des personnes qui souhaitent leur faire du mal. Déduire tout cela en se fondant sur les décès et sur les liens unissant les personnes touchées aux défunts ne constitue pas une inférence raisonnable, mais une conjecture.

Même si les fiduciaires des successions avaient réussi à démontrer l'existence d'un risque sérieux pour la vie privée, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Comme dernier obstacle, les fiduciaires des successions auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables.

Jurisprudence

Arrêt appliqué : *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522; **arrêts mentionnés :** *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332; *Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567; *Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113; *R. c. Oakes*,

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Chantelle Cseh and *Timothy Youdan*, for the appellants.

Iris Fischer and *Skye A. Sepp*, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jaqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

Robert S. Anderson, *Q.C.*, for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for the intervener the British Columbia Civil Liberties Association.

Khalid Janmohamed, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

Rochette, Sébastien, et Jean-François Côté. « Article 12 », dans Luc Chamberland, dir. *Le grand collectif : Code de procédure civile — Commentaires et annotations*, vol. 1, 5e éd., Montréal, Yvon Blais, 2020.

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Chantelle Cseh et *Timothy Youdan*, pour les appelants.

Iris Fischer et *Skye A. Sepp*, pour les intimés.

Peter Scrutton, pour l'intervenant le procureur général de l'Ontario.

Jaqueline Hughes, pour l'intervenant le procureur général de la Colombie-Britannique.

Ryder Gilliland, pour l'intervenante l'Association canadienne des libertés civiles.

Ewa Krajewska, pour l'intervenant le Centre d'action pour la sécurité du revenu.

Robert S. Anderson, *c.r.*, pour les intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, pour l'intervenante British Columbia Civil Liberties Association.

Khalid Janmohamed, pour les intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH et Mental Health Legal Committee.

The judgment of the Court was delivered by

KASIRER J. —

I. Overview

[1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

[2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of

Version française du jugement de la Cour rendu par

LE JUGE KASIRER —

I. Survol

[1] La Cour a toujours fermement reconnu que le principe de la publicité des débats judiciaires est protégé par le droit constitutionnel à la liberté d'expression, et qu'il représente à ce titre un élément fondamental d'une démocratie libérale. En règle générale, le public peut assister aux audiences et consulter les dossiers judiciaires, et les médias — les yeux et les oreilles du public — sont libres de poser des questions et de formuler des commentaires sur les activités des tribunaux, ce qui contribue à rendre le système judiciaire équitable et responsable.

[2] Par conséquent, il existe une forte présomption en faveur de la publicité des débats judiciaires. Il est entendu que cela permet un examen public minutieux qui peut être source d'inconvénients, voire d'embarras, pour ceux qui estiment que leur implication dans le système judiciaire entraîne une atteinte à leur vie privée. Cependant, ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption voulant que le public puisse assister aux audiences, et que les dossiers judiciaires puissent être consultés et leur contenu rapporté par une presse libre.

[3] Malgré cette présomption, il se présente des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires — par exemple, une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage —, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le fait que cette condition soit considérée comme un seuil élevé vise à assurer

affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent selon *Sierra Club*. La dignité en ce sens est une préoccupation connexe à la vie privée en général, mais elle est plus restreinte que celle-ci; elle transcende les intérêts individuels et, comme d'autres intérêts publics importants, c'est une question qui concerne la société en général. Un tribunal peut faire une exception au principe de la publicité des débats judiciaires, malgré la forte présomption en faveur de son application, si l'intérêt à protéger les aspects fondamentaux de la vie personnelle des individus qui se rapportent à leur dignité est sérieusement menacé par la diffusion de renseignements suffisamment sensibles. La question est de savoir non pas si les renseignements sont « personnels » pour la personne concernée, mais si, en raison de leur caractère très sensible, leur diffusion entraînerait une atteinte à sa dignité que la société dans son ensemble a intérêt à protéger.

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[34] Cet intérêt du public à l'égard de la vie privée axe à juste titre l'analyse sur l'incidence de la diffusion de renseignements personnels sensibles, plutôt que sur le simple fait de cette diffusion, intérêt qui est fréquemment menacé dans les procédures judiciaires et qui est nécessaire dans un système qui privilégie la publicité des débats judiciaires. Il s'agit d'un seuil élevé — plus élevé et plus précis que le vaste intérêt en matière de vie privée invoqué en l'espèce par les fiduciaires. Cet intérêt public ne sera sérieusement menacé que lorsque les renseignements en question portent atteinte à ce que l'on considère parfois comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this

[35] Je m'empresse de dire que la personne qui demande une ordonnance visant à faire exception au principe de la publicité des débats judiciaires ne peut se contenter d'affirmer sans fondement que cet intérêt du public à l'égard de la dignité est compromis, pas plus qu'elle ne le pourrait si c'était son intégrité physique qui était menacée. Selon *Sierra Club*, le demandeur doit démontrer, au vu des faits de l'affaire,

dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three

qu'il y a un « risque sérieux » pour cette dimension de sa vie privée liée à sa dignité. Pour l'application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l'on puisse dire qu'ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu'il existe un risque sérieux d'atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n'est pas rendue.

[36] En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtent pas ce caractère si sensible qu'on pourrait dire qu'ils touchent à l'identité fondamentale des personnes concernées; les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés met en jeu la dignité des personnes touchées. Je ne suis donc pas convaincu que l'atteinte à leur vie privée soulève un risque sérieux pour un intérêt public important, comme l'exige *Sierra Club*. De plus, comme je tenterai de l'expliquer, il n'y avait pas de risque sérieux que les personnes visées subissent un préjudice physique en raison de la levée des ordonnances de mise sous scellés. Par conséquent, la présente affaire n'est pas un cas où il convient de rendre des ordonnances de mise sous scellés ni aucune ordonnance limitant l'accès aux dossiers judiciaires en cause. Dans les circonstances, la question de l'admissibilité des nouveaux éléments de preuve du Toronto Star est théorique. Je suis d'avis de rejeter le pourvoi.

A. *Le test des limites discrétionnaires à la publicité des débats judiciaires*

[37] Les procédures judiciaires sont présumées accessibles au public (*MacIntyre*, p. 189; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11).

[38] Le test des limites discrétionnaires à la publicité présumée des débats judiciaires a été décrit comme une analyse en deux étapes, soit l'étape de la nécessité et celle de la proportionnalité de l'ordonnance proposée (*Sierra Club*, par. 53). Après un examen, cependant, je constate que ce test repose sur trois conditions préalables fondamentales dont une

prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*,

personne cherchant à faire établir une telle limite doit démontrer le respect. La reformulation du test autour de ces trois conditions préalables, sans en modifier l'essence, aide à clarifier le fardeau auquel doit satisfaire la personne qui sollicite une exception au principe de la publicité des débats judiciaires. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que :

(1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important;

(2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et

(3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires — par exemple une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage — pourra dûment être rendue. Ce test s'applique à toutes les limites discrétionnaires à la publicité des débats judiciaires, sous réserve uniquement d'une loi valide (*Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188, par. 7 et 22).

[39] Le pouvoir discrétionnaire est ainsi structuré et contrôlé de manière à protéger le principe de la publicité des débats judiciaires, qui est considéré comme étant constitutionnalisé sous le régime du droit à la liberté d'expression garanti par l'al. 2b) de la *Charte* (*Nouveau-Brunswick*, par. 23). Reposant sur la liberté d'expression, le principe de la publicité des débats judiciaires est l'un des fondements de la liberté de la presse étant donné que l'accès aux tribunaux est un élément essentiel de la collecte d'information. Notre Cour a souvent souligné l'importance de la publicité pour maintenir l'indépendance et l'impartialité des tribunaux, la confiance du

at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that

public à l'égard de leur travail et sa compréhension de celui-ci, et, au bout du compte, la légitimité du processus (voir, p. ex., *Vancouver Sun*, par. 23-26). Dans l'arrêt *Nouveau-Brunswick*, le juge La Forest a expliqué que la présomption en faveur de la publicité des débats judiciaires était devenue « [TRADUCTION] "l'une des caractéristiques d'une société démocratique" » (citant *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), p. 119), qui « fait en sorte que la justice est administrée de manière non arbitraire, conformément à la primauté du droit [. . .], situation qui favorise la confiance du public dans la probité du système judiciaire et la compréhension de l'administration de la justice » (par. 22). Le caractère fondamental de ce principe pour le système judiciaire sous-tend la forte présomption — quoique réfutable — en faveur de la tenue de procédures judiciaires publiques (par. 40; *Mentuck*, par. 39).

[40] Le test fait en sorte que les ordonnances discrétionnaires ne soient pas assujetties à une norme moins exigeante que la norme à laquelle seraient assujetties des dispositions législatives qui limiteraient la publicité des débats judiciaires (*Mentuck*, par. 27; *Sierra Club*, par. 45). À cette fin, la Cour a élaboré un cadre d'analyse par analogie avec le test de l'arrêt *Oakes*, que les tribunaux utilisent pour déterminer si une limite imposée par un texte de loi à un droit garanti par la *Charte* est raisonnable et si sa justification peut se démontrer dans le cadre d'une société libre et démocratique (*Sierra Club*, par. 40, citant *R. c. Oakes*, [1986] 1 R.C.S. 103; voir également *Dagenais*, p. 878; *Vancouver Sun*, par. 30).

[41] La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps. Dans l'arrêt *Dagenais*, le juge en chef Lamer a parlé de la nécessité d'un risque « que le procès soit inéquitable » (p. 878). Dans *Mentuck*, le juge Iacobucci a étendu cette condition à un risque « pour la bonne administration de la justice » (par. 32). Enfin, dans *Sierra Club*, le juge Iacobucci, s'exprimant encore une fois au nom de la Cour à l'unanimité, a reformulé le test de manière à englober tout risque sérieux pour un « intérêt important, y compris un intérêt commercial, dans le contexte d'un litige » (par. 53). Il a en

Court File No. CV-23-00700581-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	THURSDAY, THE 15TH DAY
	)	
JUSTICE OSBORNE	)	OF JUNE, 2023

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC., 13318184 CANADA INC., 11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER HOLDINGS CORP., PINEAPPLE EXPRESS DELIVERY INC., and HIFYRE INC

Applicants

AMENDED AND RESTATED INITIAL ORDER

THIS MOTION, made by Fire & Flower Holdings Corp., Fire & Flower Inc., 13318184 Canada Inc. ("**133 Canada**"), 11180703 Canada Inc., 10926671 Canada Ltd., Friendly Stranger Holdings Corp., Pineapple Express Delivery Inc., and Hifyre Inc. (collectively, the "**Applicants**"), for an order amending and restating the initial order of Justice Steele issued on June 5, 2023 (the "**Initial Filing Date**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at Courtroom 8-5, 330 University Avenue, Toronto, Ontario.

ON READING the affidavits of Stephane Trudel sworn June 5, 2023 (the "**Initial Trudel Affidavit**") and June 13, 2023 (the "**Second Trudel Affidavit**") and the Exhibits thereto, the pre-filing report of FTI Consulting Canada Inc. ("**FTI**"), in its capacity as proposed monitor of the Applicants dated June 5, 2023 (the "**Pre-Filing Report**"), the first report of FTI in its capacity as monitor (in such capacity, the "**Monitor**"), dated June 14, 2023 (the "**First Report**"), on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for 2707031 Ontario Inc. ("**ACT Investor**") and ACT Investor in its capacity as the DIP Lender (as defined below), counsel for Green Acre Capital LP, counsel for the Ontario Securities Commission, counsel for Turning Point Brands (Canada) Inc., counsel for Westwind

Developments Ltd., Daniels HR Corporation, and the Canada Life Assurance Company, and such other parties as listed on the Counsel Slip, with no one else appearing although duly served as appears from the affidavits of service of Philip Yang, as filed,

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used but not defined in this Order shall have the meanings given to them in the Initial Trudel Affidavit and the Second Trudel Affidavit.

APPLICATION

3. **THIS COURT ORDERS AND DECLARES** that each of the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ their employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize their existing central cash management system currently in place or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person or Persons (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after the Initial Filing Date, subject to compliance with the Updated Bi-Weekly Budget (as defined in the DIP Facility Agreement), as may be amended from time to time:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and employee and director expenses payable on or after the Initial Filing Date, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges; and

(c) with the consent of the Monitor, amounts owing for goods or services supplied to the Applicants prior to the Initial Filing Date up to a maximum amount of $250,000, if, in the opinion of the Applicants and the Monitor, the supplier is critical to the Restructuring (as hereinafter defined).

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled, subject to compliance with the Updated Bi-Weekly Budget, as may be amended from time to time, but not required to pay all reasonable expenses incurred by the

Applicants in carrying on their Business in the ordinary course after the Initial Filing Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of the Initial Filing Date.

9. **THIS COURT ORDERS** that the Applicants shall, in accordance with legal requirements, remit or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the Initial Filing Date or where such Sales Taxes were accrued or collected prior to the Initial Filing Date but not required to be remitted until on or after the Initial Filing Date; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

10. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and

realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the Initial Filing Date, monthly in equal payments on the first day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the Initial Filing Date shall also be paid.

11. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date;

(b) to grant no security interests, trust, liens, mortgages, charges or encumbrances upon or in respect of any of the Property; and

(c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

12. **THIS COURT ORDERS** that the Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:

(a) Permanently or temporarily cease, downsize or shut down any of their business or operations, and to dispose of redundant or non-material assets not exceeding $250,000 in any one transaction or $1,000,000 in the aggregate, provided that, with respect to real property leases, the Applicants may, subject to the provisions of the CCAA and paragraphs 10, 13, and 14 herein, vacate, abandon or quit the whole (but not part of) and may permanently (but not temporarily) cease, downsize, or shut down any of the Business or operations in respect of any leased premises;

(b) terminate the employment of such its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) pursue all restructuring options for the Applicants including, without limitation, all avenues of refinancing of their Business or Property, in whole or in part, subject to prior approval of this Court being obtained before any material refinancing;

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

13. **THIS COURT ORDERS** that the relevant Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) days notice to such landlord and any such secured creditors. If the Applicant disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

14. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

15. **THIS COURT ORDERS** that until and including September 1, 2023, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting their Business or their Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting their Business or their Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting their Business or their Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (c) prevent the filing of any registration to preserve or perfect a security interest, or (d) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to renew per the same terms and conditions, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, including but not limited to renewal rights in respect of existing insurance policies on the same terms, except with the written consent of the Applicants and the Monitor, or leave of this Court. For greater certainty, MC Cannabis Inc. and Alimentation Couche-Tard Inc. shall not discontinue, fail to honour, alter, interfere with, repudiate, terminate, or cease to perform any right, renewal right, contract, agreement, license or permit in favour of or held by 133 Canada.

CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses, email addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the Initial Filing Date are paid by the

Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the Initial Filing Date, nor shall any Person be under any obligation on or after the Initial Filing Date to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

KEY EMPLOYEE RETENTION PLAN

20. **THIS COURT ORDERS** that the Key Employee Retention Plan (the "**KERP**"), as described in the Second Trudel Affidavit, an unredacted copy of which is attached as the Confidential Appendix to the First Report, is hereby approved and the Applicants are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

21. **THIS COURT ORDERS** that payments made by the Applicants pursuant to this Order do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

22. **THIS COURT ORDERS** that the key employees referred to in the KERP (the "**Key Employees**") shall be entitled to the benefit of and are hereby granted a charge on the Property (the "**KERP Charge**"), which charge shall not exceed an aggregate amount of $1,160,000 to secure any payments to the Key Employees under the KERP. The KERP Charge shall have the priority as set out in paragraphs 43 and 45 herein.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

23. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the Initial Filing Date and that relates to any

obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

24. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

25. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,800,000, as security for the indemnity provided in paragraph 24 of this Order. The D&O Charge shall have the priority as set out in paragraphs 43 and 45 herein.

26. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 24 of this Order.

APPOINTMENT OF MONITOR

27. **THIS COURT ORDERS** that FTI Consulting Canada Inc. is, as of the Initial Filing Date, appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

28. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements and the Applicants' compliance with the Updated Bi-Weekly Budget;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination of financial and other information to the DIP Lender and its counsel on a periodic basis of financial and other information as agreed to between the Applicants and the DIP Lender, or as may reasonably be requested by the DIP Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis, or as may reasonably be requested by the DIP Lender;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(i) perform such other duties as are required by this Order or by this Court from time to time.

29. **THIS COURT ORDERS** that the Monitor shall not occupy or take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of (or be deemed to take Possession of), or exercise (or be deemed to have exercised) any rights of control over any activities in respect of, the Property, or any assets, properties or undertakings of any of the Applicants', or the direct or indirect subsidiaries or affiliates of any of the Applicants', including any joint venture entities, for which a permit or license is issued or required pursuant to any provision of any federal, provincial, or other law respecting, among other things, the manufacturing, possession, processing, and distribution of cannabis or cannabis products including, without limitation, under the *Cannabis Act*, S.C. 2018, c. 16, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, the *Excise Tax Act*, R.S.C. 1985, c. E. 15, *Excise Act*, 2001, S.C. 2002, c.22 the *British Columbia Cannabis Control and Licensing Act*, S.B.C. 2018, c. 29, the *British Columbia Cannabis Distribution Act*, S.B.C. 2018, c. 28, the *Ontario Cannabis Control Act*, 2017, S.O. 2017, c. 26, Sched. 1, *Ontario Cannabis Retail Corporation Act*, 2017, S.O. 2017, c. 26, the *Cannabis License Act*, 2018, S.O. 2018, c. 12, or other such applicable federal or provincial legislation (the "**Cannabis Legislation**"), and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof, and nothing in this Order shall be construed as resulting in the Monitor being an employer or successor employer within the meaning of any statute, regulation or rule of law or equity, for any purpose whatsoever.

30. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or take Possession of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act, 1999*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, the *Ontario Mining Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order, or anything done in

pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

31. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants and the DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

32. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

33. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements (including pre-filing fees and disbursements), in each case at their standard rates and charges, whether incurred prior to, on or subsequent to, the Initial Filing Date by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis. In addition, the Applicants are hereby authorized to pay to the Monitor and counsel to the Monitor, retainers in the amounts of $250,000 and $150,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

34. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

35. **THIS COURT ORDERS** that the Applicants' counsel, the Monitor and its counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $600,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor

and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority as set out in paragraphs 43 and 45 hereof.

DIP FACILITY

36. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under the DIP Facility from ACT Investor, in its capacity as the DIP Lender, in order to finance the Applicants' working capital requirements, and other general corporate purposes and capital expenditures.

37. **THIS COURT ORDERS** that such DIP Facility shall be on the terms and subject to the conditions set forth in the DIP Facility Loan Agreement between the Applicants and the DIP Lender dated as of June 5, 2023, appended as **Exhibit "N"** to the Initial Trudel Affidavit (the "**DIP Facility Agreement**").

38. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to borrow, in accordance with the terms and conditions of the DIP Facility Agreement, interim financing of up to $9,800,000 during the Stay Period.

39. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such agreements, instruments, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Facility Agreement, the "**Definitive Documents**"), as may be contemplated by the DIP Facility Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Definitive Documents (collectively, the "**DIP Obligations**") as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

40. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property as security for the DIP Obligations, which DIP Lender's Charge shall be in the aggregate amount of the DIP Obligations outstanding at any given time under the Definitive Documents. The DIP Lender's Charge shall not secure an obligation that exists before the Initial Filing Date. The DIP Lender's Charge shall have the priority as set out in paragraphs 43 and 45 hereof.

41. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender, upon three business days' notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Definitive Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lender to the Applicants against the obligations of the Applicants to the DIP Lender under the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

42. **THIS COURT ORDERS AND DECLARES** that ACT Investor and the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise under the CCAA, or any proposal filed under the BIA, with respect to any advances made by ACT Investor, as secured lender to the Applicants, and under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

43. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, the D&O Charge, and the KERP Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $600,000);

Second – DIP Lender's Charge (to the maximum amount of $9,800,000);

Third – D&O Charge (to the maximum amount of $2,800,000); and

Fourth – KERP Charge (to the maximum amount of $1,160,000).

44. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be effective as against the Property and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

45. **THIS COURT ORDERS** that the Charges shall constitute a charge on the Property and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

46. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the D&O Charge, the Administration Charge, and the KERP Charge, or further Order of this Court.

47. **THIS COURT ORDERS** that the D&O Charge, the Administration Charge, the KERP Charge, the Definitive Documents and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal, provincial or other statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Definitive Documents shall create or be deemed

to constitute a breach by the Applicants of any Agreement to which they are a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the DIP Facility Agreement, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order, the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

48. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

SERVICE AND NOTICE

49. **THIS COURT ORDERS** that the Monitor shall (a) without delay, publish in The Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (b) within five days after the date of this Order, (i) make this Order publicly available in the manner prescribed under the CCAA, (ii) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1000, and (iii) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the claims, names and addresses of any individual persons who are creditors available.

50. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05, this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further

orders that a Case Website shall be established in accordance with the Protocol with the following URL: www.cfcanada.fticonsulting.com/Fire&Flower

51. **THIS COURT ORDERS** that the Applicants, the Monitor and their respective counsel are at liberty to serve or distribute this Order, and other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicants' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

52. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

RELIEF FROM REPORTING OBLIGATIONS

53. **THIS COURT ORDERS** that the decision by the Applicants to incur no further expenses for the duration of the Stay Period in relation to any filings (including financial statements), disclosures, core or non-core documents, and press releases (collectively, the "**Securities Filings**") that may be required by any federal, provincial or other law respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange, including, without limitation, the *Securities Act* (Ontario), RSO 1990, c S.5 and comparable statutes enacted by other provinces of Canada, and the rules, regulations and policies of the Toronto Stock Exchange (collectively, the "**Securities Legislation**"), is hereby authorized, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of the Applicants failing to make any Securities Filings required by the Securities Provisions.

54. **THIS COURT ORDERS** that none of the directors, officers, employees, and other representatives of the Applicants nor the Monitor shall have any personal liability for any failure by the Applicants to make any Securities Filings required by the Securities Provisions during the Stay Period, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of such failure by the Applicants. For greater certainty, nothing in this order is intended to or shall encroach on the jurisdiction of any securities regulatory authorities (the "**Regulators**") in the matter of regulating the conduct of market participants and to issue cease trade orders if and when required pursuant to applicable securities law. Further, nothing in this Order shall constitute or be construed as an admission by the Regulators that the court has jurisdiction over matters that are within the exclusive jurisdiction of the Regulators under the Securities Legislation

SHAREHOLDERS' MEETING

55. **THIS COURT ORDERS** that the annual general meeting of shareholders of FFHC called for June 22, 2023 be postponed, and the time limit to call and hold such annual general meeting of shareholders is extended until after the conclusion of the CCAA Proceedings, subject to further Order of this Court.

SEALING PROVISION

56. **THIS COURT ORDERS** that the Confidential Appendix to the First Report is hereby sealed pending further Order of the Court and shall not form part of the public record.

GENERAL

57. **THIS COURT ORDERS** that the Applicants, the DIP Lender, or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of their powers and duties hereunder.

58. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

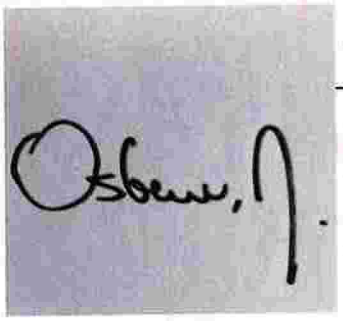
59. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give

effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

60. **THIS COURT ORDERS** that each of the Applicants and the Monitor shall be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

61. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

62. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of the Initial Filing Date.



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Toronto Superior Court of Justice / Cour supérieure de justice

Court File No./N° du dossier du greffe : CV-23-00700581-00CL

Court File No. CV-23-00700581-00CL

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC., 13318184 CANADA INC., 11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER HOLDINGS CORP., PINEAPPLE EXPRESS DELIVERY INC., and HIFYRE INC.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

AMENDED AND RESTATED INITIAL ORDER

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Lawyers for the Applicants

Court File No. CV-22-00688966-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 20TH
JUSTICE CAVANAGH	)	DAY OF OCTOBER, 2022

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 THE FLOWR CORPORATION, THE FLOWR CANADA HOLDINGS ULC, THE FLOWR GROUP (OKANAGAN) INC., AND TERRACE GLOBAL INC. (collectively, the "**Applicants**")

AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, and c. C-36, as amended (the "**CCAA**") was heard this day by Zoom video conference.

ON READING the affidavit of Darren Karasiuk sworn October 20, 2022 and the Exhibits thereto (the "**Karasiuk Affidavit**"), and the pre-filing report of Ernst & Young Inc., in its capacity as proposed monitor of the Applicants (the "**Monitor**"), dated October 20, 2022 (the "**Pre-Filing Report**"), and the First Report of the Monitor dated October 27, 2022 (the "**First Report**"), and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for Applicants, counsel for the Monitor and counsel for the DIP Lender, no one appearing for any other party although duly served as appears from the affidavits of service of Alina Stoica dated

October 20, 2022 and October 26, 2022, filed, and on reading the consent of Ernst & Young Inc. to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably

necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize the banking and cash management system currently in place as described in the Karasiuk Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that, subject to the terms of the Definitive Documents (as defined below), the Applicants shall be entitled but not required to pay the following expenses, whether incurred prior to or after the date of this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges;

(c) any taxes, duties, or other payments required under the Cannabis Legislation (as defined below); and

(d) with the consent of the Monitor, amounts owing for goods and/or services actually supplied to the Applicants prior to the date of this Order by third party suppliers if, in the opinion of the Applicants, such third party suppliers are critical to the Business and ongoing operations of the Applicants.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein and subject to the terms of the Definitive Documents, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

8. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, and (iii) income taxes;

(b) all goods and services, or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise

may be negotiated between the Applicants and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. **THIS COURT ORDERS** that the Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding $50,000 in any one transaction or $250,000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate; and

(c) pursue all avenues of sale or investment of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material sale or refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between such landlord and the Applicants, or by further Order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with Section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the

relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including January 13, 2023, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, lease, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor

shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $800,000, as security for the

indemnity provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 42 and 44 herein.

22. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

APPOINTMENT OF MONITOR

23. **THIS COURT ORDERS** that Ernst & Young Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their respective shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination to the DIP Lender and its counsel of financial and other information as agreed to between the Applicants and the DIP Lender which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis as agreed to by the DIP Lender;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) to the extent required, hold the right, title and interest of the Akanda Shares (as defined in the Karasiuk Affidavit) pursuant to the terms and conditions of a trust agreement to be negotiated and agreed to by the relevant parties; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

25. **THIS COURT ORDERS** that the Monitor shall not occupy or take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of (or be deemed to take Possession of), or exercise (or be deemed to have exercised) any rights of control over any activities in respect of, the Property, or any assets, properties or undertakings of any of the Applicants', or the direct or indirect subsidiaries or affiliates of any of the Applicants', including any joint venture entities, for which a permit or license is issued or required pursuant to any provision of any federal, provincial, or other law respecting, among other things, the manufacturing, possession, processing, and distribution of cannabis or cannabis products including, without limitation, under the *Cannabis Act*, S.C. 2018, c. 16, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, the *Excise Tax Act*, R.S.C. 1985, c. E. 15, *Excise Act, 2001,* S.C. 2002, c.22 the British Columbia *Cannabis Control and Licensing Act,* S.B.C. 2018, c. 29, the British Columbia *Cannabis Distribution Act*, S.B.C. 2018, c. 28, the Ontario *Cannabis Control Act, 2017,* S.O. 2017, c. 26, Sched. 1, *Ontario Cannabis Retail Corporation Act*, 2017, S.O. 2017, c. 26, the *Cannabis License Act, 2018*, S.O. 2018, c. 12, or other such applicable federal or provincial legislation (collectively, the "**Cannabis Legislation**") and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof, and nothing in this Order shall be

construed as resulting in the Monitor being an employer or successor employer within the meaning of any statute, regulation or rule of law or equity, for any purpose whatsoever.

26. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to take Possession of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act,* the *Fisheries Act*, the British Columbia *Environmental Management Act*, the British Columbia *Fish Protection Act* and regulations thereunder (collectively, the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

27. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants and the DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to

creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

28. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on, or subsequent to, the date of this Order by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis.

30. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

31. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, if any, and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order

in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 42 and 44 hereof.

DIP FINANCING

32. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from 1000343100 Ontario Inc. (the "**DIP Lender**") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $2,000,000 (plus interest, fees and expenses in accordance with the Commitment Letter (as defined below)) unless permitted by further Order of this Court.

33. **THIS COURT ORDERS THAT** such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicants and the DIP Lender dated as of October 20, 2022 (the "**Commitment Letter**"), filed.

34. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, with the Commitment Letter, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

35. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property, which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 42 and 44 hereof.

36. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender, upon five (5) business days' written notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Commitment Letter, Definitive Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lender to the Applicants against the obligations of the Applicants to the DIP Lender under the Commitment Letter, the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

37. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

38. **THIS COURT ORDERS** that nothing herein contained shall require or deem the DIP Lender to take Possession of, or exercise any rights of control over any activities in respect of, any of the Property or the property of any direct or indirect subsidiaries or affiliates of any of the Applicants, including any joint venture entities, that is or may be: (i) subject to any Cannabis Legislation; or (ii) environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any Environmental Legislation.

39. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the DIP Lender under this Order, any other Order of the Court (whether made pursuant to these proceedings or otherwise), or at law, the DIP Lender shall incur no liability or obligation as a result of carrying out the provisions of this Order, including under any Cannabis Legislation, save and except for any gross negligence or willful misconduct on its part.

APPROVAL OF KEY EMPLOYEE RETENTION PLAN

40. **THIS COURT ORDERS** that the Key Employee Retention Plan described in the Karasiuk Affidavit (the "**KERP**") with the confidential details being contained in Confidential

Appendix "•" to the First Report, is hereby approved and the Applicants are authorized and directed to make payments in accordance with the terms thereof.

41. **THIS COURT ORDERS** that each of the beneficiaries of the KERP shall be entitled to the benefit of and are hereby granted a charge on the Property (the "**KERP Charge**"), which KERP Charge shall not exceed an aggregate amount of $800,000, to secure the amounts payable under the KERP pursuant to paragraph 40 hereof. The KERP Charge shall have the priority set out in paragraphs 42 and 44 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

42. **THIS COURT ORDERS** that the priorities of the Directors' Charge, the Administration Charge, the DIP Lender's Charge and the KERP Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – DIP Lender's Charge;

Third – Directors' Charge (to the maximum amount of $800,000); and

Fourth – KERP Charge (to the maximum aggregate amount of $800,000).

43. **THIS COURT ORDERS** that the filing, registration or perfection of the Directors' Charge, the Administration Charge, the DIP Lender's Charge or the KERP Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

44. **THIS COURT ORDERS** that each of the Directors' Charge, the Administration Charge, the DIP Lender's Charge and the KERP Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

45. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Directors' Charge, the Administration Charge and the KERP Charge, or further Order of this Court.

46. **THIS COURT ORDERS** that the Directors' Charge, the Administration Charge, the KERP Charge, the Commitment Letter, the Definitive Documents and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or

other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Commitment Letter or the Definitive Documents shall create or be deemed to constitute a breach by any of the Applicants of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order, the Commitment Letter or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

47. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

RELIEF FROM REPORTING OBLIGATIONS

48. **THIS COURT ORDERS** that none of the directors, officers, employees, or other representatives of the Applicants, nor the Monitor (and their respective directors, officers, employees or representatives) shall have any personal liability for the Applicants' failure to file annual information forms, annual and quarterly management discussion and analysis, annual and quarterly financial statements (including related audits, reports, and certifications) for the Stay

Period, which period may be extended pursuant to further Order of the Court. Notwithstanding the foregoing, the Applicants shall continue to advise the appropriate regulators of material updates in this proceeding.

49. **THIS COURT ORDERS** that the decision by the Applicants to incur no further expenses in relation to any filings (including financial statements), disclosures, core or non-core documents, restatements, amendments to existing filings, press releases or any other actions (collectively, the "**Securities Filings**") that may be required by any federal, provincial or other law respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange, including, without limitation, the *Securities Act (Ontario)*, RSO 1990, c S.5 and comparable statutes enacted by other provinces of Canada, the CSE Policies 1-10 and other rules, regulations and policies of the Canadian Securities Exchange (collectively, the "**Securities Provisions**"), is hereby authorized, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of the Applicants failing to make any Securities Filings required by the Securities Provisions.

50. **THIS COURT ORDERS** that none of the directors, officers, employees, and other representatives of the Applicants nor the Monitor shall have any personal liability for any failure by the Applicants to make any Securities Filings required by the Securities Provisions.

SERVICE AND NOTICE

51. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in Globe & Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five business days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every

known creditor who has a claim against any of the Applicants of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

52. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/commercial/ shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: https://ey.com/ca/flowr.

53. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the respective Applicant and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

SEALING ORDER

54. **THIS COURT ORDERS** that Confidential Appendix "B" to the First Report shall be and and is hereby sealed, kept confidential, and shall not form part of the public record.

GENERAL

55. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

56. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

57. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or elsewhere, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

58. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the

terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

59. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

60. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

61. **THIS COURT ORDERS** that this Order is effective from the date that it is made and is enforceable without any need for entry and filing.

Digitally signed by
Mr. Justice
Cavanagh

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 THE FLOWR CORPORATION, THE FLOWR CANADA HOLDINGS ULC, THE FLOWR GROUP (OKANAGAN) INC., AND TERRACE GLOBAL INC. (collectively, the "**Applicants**")

Court File No.: CV-22-00688966-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER

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Lawyers for the Applicants

Court File No. CV-23-00693758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	MONDAY, THE 30TH
	)	
JUSTICE OSBORNE	)	DAY OF JANUARY, 2023

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 **ORIGINAL TRADERS ENERGY LTD. AND 2496750 ONTARIO INC.** (each, an "**Applicant**" and collectively, the "**Applicants**")

INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day by judicial videoconference via Zoom in Toronto, Ontario.

ON READING the affidavit of Scott Hill sworn January 27, 2023 and the Exhibits thereto (the "**Hill Affidavit**"), the second affidavit of Scott Hill sworn January 27, 2023 and the Exhibits thereto (the "**Second Hill Affidavit**"), the pre-filing report of the proposed monitor, KPMG Inc. ("**KPMG**") dated January 27, 2023 (the "**Pre-Filing Report**"), and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants, OTE Logistics LP and Original Traders Energy LP (with OTE Logistics LP, the "**Partnerships**" and collectively with the Applicants, the "**OTE Group**"), counsel for Royal Bank of Canada ("**RBC**") and such other counsel who were present, and on reading the consent of KPMG to act as the monitor (the "**Monitor**"),

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. THIS COURT ORDERS that capitalized terms used within this Order shall have the meanings ascribed to them in the Hill Affidavit or the Pre-Filing Report, as applicable, if they are not otherwise defined herein.

APPLICATION

3. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies. Although not Applicants, the Partnerships shall enjoy the benefits of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

4. THIS COURT ORDERS that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**") between, *inter alia*, one or more of the OTE Group.

POSSESSION OF PROPERTY AND OPERATIONS

5. THIS COURT ORDERS that the OTE Group shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the OTE Group shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The OTE Group are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. THIS COURT ORDERS that the OTE Group shall be entitled to continue to utilize the central cash management system currently in place as described in the Hill Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the OTE Group of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the OTE Group, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any future Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. THIS COURT ORDERS that the OTE Group shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any Assistants retained or employed by the OTE Group in respect of these proceedings, at their standard rates and charges;

(c) with the consent of the Monitor and the OTE Group, amounts owing for goods or services actually supplied to any of the OTE Group prior to the date of this Order by third party suppliers, up to a maximum aggregate amount of $6,375,000, if such third party is critical to the Business and ongoing operations of the OTE Group; and

(d) amounts owing to the Ministry of Finance relating to an agreement reached with the Ministry of Finance on January 26, 2023 regarding the extension of certain fuel and gas tax licenses.

8. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the OTE Group shall be entitled but not required to pay all reasonable expenses incurred by the OTE Group in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

(b) any payments required by RBC under the existing credit facilities extended by RBC to certain of the OTE Group; and

(c) payment for goods or services actually supplied to the OTE Group following the date of this Order.

9. THIS COURT ORDERS that the OTE Group shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the OTE Group in connection with the sale of goods and services by the OTE Group, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any

nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the OTE Group.

10. THIS COURT ORDERS that until a real property lease is disclaimed in accordance with the CCAA, the OTE Group shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the OTE Group and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. THIS COURT ORDERS that, except as specifically permitted herein, the OTE Group are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the OTE Group to any of its creditors as of this date, save and except for RBC; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

CARVE-OUT

12. THIS COURT ORDERS that RBC shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA.

RESTRUCTURING

13. THIS COURT ORDERS that the OTE Group shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the OTE Group to proceed with an orderly restructuring of the Business (the "**Restructuring**").

14. THIS COURT ORDERS that the OTE Group shall provide each of the relevant landlords with notice of the OTE Group's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the OTE Group's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the OTE Group, or by further Order of this Court upon application by the OTE Group on at least two (2) days notice to such landlord and any such secured creditors. If the OTE Group disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the OTE Group's claim to the fixtures in dispute.

15. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the OTE Group and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the OTE Group in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE OTE GROUP OR THE PROPERTY

16. THIS COURT ORDERS that until and including February 9, 2023, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court, tribunal, agency or other legal or, subject to paragraph 19, regulatory body (each, a "**Proceeding**") shall be commenced or continued against or in respect of the OTE Group or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the prior written consent of the OTE Group and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the OTE Group or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

17. THIS COURT ORDERS that the Stay Period does not apply to the rights and remedies of RBC as it pertains to security provided by the OTE Group in favour of RBC.

NO EXERCISE OF RIGHTS OR REMEDIES

18. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, regulatory body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), other than RBC, against or in respect of the OTE Group or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the OTE Group and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the OTE Group to carry on any business which the OTE Group is not lawfully entitled to carry on, (ii) subject to paragraph 19, affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

19. THIS COURT ORDERS that notwithstanding Section 11.1 of the CCAA, all rights and remedies of provincial and federal regulators and/or border authorities that have authority with respect to the importation and exportation of fuel, petroleum, diesel and/or gasoline against or in respect of the OTE Group or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended during the

Stay Period except with the written consent of the OTE Group and the Monitor, or leave of this Court on notice to the Service List, such that no licenses held by any of the OTE Group may be revoked or expire during the Stay Period and same are further extended during the course of these CCAA proceedings.

NO INTERFERENCE WITH RIGHTS

20. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the OTE Group, except with the written consent of the OTE Group and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

21. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the OTE Group or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the OTE Group, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the OTE Group, and that the OTE Group shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the OTE Group in accordance with normal payment practices of the OTE Group or such other practices as may be agreed upon by the supplier or service provider and each of the OTE Group and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

22. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-

advance any monies or otherwise extend any credit to the OTE Group. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

23. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the OTE Group with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the OTE Group whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the OTE Group, if one is filed, is sanctioned by this Court or is refused by the creditors of the OTE Group or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

24. THIS COURT ORDERS that the OTE Group shall jointly and severally indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the OTE Group after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

25. THIS COURT ORDERS that the directors and officers of the OTE Group shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of **$250,000**, as security for the indemnity provided in paragraph 24 of this Order. The Directors' Charge shall have the priority set out in paragraphs 36 and 38 herein.

26. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the OTE Group's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 24 of this Order.

APPOINTMENT OF MONITOR

27. THIS COURT ORDERS that KPMG is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the OTE Group with the powers and obligations set out in the CCAA or set forth herein and that the OTE Group and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the OTE Group pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

28. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the OTE Group's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise the OTE Group in its development of the Plan and any amendments to the Plan;

(d) assist the OTE Group, to the extent required by the OTE Group, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the OTE Group, to the extent that is necessary to adequately assess the OTE Group's business and financial affairs or to perform its duties arising under this Order;

(f) compel the production, from time to time, from any Person having possession, custody or control of any books, records, accountings, documents, correspondences or papers, electronically stored or otherwise, relating to the OTE Group (the "**Requested Information**");

(g) require any Requested Information to be delivered within thirty (30) days of the Monitor's request or such a longer time period as the Monitor may agree to in its discretion;

(h) conduct investigations from time to time, including examinations under oath of any Person reasonably thought to have knowledge relating to the Requested Information;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

29. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

30. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

31. THIS COURT ORDERS that the Monitor shall provide any creditor of the OTE Group with information provided by the OTE Group in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the OTE Group is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the OTE Group may agree.

32. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

33. THIS COURT ORDERS that the Monitor, counsel to the Monitor and counsel to the OTE Group shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the OTE Group as part of the costs of these proceedings, whether incurred prior to, on, or subsequent to the date of this Order, by the OTE Group as part of the costs of these proceedings. The OTE Group is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the OTE Group on a weekly basis and, in addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor and counsel to the Applicant, retainers in the approximate amount of **$950,000** to be held by them as security for payment of their respective fees and disbursements outstanding for certain pre- and post-filing costs.

34. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

ADMINISTRATION CHARGE

35. THIS COURT ORDERS that the Monitor, counsel to the Monitor, and the OTE Group's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of **$500,000**, as

security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 36 and 38 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

36. THIS COURT ORDERS that the priorities of the existing security held by RBC (the "**RBC Security**"), the Directors' Charge and the Administration Charge, as among them, shall be as follows:

First – RBC Security;

Second – Administration Charge; and

Third – Directors' Charge.

37. THIS COURT ORDERS that the filing, registration or perfection of the Directors' Charge, the Administration Charge or the RBC Security (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

38. THIS COURT ORDERS that each of the Directors' Charge, the Administration Charge and the RBC Security (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

39. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the OTE Group shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the RBC Security, unless the OTE Group also obtains the prior written

consent of the Monitor and the beneficiaries of the Directors' Charge, the RBC Security and the Administration Charge, or further Order of this Court.

40. THIS COURT ORDERS that the Directors' Charge, the Administration Charge and the RBC Security shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the OTE Group, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the OTE Group of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the OTE Group entering into the creation of the Charges; and

(c) the payments made by the OTE Group pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

41. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the OTE Group's interest in such real property leases.

SERVICE AND NOTICE

42. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in the Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the OTE Group of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

43. THIS COURT ORDERS that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the Monitor's website as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

44. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<https://home.kpmg/ca/en/home/services/advisory/deal-advisory/creditorlinks/original-traders-energy-group.html>.

45. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the OTE Group and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal

delivery or facsimile transmission to the OTE Group's creditors or other interested parties at their respective addresses as last shown on the records of the OTE Group and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

46. THIS COURT ORDERS that the OTE Group or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

47. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the OTE Group, the Business or the Property.

48. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the OTE Group, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the OTE Group and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the OTE Group and the Monitor and their respective agents in carrying out the terms of this Order.

49. THIS COURT ORDERS that each of the OTE Group and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

50. THIS COURT ORDERS that any interested party (including the OTE Group and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days

notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

51. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

52. THIS COURT ORDERS that this Order is effective from today's date and is enforceable without the need for entry or filing.

SEALING RELIEF

53. THIS COURT ORDERS that the Second Hill Affidavit shall be and is hereby sealed, kept confidential, and shall not form part of the public record until the earlier of (a) the vacating of the sealing order appended as Exhibit B to the Second Hill Affidavit (the "**Foreign Sealing Order**"), without being replaced by another sealing order granted by a court of a foreign jurisdiction, (b) the vacating of any sealing order that may granted by a court of a foreign jurisdiction to replace the Foreign Sealing Order, or (c) further Order of this Court.

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OSBORNE, J.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED
AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ORIGINAL TRADERS ENERGY LTD. AND 2496750 ONTARIO INC.

Court File No. CV-23-00693758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

INITIAL ORDER

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Lawyers for the OTE Group

Court File No. CV-24-00717664-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	THURSDAY, THE 11TH
	)	
JUSTICE CAVANAGH	)	DAY OF APRIL, 2024

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 HERITAGE CANNABIS HOLDINGS CORP., 1005477 B.C. LTD., HERITAGE CANNABIS WEST CORPORATION, MAINSTRAIN MARKET LTD., HERITAGE CANNABIS EAST CORPORATION, PUREFARMA SOLUTIONS INC., 333 JARVIS REALTY INC., 5450 REALTY INC., HERITAGE CANNABIS EXCHANGE CORP. and PREMIUM 5 LTD.

(collectively, the "**Applicants**")

AMENDED AND RESTATED INITIAL ORDER
(amending Initial Order Dated April 2, 2024)

THIS MOTION, made by the Applicants, for an order amending and restating the initial order of Justice Cavanagh issued on April 2, 2024 (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day by Zoom videoconference.

ON READING the affidavit of David Schwede sworn April 2, 2024 and the Exhibits thereto (the "**Initial Affidavit**"), the affidavit of David Schwede sworn April 9, 2024 and the Exhibits thereto (the "**Second Affidavit**"), the pre-filing report of KPMG Inc. ("**KPMG**"), in its capacity as proposed monitor of the Applicants dated April 2, 2024 (the "**Pre-Filing Report**"), and the First Report of KPMG as Court-appointed monitor of the Applicants (in such capacity, the "**Monitor**") to be filed (the "**First Report**"), and on hearing the submissions of counsel for the Applicants and the additional parties listed in Schedule "A" hereto (collectively, the "**Non-**

Applicant Stay Parties" and together with the Applicants, the "**Heritage Entities**"), counsel for the Monitor, counsel for BJK Holdings Ltd. ("**BJK**"), the Applicants' senior secured creditor and the debtor-in-possession lender (in such capacity, the "**DIP Lender**"), and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Lynda Christodoulou sworn April 10, 2024,

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that each of the Applicants is a company to which the CCAA applies. Although not Applicants, the Non-Applicant Stay Parties shall enjoy the benefits of the protections and authorizations provided under the terms of this Order.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that each of the Applicants shall have the authority to file and may, subject to further Order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their respective current and future assets, licenses, authorizations, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants

as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Heritage Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the Initial Affidavit or, with the consent of the Monitor and the DIP Lender, replace it with another substantially similar central cash management system (the "**Cash Management System**"), and that any present or future bank or credit union providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Heritage Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Heritage Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that the Applicants, subject to compliance with the Definitive Documents (as defined below), shall be entitled but not required to pay the following expenses whether incurred prior to, on, or after the date of this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and employee expenses (including, without limitation, in respect of expenses charged by employees to corporate credit cards) payable prior to, on, or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, and all other payroll and benefits processing expenses;

(b) with the consent of the Monitor and the DIP Lender, amounts owing for goods and services actually supplied to the Applicants prior to the date of this Order by third party suppliers, up to a maximum aggregate amount of $1,500,000, if such third party is critical to the Business and ongoing operations of the Applicants; and

(c) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, and subject to the Definitive Documents (as defined below), the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course on, or after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants on or following the date of this Order.

8. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance; (ii) Canada Pension Plan; and (iii) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order;

(c) any taxes, duties or other payments required under the Cannabis Legislation (as defined below) (collectively, the "**Cannabis Taxes**"), but only where such Cannabis Taxes are accrued or collected after the date of this Order; and

(d) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the applicable Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, monthly on the first day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. **THIS COURT ORDERS** that each of the Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined below), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding $250,000 in any one transaction or $1,000,0000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate; and

(c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any materials refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.

12. **THIS COURT ORDERS** that the applicable Applicant shall provide each relevant landlord with notice of such Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes such Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the applicable Applicant, or by further Order of this Court upon application by the applicable Applicant on at least two (2) days notice to such landlord and any such secured creditors. If any Applicant disclaims a lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Subsection 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to such Applicant's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the applicable Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the applicable Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE HERITAGE ENTITIES OR THEIR RESPECTIVE PROPERTY

14. **THIS COURT ORDERS** that until and including June 30, 2024, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (including, without limitation, no garnishment, requirement to pay, enhanced requirement to pay or demand on a third party notice) (each, a "**Proceeding**") shall be commenced or continued against or in respect of any Heritage Entity or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the Heritage Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any Heritage Entity or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court or the written consent of the Heritage Entities and the Monitor.

NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies (including, without limitation, no garnishment, requirement to pay, enhanced requirement to pay or demand on a third party notice) of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of any Heritage Entity or the Monitor, or their respective representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Heritage Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower any Heritage Entity to carry on any business which such Heritage Entity is not lawfully entitled to carry on; (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (iii) prevent the filing of any registration to preserve or perfect a security interest; or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. **THIS COURT ORDERS** that during the Stay Period, no Person shall accelerate, suspend, discontinue, fail to honour or renew, alter, interfere with, repudiate, rescind, terminate or cease to perform any right, renewal right, contract, agreement, lease, licence, authorization or permit in

favour of or held by any Heritage Entity, except with the written consent of the Heritage Entities and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements or arrangements with a Heritage Entity or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, security services, payroll services, insurance, transportation services, utility or other services to the Business or any Heritage Entity, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Heritage Entities, and that the Heritage Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Heritage Entities in accordance with normal payment practices of the Heritage Entities or such other practices as may be agreed upon by the supplier or service provider and the applicable Heritage Entity and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to a Heritage Entity. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of any Heritage Entity with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations

of a Heritage Entity whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as a director or officer of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of such director's or officer's gross negligence or wilful misconduct.

21. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $1,900,000, unless permitted by further Order of this Court, as security for the indemnity provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 39 and 41 herein.

22. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary: (a) no insurer or indemnitor shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any director's and officer's insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

APPOINTMENT OF MONITOR

23. **THIS COURT ORDERS** that KPMG is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Heritage Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Heritage Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor

with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements and the Applicants' compliance with the Cash Flow Projections (as defined in the DIP Term Sheet), including the management and deployment/use of any funds advanced by the DIP Lender to the Applicants under the DIP Term Sheet;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Lender and its counsel on a weekly basis of financial and other information as agreed to between the Applicants and the DIP Lender which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by the DIP Lender;

(e) advise the Applicants in the development of any Plan and any amendments to any Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on any Plan;

(g) assist the Applicants in communications with their stakeholders, including creditors and governmental authorities;

(h) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Heritage

Entities, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

25. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property, nor be deemed to take possession of the Property, pursuant to any provision of any federal, provincial or other law respecting, among other things, the manufacturing, possession, processing and distribution of cannabis or cannabis products including, without limitation, under the *Cannabis Act* S.C. 2018, c. 16, as amended, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, as amended, the *Excise Act, 2001*, S.C. 2002, c. 22, as amended, the Ontario *Cannabis Licence Act*, S.O. 2018, c. 12, Sched. 2, as amended, the Ontario *Cannabis Control Act*, S.O. 2017, c. 26, Sched. 1, as amended, the *Ontario Cannabis Retail Corporation Act*, 2017, S.O. 2017, c. 26, as amended, the British Columbia *Cannabis Control and Licensing Act*, S.B.C. 2018, c. 29, as amended, the British Columbia *Cannabis Distribution Act*, S.B.C. 2018, c. 28, as amended, the Alberta *Gaming, Liquor and Cannabis Act*, R.S.A. 2000, c. G-1, as amended, the Alberta *Gaming, Liquor and Cannabis Regulation,* Alta. Reg. 143/996, as amended, *The Cannabis Control (Saskatchewan) Act*, S.S. 2018, c. C-2.111, as amended, the Saskatchewan *Cannabis Control (Saskatchewan) Regulations,* R.R.S. c. C-2.111 Reg. 1, the Manitoba *The Liquor, Gaming and Cannabis Control Act*, C.C.S.M. c. L153, as amended, the Manitoba *Cannabis Regulation*, M.R. 120/2018, as amended, the Newfoundland and Labrador *Cannabis Control Act*, S.N.L. 2018, c. C-4.1, as amended, the Newfoundland and Labrador *Cannabis Control Regulations*, NLR. Reg. 93/18, as amended, the Newfoundland and Labrador *Cannabis Licensing and Operations Regulations*, NLR. Reg. 94/18, as amended, the Nova Scotia *Cannabis Control Act*, S.N.S. 2018, c 3, as amended, the Nova Scotia *Cannabis Retail Regulations*, NS. Reg. 203/2019, the Prince Edward Island *Cannabis Control Act*, R.S.P.E.I. 1998, c. C-1.2, as amended, the Prince Edward Island *Cannabis Control Regulations*, PEI. Reg. EC575/18, as amended, the New Brunswick *Cannabis Control Act*, S.N.B. 2018, c. 2, the Yukon *Cannabis Control and Regulation Act*, S.Y. 2018, c. 4,

as amended, the Yukon *Cannabis Control and Regulation*, YOIC. 2018/139, the Yukon *Cannabis Control and Regulation General Regulation*, YOIC. 2018/184, the Yukon *Cannabis Licensing Regulation*, YOIC. 2019/43, the Yukon *Cannabis Remote Sales Regulation*, YOIC. 2022/29, the Northwest Territories *Cannabis Legalization and Regulation Implementation Act*, S.N.W.T. 2018, c. 6, as amended, or other such applicable federal, provincial or other legislation or regulations (collectively, the "**Cannabis Legislation**"), and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof within the meaning of any Cannabis Legislation or otherwise, and nothing in this Order shall be construed as resulting in the Monitor being an employer or successor employer within the meaning of any statute, regulation or rule of law or equity for any purpose whatsoever.

26. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Fisheries Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, the Ontario *Occupational Health and Safety Act,* the British Columbia *Environmental Management Act,* the British Columbia *Fish Protection Act* or the British Columbia *Riparian Areas Protection Act* and all regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

27. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants, including without limitation, the DIP Lender, with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor

addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

28. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the Monitor under the CCAA or as an officer of this Court, neither the Monitor nor its employees and representatives acting in such capacities shall incur any liability or obligation as a result of the appointment of the Monitor or the carrying out by it of the provisions of this Order, including under any Cannabis Legislation, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on, or subsequent to the date of this Order, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a bi-weekly basis or on such other terms as the parties may agree.

30. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

31. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Applicants' corporate counsel (Owens Wright LLP) and insolvency counsel (Chaitons LLP) shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 39 and 41 hereof.

DIP FINANCING

32. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from the DIP Lender in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that initial borrowings under such credit facility shall not exceed $1,500,000 unless permitted by further Order of this Court.

33. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the Debtor-In-Possession Facility Term Sheet between the DIP Lender and the Applicants, as appended to the First Report (as may be amended from time to time, the "**DIP Term Sheet**").

34. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, with the DIP Term Sheet, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Definitive Documents (collectively, the "**DIP Obligations**") as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

35. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property as security for the DIP Obligations, which DIP Lender's Charge shall be in the aggregate amount of the DIP Obligations outstanding at any given time under the Definitive Documents. The DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 39 and 41 hereof.

36. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender, upon 3 business days notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Definitive Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lender to the Applicants against the obligations of the Applicants to the DIP Lender under the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

37. **THIS COURT ORDERS AND DECLARES** that, unless otherwise agreed to in writing by the DIP Lender, the DIP Lender shall be treated as unaffected in any Plan filed by any of the Applicants under the CCAA, or any proposal filed by any of the Applicants under the *Bankruptcy and Insolvency Act of Canada* (the "**BIA**"), with respect to any advances made under the Definitive Documents.

APPROVAL OF KEY EMPLOYEE RETENTION PLAN

38. **THIS COURT ORDERS** that the Applicants' key employee retention plan (the "**KERP**") described in the Second Affidavit, be and is hereby approved and the Applicants are authorized and directed to make payments contemplated thereunder should the employees become entitled thereto in accordance with the terms and conditions of the KERP.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

39. **THIS COURT ORDERS** that the priorities of the Directors' Charge, the Administration Charge, and the DIP Lender's Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge, to a maximum amount of $500,000;

Second – Directors' Charge, to a maximum amount of $1,900,000; and

Third – DIP Lender's Charge.

40. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be effective as against the Property and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

41. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

42. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Applicants also obtain the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Charges, or further Order of this Court.

43. **THIS COURT ORDERS** that the Charges and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Definitive Documents shall create or be deemed to constitute a breach by the Applicants of any Agreement to which they are a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the Definitive Documents, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

44. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Applicant's interest in such real property leases.

CORPORATE MATTERS

45. **THIS COURT ORDERS** that Heritage is hereby relieved of any obligation to call and hold an annual meeting of its shareholders until further Order of this Court.

RELIEF FROM REPORTING OBLIGATIONS

46. **THIS COURT ORDERS** that the decision by the Applicants to incur no further expenses for the duration of the Stay Period in relation to any filings (including financial statements), disclosures, core or non-core documents, and press releases (collectively, the "**Securities Filings**") that may be required by any federal, provincial or other law respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange, including, without limitation, the *Securities Act* (Ontario), R.S.O., c. S.5 and comparable statutes enacted by other provinces of Canada, the CSE Policies 1-10 and the rules, regulations and policies of the Canadian Securities Exchange and OTCQB® (collectively, the "**Securities Provisions**"), is hereby authorized, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in Section 11.1(2) of the CCAA as a consequence of the Applicants failing to make Securities Filings required by the Securities Provisions.

47. **THIS COURT ORDERS** that none of the directors, officers, employees, and other representatives of the Applicants, nor the Monitor shall have any personal liability for any failure by the Applicants to make any Securities Filings required by the Securities Legislation during the Stay Period, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have against the directors, officers, employees and other representatives of the Applicants of a nature described in section 11.1(2) of the CCAA as a consequence of such failure by the Applicants. For greater certainty, nothing in this Order is intended to or shall encroach on the jurisdiction of any securities regulatory authorities (the "**Regulators**") in the matter of regulating the conduct of market participants and to issue or maintain cease trader orders if and when required pursuant to applicable securities law. Further, nothing in this Order shall constitute or be construed as an admission by the Regulators that the Court has jurisdiction over matters that are within the exclusive jurisdiction of the Regulators under the Securities Legislation.

"STATUS QUO" OF APPLICANTS' LICENSES

48. **THIS COURT ORDERS** that (a) the status quo in respect of the Applicants' Health Canada and cannabis excise licenses (collectively, the "**Licenses**") shall be preserved and maintained during the pendency of the Stay Period, including the Applicants' ability to sell

cannabis inventory in the ordinary course under the Licenses; and (b) to the extent any License may expire during the Stay Period, the term of such License shall be deemed to be extended by a period equal to the Stay Period.

SERVICE AND NOTICE

49. **THIS COURT ORDERS** that the Monitor shall: (i) without delay, publish in *The Globe and Mail,* National Edition, a notice containing the information prescribed under the CCAA; and (ii) within five (5) days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, or cause to be sent, in the prescribed manner, a notice to every known creditor who has a claim against any of the Applicants of more than $1,000 (excluding individual employees, and former employees), and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder; provided that the Monitor shall not be required to make the claims, names and addresses of individuals who are creditors publicly available unless otherwise ordered by this Court.

50. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: https://kpmg.com/ca/heritage (the "**Website**").

51. **THIS COURT ORDERS** that the Applicants and the Monitor and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicants' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in

satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations,* Reg. 81000-2175 (SOR/DORS).

52. **THIS COURT ORDERS** that subject to further Order of this Court in respect of urgent motions, any interest party wishing to object to the relief sought in a motion brought by the Applicants or the Monitor in these CCAA proceedings shall, subject to further Order of this Court, provide the service list in these proceedings (the "**Service List**") with responding motion materials or a written notice (including by e-mail) stating its object to the motion and the grounds for such objection by no later than 5:00 p.m. (Toronto Time) on the date that is two (2) days prior to the date such motion is returnable (the "**Objection Deadline**"). The Monitor shall have the ability to extend the Objection Deadline after consulting with the Applicants.

53. **THIS COURT ORDERS** that following the expiry of the Objection Deadline, counsel to the Monitor or counsel to the Applicants shall inform the Court, including by way of a 9:30 a.m. appointment, of the absence or the status of any objections to the motion and the judge having carriage of the motion may determine (a) whether a hearing in respect of the motion is necessary, (b) if a hearing is necessary, the date and time of the hearing, (c) whether such hearing will be in person, by telephone or videoconference, or by written submissions only, and (d) the parties from whom submissions are required. In the absence of any such determination, a hearing will be held in the ordinary course on the date specified in the notice of motion.

GENERAL

54. **THIS COURT ORDERS** that each of the Applicants, the Monitor or the DIP Lender may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder or in the interpretation of this Order.

55. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

56. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby

respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

57. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

58. **THIS COURT ORDERS** that any interested party (including each of the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order; provided, however, that the Chargees shall be entitled to rely on this Order as issued and entered and on the Charges and priorities set forth in paragraphs 39 and 41 hereof with respect to any fees, expenses and disbursements incurred, or advances made pursuant to the DIP Term Sheet, as applicable, until the date of this Order may be amended, varied, or stayed.

59. **THIS COURT ORDERS** that with the exception of Paragraph 41, references in this Order to the "date of this Order" or similar phrases refer to the date of the Initial Order granted in these Proceedings on April 2, 2024. The effective date of the Initial Order shall be 4:30 p.m. (Toronto Time) on April 2, 2024. The amendment of the Initial Order effected by the provisions of this Amended and Restated Initial Order (including the foregoing sentence of this Paragraph 59) shall be effective as of 12:01 a.m. (Toronto Time) on April 11, 2024, without the need for entry or filing.

Digitally signed by Mr. Justice Cavanagh

SCHEDULE "A"
NON-APPLICANT STAY PARTIES

Heritage (US) Colorado Corp.

Opticann, Inc.

Heritage US Holdings Corp.

Heritage (US) Cali Corp.

Heritage (US) Oregon Corp.

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 HERITAGE CANNABIS HOLDINGS CORP., 1005477 B.C. LTD., HERITAGE CANNABIS WEST CORPORATION, MAINSTRAIN MARKET LTD., HERITAGE CANNABIS EAST CORPORATION, PUREFARMA SOLUTIONS INC., 333 JARVIS REALTY INC., 5450 REALTY INC., HERITAGE CANNABIS EXCHANGE CORP., AND PREMIUM 5 LTD.

Court File No.: CV-24-00717664-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER
(returnable April 11, 2024)

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Toronto, ON M2N 7E9

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Lawyers for the Applicants

Court File No.: CV-23-00703350-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	TUESDAY, THE 22ND
	)	
JUSTICE CONWAY	)	DAY OF AUGUST, 2023

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 ALEAFIA HEALTH INC., EMBLEM CORP., EMBLEM CANNABIS CORPORATION, EMBLEM REALTY LTD., GROWWISE HEALTH LIMITED., CANABO MEDICAL CORPORATION, ALEAFIA INC., ALEAFIA FARMS INC., ALEAFIA BRANDS INC., ALEAFIA RETAIL INC., 2672533 ONTARIO INC., and 2676063 ONTARIO INC.

(collectively, the "**Applicants**")

ORDER
(Re: SISP Approval)

THIS MOTION, made by the Applicants, for an order approving, among other things: (i) the Sale and Investment Solicitation Process in respect of the Applicants as attached hereto at Schedule "A" (the "**SISP**"); and (ii) the Stalking Horse Agreement (as defined herein) pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, was heard this day by judicial videoconference.

ON READING the affidavit of Patricia Symmes-Rizakos sworn July 24, 2023 and the Exhibits thereto (the "**Initial Symmes Affidavit**"), the affidavit of Patricia Symmes-Rizakos sworn July 26, 2023 and the Exhibits thereto (the "**Comeback Affidavit**"), the affidavit of Patricia Symmes-Rizakos sworn August 11, 2023 and the Exhibits thereto (the "**Third Affidavit**"), the pre-filing report of KSV Restructuring Inc. ("**KSV**"), in its capacity as proposed monitor of the Applicants dated July 24, 2023, the First Report of KSV, in its capacity as monitor (in such

capacity, the "**Monitor**"), dated August 1, 2023 (the "**First Report**"), and the Second Report of the Monitor, dated August 17, 2023 (the "**Second Report**") and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel to Red White & Bloom Brands Inc. (the "**DIP Lender**"), and such other parties listed on the Counsel Slip, no one appearing for any other party although duly served as appears from the Affidavits of Service of S. Hans, as filed,

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP or the Amended and Restated Initial Order granted by the Honourable Justice Penny on August 4, 2023 (the "**ARIO**"), as applicable.

STAY EXTENSION

3. **THIS COURT ORDERS** that the Stay Period is hereby extended until and including October 31, 2023.

APPROVAL OF THE SALE AND INVESTMENT SOLICITATION PROCESS

4. **THIS COURT ORDERS** that the SISP (subject to any amendments thereto that may be made in accordance therewith and with this Order) is hereby approved and the Applicants and the Monitor are hereby authorized to implement the SISP pursuant to the terms thereof. The Applicants and the Monitor are hereby authorized and directed to take any and all actions as may be necessary or desirable to implement and carry out the SISP in accordance with its terms and this Order.

5. **THIS COURT ORDERS** that the Applicants and the Monitor are authorized to immediately commence the SISP to solicit interest in the opportunity for a sale of or investment in all or part of the Applicants' (i) property, assets and undertaking or shares in the capital of one or more of the Applicants (collectively, the "**Property**") and (ii) business operations (the "**Business**") in accordance with the terms of the SISP.

6. **THIS COURT ORDERS** that each of the Applicants, the Monitor and their respective affiliates, partners, directors, employees, agents, consultants, advisors, experts, accountants, counsel and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any Person in connection with or as a result of implementing or otherwise in connection with the SISP, except to the extent such losses, claims, damages or liabilities result from their respective gross negligence or wilful misconduct, as applicable, as determined by this Court.

7. **THIS COURT ORDERS** that, pursuant to section 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS), the Monitor and the Applicants are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective bidders or offerors and to their advisors, but only to the extent required to provide information with respect to the SISP in these proceedings.

8. **THIS COURT ORDERS** that notwithstanding anything contained herein or in the SISP, and in no way limiting the protections provided to the Monitor in the ARIO, the Monitor shall not take possession of any Property or be deemed to take possession of any Property, including pursuant to any provision of the Cannabis Legislation.

APPROVAL OF THE STALKING HORSE AGREEMENT

9. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to enter into the stalking horse agreement (the "**Stalking Horse Agreement**") among Aleafia Health Inc., Emblem Cannabis Corporation, Canabo Medical Corporation, Aleafia Farms Inc., Aleafia Retail Inc., the DIP Lender and RWB (PV) Canada Inc., a wholly-owned subsidiary of the DIP Lender (the "**Purchaser**"), and attached as Exhibit "G" to the Third Affidavit, *nunc pro tunc,* with such minor amendments as may be acceptable to each of the parties thereto, with the prior written approval of the Monitor.

10. **THIS COURT ORDERS** that the Stalking Horse Agreement is hereby approved and accepted solely for the purposes of being the Stalking Horse Bid under the SISP; provided that, nothing herein approves the transactions contemplated in the Stalking Horse Bid, and the approval of any transactions contemplated by the Stalking Horse Agreement shall be considered by this

Court on a subsequent motion made to this Court if the Stalking Horse Agreement is the Successful Bid pursuant to the SISP.

11. **THIS COURT ORDERS** that the Expense Reimbursement (as defined in the Stalking Horse Agreement) is hereby approved and the Applicants party to the Stalking Horse Agreement are hereby authorized and directed to pay the Expense Reimbursement to the Purchaser (or as it may direct) subject to and in accordance with the terms of the Stalking Horse Agreement.

PROTECTION OF PERSONAL INFORMATION

12. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Monitor, the Applicants and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants (each, a "**SISP Participant**") and their advisors personal information of identifiable individuals ("**Personal Information**"), records pertaining to the Applicants' past and current employees, and information on specific customers, but only to the extent desirable or required to negotiate or attempt to complete a transaction under the SISP (a "**Transaction**"). Each SISP Participant to whom any Personal Information is disclosed shall maintain and protect the privacy of such Personal Information and limit the use of such Personal Information to its evaluation of a Transaction, and if it does not complete a Transaction, shall return all such information to the Applicants or the Monitor, or in the alternative destroy all such information and provide confirmation of its destruction if required by the Applicants or the Monitor. The Successful Bidder(s) shall maintain and protect the privacy of such information and, upon closing of the Transaction contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants or the Monitor, or ensure that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor or the Applicants.

"STATUS QUO" OF APPLICANTS' LICENSES

13. **THIS COURT ORDERS** that (a) the status quo in respect of the Applicants' Health Canada and cannabis excise licenses (collectively, the "**Licenses**") shall be preserved and

maintained during the pendency of the Stay Period, including the Applicants' ability to sell cannabis inventory in the ordinary course under the Licenses; and (b) to the extent any License may expire during the Stay Period, the term of such License shall be deemed to be extended by a period equal to the Stay Period.

GENERAL

14. **THIS COURT ORDERS** that each of the Applicants or the Monitor may, from time to time, apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of their respective powers and duties under this Order or in the interpretation of this Order.

15. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

16. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, Germany or in Australia, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

17. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

18. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order without the need for entry or filing.

Schedule "A"

Bidding Procedures for the Sale and Investment Solicitation Process

Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on July 25, 2023 (as amended and restated, the "**Initial Order**"), Aleafia Health Inc., Emblem Corp., Emblem Cannabis Corporation, Emblem Realty Ltd., Growwise Health Limited, Canabo Medical Corporation, Aleafia Inc., Aleafia Farms Inc., Aleafia Brands Inc., Aleafia Retail Inc., 2672533 Ontario Inc. and 2676063 Ontario Inc. (collectively, the "**Applicants**" or the "**Aleafia Group**") were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**" and the proceedings thereunder, the "**CCAA Proceedings**"), and KSV Restructuring Inc. ("**KSV**") was appointed monitor of the Applicants (in such capacity, the "**Monitor**").

On August 15, 2023, the Court granted an order (the "**SISP Order**"), authorizing the Monitor, with the assistance of the Aleafia Group's management team, to undertake a sale and investment solicitation process ("**SISP**") for the sale of the Aleafia Group's (i) property, assets and undertaking or shares in the capital of one or more of the Applicants (collectively, the "**Property**"), and (ii) business operations (the "**Business**"). The SISP will be conducted by the Monitor in the manner set forth herein and in accordance with the SISP Order.

Among other things, the SISP Order also: (a) approved the procedures set out in this Schedule (the "**Bidding Procedures**") for the solicitation of offers or proposals (each, a "**Bid**") for the acquisition of (i) the Grimsby Property, and (ii) the other Property and the Business or some portion thereof; and (b) approved the form of stalking horse agreement (as same may be amended from time to time pursuant to its terms and the SISP Order, the "**Stalking Horse Agreement**") to be entered into between each of Aleafia Health Inc., Emblem Cannabis Corporation, Canabo Medical Corporation, Aleafia Farms Inc. and Aleafia Retail Inc., as vendors, and (PV) Canada Inc.[1] (a wholly-owned subsidiary of the DIP Lender, the "**Stalking Horse Bidder**"), as purchaser, for the purposes of serving as the stalking horse bid in the SISP (the "**Stalking Horse Bid**"). For the avoidance of doubt, the implementation of the transactions contemplated by the Stalking Horse Agreement is conditional upon the Stalking Horse Bid being selected as a Successful Bid (as defined below) in accordance with the Bidding Procedures and Court approval of the Stalking Horse Agreement and the transactions contemplated therein on a subsequent motion to be brought by the Applicants following the completion of the SISP.

Defined Terms

1. Capitalized terms used in these Bidding Procedures and not otherwise defined herein have the meanings given to them in Appendix "**A**" hereto.

[1] Stalking Horse Agreement and Implementation Steps contemplate the assignment/pledge of the DIP and Senior Loans and security to the Purchaser.

Bidding Procedures

Opportunity

2. The SISP is intended to solicit interest in and opportunities for a sale of, or investment in, all or part of the Aleafia Group's Property and Business (the "**Opportunity**"). The Opportunity may include one or more of a restructuring, refinancing, recapitalization or other form of reorganization of the business and affairs of one or more entity comprising the Aleafia Group as a going concern, or a sale of all, substantially all or one or more components of the Aleafia Group's Property and Business as a going concern or otherwise.

3. Any sale of any of the Property or investment in the Business will be on an "*as is, where is*" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, the Aleafia Group or any of their respective agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of the Aleafia Group in and to the Property to be acquired will be sold free and clear of, *inter alia*, all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders and definitive documents.

4. The Stalking Horse Agreement constitutes a Binding Offer (as defined below) by the Stalking Horse Bidder (which constitutes a Binding Offer Bidder (as defined below)) for all purposes and at all times under this SISP and will serve as the Stalking Horse Bid for purposes of this SISP and the Bidding Procedures and have the right to participate in the Auction (as defined below), if any. Notwithstanding the Stalking Horse Agreement and proposed transactions therein, all interested parties are encouraged to submit bids based on any form of Opportunity that they may elect to advance pursuant to the SISP, including as a Sale Proposal (as defined below), a Partial Sale Proposal (as defined below), an Investment Proposal (as defined below), or a Grimsby Proposal (as defined below). A copy of the Stalking Horse Agreement will be made available to all Qualified Bidders (as defined below) and a form of such agreement, to be uploaded to the VDR (as defined below), may be used as the basis for any Binding Offer made in the SISP. A form of purchase and sale agreement prepared by the Applicants and the Monitor in connection with the sale of the Grimsby Property (the "**Grimsby APS**"), will be made available to all Qualified Bidders that have expressed an interest in the Grimsby Property and uploaded to the VDR, and will be used as the basis for any Binding Offer for the Grimsby Property in the SISP.

5. The Bidding Procedures describe the manner in which prospective bidders may gain access to due diligence materials concerning the Aleafia Group, the Property and the Business, the manner in which bidders may participate in the SISP, the requirement of and the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder (as defined below) and the requisite approvals to be sought from the Court in connection therewith.

   Subject to paragraph 18 below, the Monitor, in consultation with the Aleafia Group, may at any time and from time to time, modify, amend, vary or supplement the Bidding Procedures, without the need for obtaining an order of the Court or providing notice to

Qualified Bidders, Binding Offer Bidders, the Successful Bidder(s) or the Back-Up Bidder(s) (as defined below) provided that such modification, amendment, variation or supplement is expressly limited to changes that do not alter, amend or prejudice the rights of such bidders (including the rights of the Stalking Horse Bidder, except with the authorization of the Stalking Horse Bidder) and are necessary or useful in order to give effect to the substance of the SISP, the Bidding Procedures or the SISP Order. Notwithstanding the foregoing, the dates or time limits indicated in the table contained below may be extended by the Monitor, as the Monitor deems necessary or appropriate, and with the consent of the DIP Lender, acting reasonably, or by order of the Court.

The Monitor will post on the Monitor's website and serve on the service list maintained in the CCAA Proceedings, as soon as practicable, any such modification, amendment, variation or supplement to these Bidding Procedures and inform the bidders impacted by such modifications.

In the event of a dispute as to the interpretation or application of the SISP Order or these Bidding Procedures, the Court will have exclusive jurisdiction to hear and resolve such dispute. For the avoidance of doubt, all bidders shall be deemed to have consented to the jurisdiction of the Court in connection with any disputes relating to the SISP, including the qualification of bids, the construction and enforcement of the SISP, and closing of a Successful Bid, as applicable.

A summary of the key dates pursuant to the SISP is as follows:

Milestone	**Date**
Commence solicitation of interest from parties, including delivering NDA and Teaser Letter, and upon execution of NDA (each as defined below), Confidential Information Memorandum and access to VDR	No later than two (2) Business Days after the granting of the SISP Order
Grimsby Offer Deadline (as defined below)	September 6, 2023 at 5:00 p.m. EST
Binding Offer Deadline (as defined below)	October 2, 2023 at 5:00 p.m. EST
If no Binding Offers are received other than Stalking Horse Bid	

Selection of Stalking Horse Bid as Successful Bid	October 3, 2023
Approval Motion (as defined below)	October 11, 2023 or the earliest date available thereafter
Closing of Stalking Horse Bid	As soon as possible but no later than November 22, 2023
If Binding Offers are received other than Stalking Horse Bid	
Selection of Successful Bid in respect of the Grimsby Property, if any, and Back-Up Bidder, if needed	No later than September 8, 2023
Approval Motion in respect of the Grimsby Property	No later than September 22, 2023
Closing of the Successful Bid in respect of the Grimsby Property, if any	As soon as possible but no later than October 31, 2023
Deadline to notify Qualified Bidders of Auction	No later than October 6, 2023
Auction, if needed	October 10, 2023
Selection of Successful Bid and Back-Up Bidder, if needed	October 10, 2023 or such later date immediately thereafter if the Auction is not completed in one day
Approval Motion	No later than October 18, 2023
Closing of the Successful Bid	As soon as possible but no later than November 22, 2023

Solicitation of Interest: Notice of the SISP

6. As soon as reasonably practicable, but, in any event, by no later than two (2) Business Days after the granting of the SISP Order:

   (a) the Monitor, in consultation with the Aleafia Group, will prepare a list of potential bidders, including (i) parties that have approached the Applicants or the Monitor indicating an interest in the Opportunity, (ii) strategic and financial parties who the Monitor, in consultation with the Aleafia Group, believe may be interested in purchasing all or part of the Business or the Property or investing in the Aleafia Group pursuant to the SISP, and (iii) parties that showed an interest in the Aleafia Group and/or their Property prior to the date of the SISP Order including by way of the previous, out-of-court strategic review process, in each case whether or not such party has submitted a letter of intent or similar document (collectively, the "**Known Potential Bidders**");

   (b) a notice of the SISP (and such other relevant information which the Monitor, in consultation with the Aleafia Group, considers appropriate) (the "**Notice**") will be published by the Monitor in one or more trade industry and/or insolvency-related publications as may be considered appropriate by the Monitor;

   (c) the Aleafia Group will issue a press release setting out the information contained in the Notice and such other relevant information which the Monitor and the Applicants determine is appropriate; and

   (d) the Monitor, with the assistance of the Aleafia Group, will prepare (i) a process summary (the "**Teaser Letter**") describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP; and (ii) a non-disclosure agreement in form and substance satisfactory to the Monitor and Aleafia Group and their respective counsel, which shall enure to the benefit of any purchaser of the Business or Property or any part thereof (an "**NDA**"). The Monitor may prepare a separate Teaser Letter in respect of the solicitation of offers or proposals for the acquisition of the Grimsby Property.

7. The Monitor will cause the Teaser Letter and NDA to be sent to each Known Potential Bidder by no later than two (2) Business Days after the granting of the SISP Order, and to any other party who requests a copy of the Teaser Letter and NDA or who is identified to the Monitor as a potential bidder as soon as reasonably practicable after such request or identification, as applicable.

Virtual Data Room

8. A confidential virtual data room or rooms[2] (collectively, the "**VDR**") in relation to the Opportunity will be made available by the Aleafia Group and the Monitor to Potential Bidders (as defined below) that have executed the NDA. The VDR will be made available

[2] A separate VDR may be made available in respect of the solicitation of offers or proposals for the acquisition of the Grimsby Property.

as soon as practicable. The Monitor, in consultation with the Aleafia Group, may establish or cause the Aleafia Group to establish separate VDRs (including "**clean rooms**"), if the Aleafia Group reasonably determines that doing so would further the Aleafia Group's and any Potential Bidder's compliance with applicable antitrust and competition laws, or would prevent the distribution of commercially sensitive competitive information. The Monitor may also, in consultation with the Aleafia Group, limit the access of any Potential Bidder to any confidential information in the VDR where the Monitor, in consultation with the Aleafia Group, reasonably determines that such access could negatively impact the SISP, the ability to maintain the confidentiality of the information, the Business, the Property or their value.

Qualified Bidders and Delivery of Confidential Information Memorandum

9. Any party who wishes to participate in the SISP (a "**Potential Bidder**") must provide to the Monitor and counsel to the Aleafia Group, at the addresses specified in Appendix "B" hereto (including by email transmission), an NDA executed by it, acceptable to the Monitor, in consultation with the Aleafia Group, and written confirmation of the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder.

10. A Potential Bidder (who has delivered the executed NDA and letter as set out above) will be deemed a "**Qualified Bidder**" if the Monitor, in its reasonable judgment, and in consultation with the Aleafia Group, determines such person is likely, based on the availability of financing, experience and other considerations, to be able to consummate a sale or investment pursuant to the SISP. All Qualified Bidders will receive a Confidential Information Memorandum prepared by the Monitor and will be granted access to the VDR. For the avoidance of doubt, the Stalking Horse Bidder is, and will be deemed to be, a Qualified Bidder.

11. The Monitor will prepare and send to each Qualified Bidder a Teaser Letter and provide a copy of the Stalking Horse Agreement or the Grimsby APS, as applicable, and any material amendment thereto. The Aleafia Group, the Monitor and their respective advisors make no representation or warranty as to the information contained in the VDR, Teaser Letter, Confidential Information Memorandum or otherwise made available pursuant to the SISP.

12. At any time during the SISP, the Monitor may, in its reasonable judgment, and in consultation with the Aleafia Group, eliminate a Qualified Bidder from the SISP, in which case such bidder will be eliminated from the SISP and will no longer be a "Qualified Bidder" for the purposes of the SISP.

13. Potential Bidders must rely solely on their own independent review, diligence, investigation and/or inspection of all information and of the Property and Business in connection with their participation in the SISP and any transaction they enter into with one or more of the entities comprising the Aleafia Group.

Due Diligence

14. The Monitor and the Aleafia Group, shall, subject to competitive and other business considerations, afford each Qualified Bidder such access to due diligence materials and information relating to the Property and Business as the Monitor, in consultation with the Aleafia Group, may deem appropriate. Due diligence access may include management presentations, access to the VDR, on-site inspections, and other matters which a Qualified Bidder may reasonably request and as to which the Monitor, in its reasonable judgment, and in consultation with the Aleafia Group, may agree. Any access or interactions with the Aleafia Group's management and personnel shall be coordinated through, and involve a representative of, the Monitor.

15. The Monitor will designate one or more representatives of the Monitor to be solely responsible for coordinating and responding to all requests for information and due diligence access from Qualified Bidders and the manner in which such requests must be communicated. Neither the Monitor, nor the Aleafia Group through the Monitor, will be obligated to furnish any information relating to the Property or Business to any person other than to Qualified Bidders. Further, and for the avoidance of doubt, selected due diligence materials may be withheld from certain Qualified Bidders if the Monitor, in consultation with the Aleafia Group, determines such information to represent proprietary or sensitive competitive information.

Formal Binding Offers

16. Any Qualified Bidder (other than the Stalking Horse Bidder) that wishes to make a formal offer to (A) acquire all or substantially all of the Property or Business, whether through an asset purchase, a share purchase or a combination thereof (either one, a "**Sale Proposal**") or a portion of the Property or the Business (a "**Partial Sale Proposal**"); (B) make an investment in, restructure, recapitalize or refinance the Aleafia Group or the Business or a portion thereof (an "**Investment Proposal**"); or (C) acquire the Grimsby Property (a "**Grimsby Proposal**"), must submit a binding offer (a "**Binding Offer**"): (a) in the case of a Sale Proposal, in the form of a template purchase agreement provided in the VDR, along with a marked version showing edits to the original form of the template provided in the VDR and otherwise with a marked version compared to the Stalking Horse Agreement; or (b) in the case of an Investment Proposal, a plan or restructuring support agreement in form and substance satisfactory to the Monitor, in consultation with the Aleafia Group (the "**Binding Offer Bidder**"), in each case, to the Monitor, no later 5 p.m. EST on October 2, 2023 (the "**Binding Offer Deadline**"), which does not apply in respect of a Grimsby Proposal. Any Qualified Bidder who wishes to make a formal offer in respect of a Grimsby Proposal must submit a Binding Offer, in the form of the Grimsby APS, to the Monitor no later than 5 p.m. EST on September 6, 2023 (the "**Grimsby Offer Deadline**"). Due to the earlier submission of offers for the Grimsby Property contemplated herein, the Grimsby Property, if subject to a Successful Bid arising from a Binding Offer submitted by the Grimsby Offer Deadline, shall be excluded from the later stages of this SISP (such as the Auction, as detailed below).

17. Except in the case of a Grimsby Proposal, a Binding Offer will be considered if it:

(a) provides net cash proceeds on closing via provisions that meet the following requirements, that are not less than the aggregate total of: (A) the amount of cash payable under the Stalking Horse Agreement together with the amount of all secured indebtedness, liabilities and obligations owing by the Aleafia Group to the DIP Lender (both in respect of its outstanding pre-filing secured loans and advances under the DIP Facility), plus (B) the amount of cash payable to cover the Expense Reimbursement (as defined in the Stalking Horse Agreement), plus (C) a minimum overbid amount of $200,000, plus (D) the amount of cash payable to repay in full all of the secured indebtedness, liabilities and obligations owing by the Aleafia Group to 1260356 Ontario Limited (the amounts set forth in this paragraph 17(a), the "**Minimum Purchase Price**"); provided, however, that the Monitor may, in its reasonable judgment, and in consultation with the Aleafia Group, deem this criterion satisfied if the Sale Proposal, Partial Sale Proposal or the Investment Proposal, together with one or more other non-overlapping Sale Proposal, Partial Sale Proposal or Investment Proposal, in the aggregate, meet or exceed the Minimum Purchase Price and such Minimum Purchase Price is payable in full in cash on closing (such bids, "**Aggregated Bids**", and each an "**Aggregated Bid**") (the amount of the Minimum Purchase Price will be confirmed by the Monitor with Potential Bidders);

(b) is submitted on or before the Binding Offer Deadline by a Qualified Bidder;

(c) is made by way of binding, definitive transaction document(s) that is/are executed by the Binding Offer Bidder;

(d) is a Binding Offer: (i) to purchase all, substantially all, or a portion of the Property or the Business; and/or (ii) to make an investment in, restructure, recapitalize or refinance the Aleafia Group or the Business or a portion thereof, on terms and conditions reasonably acceptable to the Monitor and the Aleafia Group;

(e) identifies all executory contracts of the Aleafia Group that the Binding Offer Bidder will assume and clearly describes, for each contract or on an aggregate basis, how all monetary defaults and non-monetary defaults will be remedied, as applicable;

(f) is not subject to any financing condition, diligence condition or internal or board approval;

(g) is unconditional, other than upon the receipt of the Approval Order(s) (as defined below) and satisfaction of any other conditions expressly set forth in the Binding Offer;

(h) contains or identifies the key terms and provisions to be included in any Approval Order, including whether such order will be a "reverse vesting order";

(i) contains the Binding Offer Bidder's proposed treatment of employees of the applicable Aleafia Group entities (for example, anticipated employment offers and treatment of post-employment benefits);

(j) includes acknowledgments and representations of the Binding Offer Bidder that it: (i) has had an opportunity to conduct any and all due diligence regarding the Opportunity prior to making its Binding Offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property and/or the Business in making its Binding Offer; (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Opportunity or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer; and (iv) promptly will commence any governmental or regulatory review of the proposed transaction by the applicable competition, antitrust or other applicable governmental authorities, including those regulating the cannabis sector;

(k) provides for (i) net cash proceeds on closing that are not less than the Minimum Purchase Price; unless it is a part of a bid that qualifies as an Aggregated Bid, as the case may be, in which case the total net cash proceeds of the Aggregated Bids will be not less than the Minimum Purchase Price; and (ii) evidence satisfactory to the Monitor of funds available to pay the Minimum Purchase Price on closing including written evidence of a firm, irrevocable commitment for financing or other evidence of ability to pay the Minimum Purchase Price on closing;

(l) is accompanied by a letter that confirms that the Binding Offer: (i) may be accepted by the Aleafia Group by countersigning the Binding Offer, and (ii) is irrevocable and capable of acceptance until the earlier of (A) two (2) Business Days after the date of closing of the applicable Successful Bid; and (B) the Outside Date (as defined below);

(m) provides for any anticipated corporate, licensing, securityholder, Health Canada, legal or other regulatory approvals required to close the transaction, and an estimate of the anticipated time frame and any anticipated impediments for obtaining such approvals;

(n) does not provide for any break or termination fee, expense reimbursement or similar type of payment, it being understood and agreed that no bidder will be entitled to any bid protections;

(o) in the case of a Sale Proposal or Partial Sale Proposal, includes:

(i) the specific purchase price in Canadian dollars and a description of any non-cash consideration;

(ii) a description of the Property that is expected to be subject to the transaction and any of the Property expected to be excluded;

(iii) a specific indication of the sources of capital for the Binding Offer Bidder and the structure and financing of the transaction; and

(iv) a description of those liabilities and obligations (including operating liabilities) which the Binding Offer Bidder intends to assume and which such liabilities and obligations it does not intend to assume and are to be excluded as part of the transaction;

(p) in the case of an Investment Proposal, includes:

(i) a description of how the Binding Offer Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization, and a description of any non-cash consideration;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Business or the Applicants in Canadian dollars;

(iii) the underlying assumptions regarding the pro forma capital structure;

(iv) a specific indication of the sources of capital for the Binding Offer Bidder and the structure and financing of the transaction; and

(v) a description of those liabilities and obligations (including operating liabilities) which the Binding Offer Bidder intends to assume and which liabilities and obligations it does not intend to assume and are to be excluded as part of the transaction;

(q) prior to entering the Auction, the Binding Offer Bidder will be required to deliver to the Monitor a deposit in the amount of not less than 10% of the cash purchase price payable on closing or total new investment contemplated, as the case may be (the "**Deposit**");

(r) is accompanied by an acknowledgement that (i) if the Binding Offer Bidder is selected as a Successful Bidder, that the Deposit will be non-refundable subject to approval of such Successful Bid by the Court and the terms described in paragraph 27 below; and (ii) if the Binding Offer Bidder is selected as a Back-Up Bidder, that the Deposit will be held and dealt with as described in paragraph 27 below;

(s) contemplates and reasonably demonstrates a capacity to consummate a closing of the transaction set out therein on the date that is twenty-one (21) days from the date of the issuance of the Approval Order approving such bid, or such earlier date as is practical for the parties to close the contemplated transaction, following the satisfaction or waiver of the conditions to closing (the "**Target Closing Date**") and in any event no later than November 22, 2023 (the "**Outside Date**"); and

(t) includes such other information as reasonably requested or identified as being necessary or required by the Monitor, in consultation with the Aleafia Group.

17A. In the case of a Grimsby Proposal, a Binding Offer will be considered if it:

(a) provides net cash proceeds on closing that provide an acceptable value for the Grimsby Property, as determined by the Aleafia Group and the Monitor, with the consent of the DIP Lender, on a commercially reasonable basis;

(b) is submitted on or before the Grimsby Offer Deadline by a Qualified Bidder;

(c) is made by way of binding, definitive transaction document(s) that is/are executed by the Binding Offer Bidder, and includes a blackline to the Grimsby APS;

(d) is not subject to any financing condition, diligence condition or internal or board approval;

(e) is unconditional, other than upon the receipt of the Approval Order and satisfaction of any other conditions expressly set forth in the Binding Offer;

(f) includes acknowledgments and representations of the Binding Offer Bidder that it: (i) has had an opportunity to conduct any and all due diligence regarding the Opportunity prior to making its Binding Offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Grimsby Property in making its Binding Offer; (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Opportunity or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer; and (iv) promptly will commence any governmental or regulatory review of the proposed transaction by any applicable governmental authorities;

(g) is accompanied by a letter that confirms that the Binding Offer: (i) may be accepted by the Aleafia Group by countersigning the Binding Offer, and (ii) is irrevocable and capable of acceptance until the earlier of two (2) Business Days after the date of closing of the applicable Successful Bid; and (B) the Grimsby Outside Date (as defined below);

(h) does not provide for any break or termination fee, expense reimbursement or similar type of payment, it being understood and agreed that no bidder will be entitled to any bid protections;

(i) includes the specific purchase price in Canadian dollars;

(j) includes a specific indication of the sources of capital for the Binding Offer Bidder and the structure and financing of the transaction;

(k) is accompanied by the delivery to the Monitor of a deposit in the amount of not less than 10% of the cash purchase price payable on closing (the "**Grimsby Deposit**") and an acknowledgement that (i) if the Binding Offer Bidder is selected as a Successful Bidder, that the Grimsby Deposit will be non-refundable subject to approval of such Successful Bid by the Court and the terms described in paragraph

27 below; and (ii) if the Binding Offer Bidder is selected as a Back-Up Bidder, that the Grimsby Deposit will be held and dealt with as described in paragraph 27 below;

(l) demonstrates a capacity to consummate a closing of the transaction set out therein on the date that is twenty-one (21) days from the date of the issuance of the Approval Order approving such bid, or such earlier date as is practical for the parties to close the contemplated transaction, following the satisfaction or waiver of the conditions to closing (the "**Grimsby Target Closing Date**") and in any event no later than October 31, 2023 (the "**Grimsby Outside Date**"); and

(m) includes such other information as reasonably requested or identified as being necessary or required by the Monitor, in consultation with the Aleafia Group.

18. The Monitor, in its reasonable judgment, and in consultation with the Aleafia Group, may waive strict compliance with any one or more of the requirements specified above (with the exception of the requirements contained in paragraphs 17(a) and 17(k), which cannot be waived without the prior written consent of the DIP Lender) and consider such non-compliant Binding Offer. For the avoidance of doubt, the completion of any Binding Offer shall be subject to the approval of the Court.

19. In the circumstance that a Binding Offer, including one or more Binding Offers comprising an Aggregated Bid, does not provide for net cash proceeds on closing that are at least equal to the Minimum Purchase Price, the Monitor will consult with the DIP Lender and, with the consent of the DIP Lender, may elect that such Binding Offer nevertheless be considered as a potential Successful Bid and be entitled to participate in the Auction.

Selection of Successful Bid

20. The Monitor, in consultation with the Aleafia Group, may, following the receipt of any Binding Offer, including one or more Binding Offers comprising an Aggregated Bid, seek clarification with respect to any of the terms or conditions of such Binding Offer and/or request and negotiate one or more amendments to such Binding Offer prior to determining if the Binding Offer should be considered.

21. The Monitor and the Aleafia Group, will (i) review and evaluate each relevant Binding Offer, valued upon numerous factors as referenced above, including factors affecting the speed, certainty and value of the transaction (including any licensing, Health Canada, regulatory or legal approvals, assignments or third party contractual arrangements required to close the transactions); (ii) subject to paragraph 22(j) below, (A) identify the highest and otherwise best Binding Offer (the "**Successful Bid**", and the Binding Offer Bidder making such Successful Bid, the "**Successful Bidder**"), and (B) the next highest and otherwise second best Binding Offer (the "**Back-Up Bid**", and the Binding Offer Bidder making such Back-Up Bid, the "**Back-Up Bidder**"); provided that, with respect to the sale of the Grimsby Property pursuant to a Grimsby Proposal, the applicable Successful Bid, Successful Bidder, Back-Up Bid and Back-Up Bidder, if any, will be identified by the Monitor and the Aleafia Group, with the consent of the DIP Lender, following the Grimsby Offer Deadline by no later than September 8, 2023 in accordance with the terms hereof.

Provided that the Ad Hoc Committee of Convertible Debentureholders confirms in writing that (i) it has not submitted or participated in the submission of a Binding Offer, and (ii) it is not affiliated or communicating with any Binding Offer Bidder, the Ad Hoc Steering Committee and counsel to the Ad Hoc Committee of Convertible Debentureholders shall be entitled to receive copies of each Binding Offer submitted by the Grimsby Offer Deadline and the Binding Offer Deadline, as applicable, on a confidential basis pursuant to one or more NDAs satisfactory to the Monitor as soon as reasonably practicable following receipt thereof.

22. In the event that no Binding Offer is selected (other than the Stalking Horse Bid), the Aleafia Group will promptly seek Court approval of the Stalking Horse Agreement and the transactions contemplated therein. In the event there is at least one Binding Offer in addition to the Stalking Horse Bid, a Successful Bid will be identified through an auction in accordance with the procedure set out below; provided that, the Grimsby Property is intended to be marketed separately as part of this SISP as set forth herein and will only be marketed through the Auction if no Grimsby Proposal is received by the Grimsby Offer Deadline or if the Grimsby Proposals received provide insufficient value, as determined by the Aleafia Group and the Monitor, on a commercially reasonable basis.

23. In the event that an auction (the "**Auction**") is required in accordance with the terms of these Bidding Procedures, it will be conducted in accordance with the procedures set forth in this paragraph (provided that, for certainty, the Auction will not apply or take place in respect of the Grimsby Property unless the requirements set out in the paragraph above are met):

(a) The Auction will commence at a time to be designated by the Monitor, on October 10, 2023, and may, in the discretion of the Monitor, be held virtually via videoconference, teleconference or such other reasonable means as the Monitor deems appropriate. The Monitor will consult with the parties permitted to attend the Auction to arrange for the Auction to be so held. Subject to the terms hereof, the Monitor, in consultation with the Aleafia Group, may postpone the Auction.

(b) The identity of each Binding Offer Bidder participating in the Auction will be disclosed, on a confidential basis, to other Binding Offer Bidders participating in the Auction.

(c) Except as otherwise permitted in the Monitor's discretion, only the Aleafia Group, the Monitor and the Binding Offer Bidders, and, in each case, their respective professionals and representatives, will be permitted to attend the Auction. Only Binding Offer Bidders (including, for greater certainty, the Stalking Horse Bidder) are eligible to participate in the Auction.

(d) Binding Offer Bidders will participate in the Auction through a duly authorized representative.

(e) Except as otherwise set forth herein, the Monitor may waive and/or employ and announce at the Auction additional rules, including rules to facilitate the

participation of parties participating in an Aggregated Bid, that are reasonable under the circumstances for conducting the Auction, provided that such rules are: (i) not inconsistent with the Initial Order, the SISP, the Bidding Procedures, the CCAA, or any order of the Court issued in connection with the CCAA Proceedings; (ii) disclosed to each Binding Offer Bidder; and (iii) designed, by the Monitor, in its reasonable judgment, and in consultation with the Aleafia Group, to result in the highest and otherwise best offer.

(f) The Monitor may arrange for the actual bidding at the Auction to be transcribed or recorded. Each Binding Offer Bidder participating in the Auction will designate a single individual to be its spokesperson during the Auction.

(g) Each Binding Offer Bidder participating in the Auction must confirm on the record, at the commencement of the Auction and again at the conclusion of the Auction, that it has not engaged in any collusion with the Aleafia Group or any other person, without the consent of the Monitor, regarding the SISP, that has not been disclosed to all other Binding Offer Bidders. For greater certainty, communications between the Stalking Horse Bidder and either the Aleafia Group or the Monitor with respect to and in preparation of the Stalking Horse Agreement, the SISP and the Bidding Procedures, prior to the issuance of the SISP Order and the commencement of the SISP will not represent collusion nor communications prohibited by this paragraph.

(h) Prior to the Auction, the Monitor will identify the highest and best of the Binding Offers received and such Binding Offers will constitute the opening bid for the purposes of the Auction (the "**Opening Bid**"). Subsequent bidding will continue in minimum increments valued at not less than $200,000 cash in excess of the Opening Bid. Each Binding Offer Bidder will provide evidence of its financial wherewithal and ability to consummate the transaction at the increased purchase price. Further, in the event that an Aggregated Bid qualifies to participate in the Auction, modifications to the bidding requirements may be made by the Monitor, in consultation with the Aleafia Group, to facilitate bidding by the participants in the Aggregated Bid.

(i) All Binding Offer Bidders will have the right, at any time, to request that the Monitor announce, subject to any potential new bids, the then-current highest and best bid and, to the extent requested by any Binding Offer Bidder, use reasonable efforts to clarify any and all questions such Binding Offer Bidder may have regarding the Monitor's announcement of the then-current highest and best bid.

(j) Each participating Binding Offer Bidder will be given reasonable opportunity to submit an overbid at the Auction to any then-existing overbids. The Auction will continue until the bidding has concluded and there is one remaining Binding Offer Bidder. The Monitor and the Aleafia Group shall determine which Binding Offer Bidders have submitted (i) the highest and otherwise best Binding Offer of the Auction, which shall be a Successful Bid, and (ii) the next highest and otherwise second best Binding Offer of the Auction, which shall be a Back-Up Bid. At such time and upon the conclusion of the bidding, the Auction will be closed, and the

Binding Offer Bidder with the highest and otherwise best Binding Offer of the Auction will be a Successful Bidder. The Binding Offer Bidder with the next highest and otherwise second best Binding Offer of the Auction will be a Back-Up Bidder.

(k) Upon selection of a Successful Bidder and a Back-Up Bidder, if any, the Successful Bidder and the Back-Up Bidder, if any, shall each deliver to the Monitor and the Aleafia Group, an amended and executed transaction document that reflects their final bid and any other modifications submitted and agreed to during the Auction, prior to the filing of the motion material for the hearing to consider the Approval Motion.

(l) Any bids submitted after the conclusion of the Auction will not be considered.

(m) The Monitor, in consultation with the Aleafia Group, shall be at liberty to modify or to set additional procedural rules for the Auction as it sees fit, including to conduct the Auction by way of written submissions.

24. Other than in the case of a Grimsby Proposal, a Successful Bid and Back-Up Bid, if any, will be selected by no later than 5:00 p.m. (Eastern Time) on October 10, 2023 (or such later date immediately thereafter if the Auction is conducted and not completed in one day) and the completion and execution of definitive documentation in respect of such Successful Bid and Back-Up Bid, as applicable, must be finalized and executed no later than October 10, 2023 (or such later date immediately thereafter if the Auction is conducted and not completed in one day) which definitive documentation will be conditional only upon the receipt of the Approval Order(s) and the express conditions set out therein and will provide that the Successful Bidder will use all reasonable efforts to close the proposed transaction by no later than the Target Closing Date, or such longer period as may be agreed to by the Monitor, in consultation with the Aleafia Group and the Successful Bidder, subject to the terms hereof. In any event, such Successful Bid must be closed by no later than the Outside Date. In the case of a Grimsby Proposal, a Successful Bid and Back-Up Bid, if any, will be selected following the Grimsby Offer Deadline by no later than September 8, 2023, and the completion and execution of definitive documentation in respect of such Successful Bid and Back-Up Bid, as applicable, must be finalized and executed within two (2) Business Days of selection, which definitive documentation will be conditional only upon the receipt of the Approval Order and the express conditions set out therein and will provide that the Successful Bidder will use all reasonable efforts to close the proposed transaction by no later than the Grimsby Target Closing Date, or such longer period as may be agreed to by the Monitor, in consultation with the Aleafia Group, the DIP Lender and the Successful Bidder, subject to the terms hereof. In any event, such Successful Bid must be closed by no later than the Grimsby Outside Date. If a Back-Up Bid is identified in accordance with the SISP, then such Back-Up Bid shall remain open until the date (the "**Back-Up Bid Outside Date**") on which the transaction contemplated by the applicable Successful Bid is consummated or such earlier date as the Monitor, in consultation with the Aleafia Group, determines. If the transactions contemplated by the applicable Successful Bid have not closed by the Outside Date or the Grimsby Outside Date, as applicable, or the applicable Successful Bid is terminated for any reason prior to the

Outside Date or the Grimsby Outside Date, as applicable, the Aleafia Group and the Monitor may elect to, or by further order of the Court, seek to complete the transactions contemplated by the applicable Back-Up Bid, and will promptly seek to close the transaction contemplated by such Back-Up Bid, which will be deemed to be a Successful Bid. The Aleafia Group will be deemed to have accepted such Back-Up Bid only when the Aleafia Group and the Monitor have made such election.

Approval of Successful Bid

25. The Aleafia Group will apply to the Court (the "**Approval Motion**") for one or more orders: (i) approving the Successful Bid(s) and authorizing the taking of such steps and actions and completing such transactions as are set out therein or required thereby (such order shall also approve the Back-Up Bid(s), if any, should the Successful Bid(s) not close for any reason); and (ii) granting a vesting order and/or reverse vesting order to the extent that such relief is contemplated by the Successful Bid(s) so as to vest title to any purchased assets and/or shares in the name of the applicable Successful Bidder(s) and/or vesting unwanted assets and liabilities out of one or more of the Aleafia Group (collectively, the "**Approval Order(s)**"). The Approval Motion will be held on a date to be scheduled by the Aleafia Group and confirmed by the Court upon application by the Aleafia Group. With the consent of the Monitor and the applicable Successful Bidder(s), the Approval Motion may be adjourned or rescheduled by the Aleafia Group without further notice, by an announcement of the adjourned date at the Approval Motion or in a notice to the service list maintained in the CCAA Proceedings prior to the Approval Motion. The Aleafia Group will consult with the Monitor and the applicable Successful Bidder regarding the motion material to be filed by the Aleafia Group for the Approval Motion.

26. All Binding Offers (other than the Successful Bid(s) but including the applicable Back-Up Bid(s)) will be deemed rejected on and as of the date of the closing of the applicable Successful Bid(s), with no further or continuing obligation of the Aleafia Group or the Monitor to any unsuccessful Binding Offer Bidders.

Deposits

27. The Deposit(s) and the Grimsby Deposit(s), as applicable:

    (a) will, upon receipt from the Binding Offer Bidder(s), be retained by the Monitor and deposited in a non-interest-bearing trust account;

    (b) received from the Successful Bidder(s) and the Back-Up Bidder(s), if any, will:

        (i) be applied to the purchase price to be paid by the applicable Successful Bidder or Back-Up Bidder whose Successful Bid or Back-Up Bid, as applicable, is the subject of the Approval Order(s), upon closing of the approved transaction; and

        (ii) otherwise be held and refunded in accordance with the terms of the definitive documentation in respect of the applicable Successful Bid or or Back-Up Bid, provided that (i) all such documentation will provide that the

Deposit or Grimsby Deposit, as applicable, will be fully refunded to the Back-Up Bidder on the Back-Up Bid Outside Date; and (ii) all such documentation will provide that the Deposit will be retained by the Aleafia Group and forfeited by the Successful Bidder, if its Successful Bid fails to close by the Outside Date or Grimsby Outside Date, as applicable, and such failure is attributable to any failure or omission of the Successful Bidder to fulfil its obligations under the terms of its Successful Bid; and

(c) received from the Binding Offer Bidder(s) that are not a Successful Bidder or a Back-Up Bidder will be fully refunded to the Binding Offer Bidder(s) that paid the Deposit(s) or the Grimsby Deposit(s), as applicable, as soon as practical following the closing of the applicable Successful Bid.

28. Notwithstanding anything to the contrary herein, the Stalking Horse Bidder will not be required to provide a Deposit.

"As is, Where is"

29. Any sale (or sales) of the Property or the Business or portions thereof will be on an "**as is, where is**" basis except for representations and warranties that are customarily provided in purchase agreements for a company subject to CCAA proceedings. Any such representations and warranties provided for in the definitive documents will not survive closing.

Free of Any and All Claims and Interests

30. In the event of a sale, to the extent permitted by law, all of the rights, title and interests of the Aleafia Group in and to the Property or the Business to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "**Claims and Interests**") pursuant to section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Property or Business and/or excluded assets, as applicable (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant transaction documents with a Successful Bidder.

Credit Bidding

31. The Stalking Horse Bidder will be entitled pursuant to the Stalking Horse Agreement, including for greater certainty as part of the Auction, as the case may be, to credit bid or retain as Retained Liabilities all or part of the existing secured obligations owing to it, including all interest, costs and fees to which the Stalking Horse Bidder is entitled pursuant to its relevant loan, interim financing, debenture, promissory note and/or security agreements with the Aleafia Group.

32. Any other secured party of the Applicants may include as part of a Binding Offer under this SISP all or part of its existing secured obligations owing to it as a credit bid for the Business and the Property. For the avoidance of doubt, a secured party, including, without

limitation, the Stalking Horse Bidder, may only make a credit bid in relation to the Property subject to such secured party's valid and enforceable security (in each case, the "**Encumbered Assets**"). To the extent that a secured party wishes to submit a Binding Offer for Property that does not form part of the Encumbered Assets (the "**Unencumbered Assets**"), such secured party shall specify a cash purchase price allocated to the Unencumbered Assets while making a credit bid for the Encumbered Assets that are included in such Binding Offer.

Confidentiality

33. For greater certainty, other than as required in connection with any Auction or Approval Motion and subject to paragraph 21, neither the Aleafia Group nor the Monitor will disclose: (i) the identity of any Potential Bidder or Qualified Bidder (other than the Stalking Horse Bidder); or (ii) the terms of any bid, Sale Proposal, Investment Proposal, Grimsby Proposal or Binding Offer (other than the Stalking Horse Agreement), to any other bidder or any of its affiliates (provided that disclosure may be made to the DIP Lender when expressly contemplated by the SISP, such as in the event that no single Binding Offer provides for net cash proceeds that are at least equal to the Minimum Purchase Price), except to the extent the Monitor, with the consent of such applicable parties is seeking to combine separate bids into Aggregated Bids. Potential Bidders, Qualified Bidders (including the Stalking Horse Bidder) and each of their respective affiliates shall not communicate with, or contact, directly or indirectly, any other Potential Bidder, Qualified Bidder or their respective affiliates, or any secured creditors of members of the Aleafia Group, including the Ad Hoc Committee of Convertible Debentureholders, without the express written consent of the Monitor, and such communications or discussions are to take place under the supervision of the Monitor.

Further Orders

34. At any time during the SISP, the Aleafia Group or the Monitor may apply to the Court for advice and directions with respect to any aspect of this SISP including, but not limited to, the continuation of the SISP or with respect to the discharge of its powers and duties hereunder.

Additional Terms

35. In addition to any other requirement of the SISP:

    (a) The Aleafia Group and the Monitor, as applicable, will at all times prior to the selection of a Successful Bid use commercially reasonable efforts to facilitate a competitive bidding process in the SISP including, without limitation, by actively soliciting participation by all persons who would be customarily identified as potential bidders in a process of this kind or who may be reasonably proposed by any of the Aleafia Group' stakeholders as a potential bidder.

    (b) Any consent, approval or confirmation to be provided by the Stalking Horse Bidder, the DIP Lender, the Aleafia Group and/or the Monitor is ineffective unless provided in writing and any approval required pursuant to the terms hereof is in addition to,

and not in substitution for, any other approvals required by the CCAA or as otherwise required at law in order to implement a Successful Bid. For the avoidance of doubt, a consent, approval or confirmation provided by email will be deemed to have been provided in writing for the purposes of this paragraph.

(c) Prior to seeking Court approval for any transaction or bid contemplated by this SISP, the Monitor will provide a report to the Court on the SISP process, parts of which may be filed under seal, including in respect of any and all bids received.

36. This SISP does not, and will not be interpreted to create any contractual or legal relationship between the Aleafia Group and any other party, other than as specifically set forth in the NDA or any other definitive agreement executed.

37. Notwithstanding anything to the contrary herein, the Monitor shall have no liability whatsoever to any person or entity, including without limitation any Potential Bidder, Qualified Bidder, Binding Offer Bidder, Successful Bidder, Back-Up Bidder or any other creditor or stakeholder, or any Applicant, as a result of implementation or otherwise in connection with this SISP, except to the extent that any such liabilities result from the gross negligence or wilful misconduct of the Monitor, as determined by the Court, and all such persons or entities shall have no claim against the Monitor in respect of the SISP for any reason whatsoever.

38. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any Binding Offer, due diligence activities, and any other negotiations or other actions whether or not they lead to the consummation of a transaction.

APPENDIX A

DEFINED TERMS

"**Ad Hoc Committee of Convertible Debentureholders**" means the ad hoc group of holders of Aleafia Health Inc.'s secured convertible debentures issued under the amended and restated debenture indenture providing for the issue of certain convertible debentures dated as of June 27, 2022 between Aleafia Health Inc. and Computershare Trust Company of Canada, as the trustee, as supplemented by: (i) the first supplemental indenture dated as of June 27, 2022 (providing for the issue of the 8.5% Series A Secured Convertible Debentures Due June 30, 2024); (ii) the second supplemental indenture dated as of June 27, 2022 (providing for the issue of the 8.5% Series B Secured Convertible Debentures Due June 30, 2026); and (iii) the third supplemental indenture dated as of June 27, 2022 (providing for the issue of 8.50% Series C Secured Debentures Due June 30, 2028).

"**Ad Hoc Steering Committee**" means the three member committee elected by the Ad Hoc Committee of Convertible Debentureholders to represent and advance the interests of the Ad Hoc Committee of Convertible Debentureholders.

"**Business Day**" means a day on which banks are open for business in Toronto but does not include a Saturday, Sunday or statutory holiday in the Province of Ontario.

"**DIP Lender**" means Red White & Bloom Brands Inc. and its successors and permitted assigns.

"**Grimsby Property**" means the lands and premises municipally known as 378 South Service Road, Grimsby, Ontario and legally described under PIN 46033-0368 (LT) as 1STLY: PT LT 1 CON 1 NORTH GRIMSBY DESIGNATED AS PT 2 30R13028 & PT 18 30R13499; 2NDLY PT LT A EAST GORE NORTH GRIMSBY DESIGNATED AS PTS 4, 5, 8, 9, 10 30R13028; S/T RO437966; SUBJECT TO AN EASEMENT IN GROSS OVER PART LOT A, EAST GORE, NORTH GRIMSBY, PART 4, 30R13028 AS IN NR529869; TOWN OF GRIMSBY and all personal property located on and therein other than inventory.

"**Retained Liabilities**" has the meaning given to it in the Stalking Horse Agreement.

APPENDIX "B"

The Monitor:

KSV Restructuring Inc.
150 King Street West, Suite 2308
Toronto, ON M5H 1J9

Attention: Noah Goldstein and Eli Brenner

Email: ngoldstein@ksvadvisory.com / ebrenner@ksvadvisory.com

with copies to:

Osler, Hoskin & Harcourt LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, ON M5X 1B8

Attention: Marc Wasserman and Martino Calvaruso

Email: mwasserman@osler.com / mcalvaruso@osler.com

The Applicants

Aleafia Group
c/o Aird & Berlis LLP
Brookfield Place, 181 Bay St. #1800
Toronto, ON M5J 2T9

Attention: Kyle Plunkett and Mel Cole

Email: kplunkett@airdberlis.com / mcole@airdberslis.com

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 ALEAFIA HEALTH INC. et al.

Applicants

Court File No. CV-23-00703350-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

ORDER
(Re: SISP Approval)

AIRD & BERLIS LLP
Brookfield Place
181 Bay Street
Suite 1800
Toronto, ON M5J 2T9

Kyle Plunkett (LSO# 61044N)
Miranda Spence (LSO# 60621M)
Tamie Dolny (LSO# 77958U)
Samantha Hans (LSO# 84737H)

Tel: 416.863.1500
Fax: 416.863.1515

Lawyers for the Applicants

Court File No. CV-24-00722044-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	**FRIDAY, THE 21ST**
	)	
JUSTICE OSBORNE	)	**DAY OF JUNE, 2024**

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 INDIVA LIMITED, INDIVA AMALCO LTD., INDIVA INC., VIEVA CANADA LIMITED, AND 2639177 ONTARIO INC. (collectively the "**Applicants**" and each an "**Applicant**")

AMENDED AND RESTATED INITIAL ORDER
(Amending Initial Order dated June 13, 2024)

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day by judicial videoconference via Zoom.

ON READING the affidavit of Carmine Niel Marotta sworn June 12, 2024 and the Exhibits thereto (the "**Marotta Affidavit**"), the affidavit of Carmine Niel Marotta sworn June 17, 2024 and the Exhibits thereto (the "**Second Marotta Affidavit**"), the Pre-Filing Report of PricewaterhouseCoopers Inc. ("**PwC**") as the proposed monitor dated June 13, 2024, and the First Report of PwC as the Court-appointed Monitor of the Applicants (in such capacity, the "**Monitor**"), filed, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for SNDL Inc. (the "**DIP Lender**"), and such other counsel that were present, no one else appearing although duly served as appears from the affidavits of service of Thomas Gray, filed and on reading the consent of PwC to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that, for the avoidance of doubt, references in this Order to the "date of this Order", the "date hereof", or similar phrases refer to the date the Initial Order of this Court was granted in these proceedings, being June 13, 2024 (the "**Initial Order**").

APPLICATION

3. **THIS COURT ORDERS** that the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that each of the Applicants shall have the authority to file and may, subject to further Order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their respective current and future assets, licences, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize the central cash management system currently in place as described in the Marotta Affidavit or, with

the consent of the Monitor and the DIP Lender, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. **THIS COURT ORDERS** that, subject to the terms of the Definitive Documents (as hereinafter defined), the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) with the consent of the Monitor and the DIP Lender, amounts owing for goods and services actually supplied to the Applicants prior to the date of this Order, with the Monitor considering, among other factors, whether (i) the supplier or service provider is essential to the Business and ongoing operations of the Applicants and the payment is required to ensure ongoing supply, (ii) making such payment will preserve, protect or enhance the value of the Property or the Business, (iii) making such payment is required to address regulatory concerns, and (iv) the supplier or service provider is required to continue to provide goods or services to the Applicants after the date of this Order, including pursuant to the terms of this Order; and

(c) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants on or following the date of this Order.

9. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, and (iii) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order;

(c) any taxes, duties or other payments required under the Cannabis Legislation (as defined below) (collectively, "**Cannabis Taxes**"), but only where such Cannabis Taxes are accrued or collected after the date of this Order, or where such Cannabis Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(d) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

10. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the applicable Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

12. **THIS COURT ORDERS** that each of the Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $250,000 in any one transaction or $1,000,000 in the aggregate;

(b) sell inventory in the ordinary course of business consistent with past practice, or otherwise with the consent of the Monitor and the DIP Lender; and

(c) in accordance with paragraphs 13 and 14 of this Order, vacate, abandon or quit any leased premises and/or disclaim or resiliate any real property lease and any ancillary agreements relating to the leased premises in accordance with Section 32 of the CCAA;

(d) disclaim such other arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the applicable Applicant deems appropriate, in accordance with Section 32 of the CCAA;

(e) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate;

(f) pursue all avenues of refinancing of its Business or Property, in whole or in part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.

13. **THIS COURT ORDERS** that the applicable Applicant shall provide each relevant landlord with notice of such Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes such Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the applicable Applicant, or by further Order of this Court upon application by the applicable Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If any Applicant disclaims or resiliates a lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Subsection 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to such Applicant's claim to the fixtures in dispute.

14. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then: (i) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the applicable Applicant and the Monitor 24 hours' prior written notice; and (ii) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the applicable Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

15. **THIS COURT ORDERS** that until and including September 6, 2024, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**", and collectively, "**Proceedings**") shall be commenced or continued against or in respect of the Applicants or the Monitor or their respective employees, directors, advisors, officers and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants, or their employees, directors, advisors, officers or representatives acting in such capacities, or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court or the written consent of the Applicants and the Monitor.

NO EXERCISE OF RIGHTS OR REMEDIES

16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or their respective employees, directors, officers, advisors and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such

investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, rescind, terminate or cease to perform any right, renewal right, contract, agreement, lease, sublease, licence, authorization or permit in favour of or held by any of the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-

advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of any of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

21. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of any of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of such director's or officer's gross negligence or wilful misconduct.

22. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,651,000, unless permitted by further Order of this Court, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 42 and 44 hereof.

23. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.

APPOINTMENT OF MONITOR

24. **THIS COURT ORDERS** that PwC is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

25. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Lender and its counsel on a weekly basis of financial and other information as agreed to between the Applicants and the DIP Lender which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by the DIP Lender;

(e) advise the Applicants in their development of the Plan (if any) and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(i) perform such other duties as are required by this Order or by this Court from time to time.

26. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property or be deemed to take possession of the Property, pursuant to any provision of any federal, provincial or other law respecting, among other things, the manufacturing, possession, processing and distribution of cannabis or cannabis products including, without limitation, under the *Cannabis Act*, S.C. 2018, c. 16, as amended, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, as amended, the *Criminal Code*, R.S.C. 1985, c. C-46, as amended, the *Excise Act, 2001*, S.C. 2002, c. 22, as amended, the Ontario *Cannabis Licence Act, 2018*, S.O. 2018, c. 12, Sched. 2, as amended, the Ontario *Cannabis Control Act, 2017*, S.O. 2017, c. 26, Sched. 1, as amended, the *Ontario Cannabis Retail Corporation Act, 2017*, S.O. 2017, c. 26, Sched. 2, as amended or other such applicable federal, provincial or other legislation or regulations (collectively, the "**Cannabis Legislation**"), and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or the Property, or any part thereof within the meaning of any Cannabis Legislation or otherwise. For greater certainty, nothing in this Order shall be construed as resulting in the Monitor being an employer or successor employer within the meaning of any statute, regulation or rule of law or equity for any purpose whatsoever.

27. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

28. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants, including, without limitation, the DIP Lender, with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

29. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the Monitor under the CCAA or as an officer of this Court, neither the Monitor nor its respective employees and representatives acting in such capacities shall incur any liability or obligation as a result of the appointment of the Monitor or the carrying out by it of the provisions of this Order including, without limitation, under any Cannabis Legislation, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded to the Monitor by the CCAA or any applicable legislation.

30. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings, whether incurred prior to, on, or subsequent to the date of this Order. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis, or pursuant to such other arrangements as may be agreed to between the Applicants and such parties, and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicants retainers *nunc pro tunc*, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

31. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

32. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $700,000 unless permitted by further Order of this Court, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 42 and 44 hereof.

DIP FINANCING

33. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from the DIP Lender in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that the indebtedness under such credit facility shall not exceed $2,400,000, plus interest, fees and expenses, unless permitted by further Order of this Court.

34. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicants and the DIP Lender dated as of June 12, 2024 (the "**DIP Agreement**"), filed.

35. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the DIP Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Agreement and the Definitive Documents (collectively, the "**DIP Obligations**") as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

36. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property, which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 42 and 44 hereof.

37. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender, upon five (5) days' notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the DIP Agreement, Definitive Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lender to the Applicants against the obligations of the Applicants to the DIP Lender under the DIP Agreement, the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

38. **THIS COURT ORDERS** that the DIP Lender shall be treated as unaffected in any Plan filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

KEY EMPLOYEE RETENTION PLAN

39. **THIS COURT ORDERS** that the Key Employee Retention Plan (the "**KERP**"), as described in the Marotta Affidavit and the Second Marotta Affidavit, is hereby approved and the Applicants are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

40. **THIS COURT ORDERS** that payments made by the Applicants pursuant to the KERP do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

41. **THIS COURT ORDERS** that the key employees referred to in the KERP (the "**Key Employees**") shall be entitled to the benefit of and are hereby granted a charge on the Property, which charge shall not exceed an aggregate amount of $132,100 (the "**KERP Charge**"), as security for amounts payable to the Key Employees pursuant to the KERP. The KERP Charge shall have the priority set out in paragraphs 42 and 44 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

42. **THIS COURT ORDERS** that the priorities of the Directors' Charge, the Administration Charge, the DIP Lender's Charge, and the KERP Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $700,000);

Second – DIP Lender's Charge (to the maximum amount of the DIP Obligations at the relevant time);

Third – Directors' Charge (to the maximum amount of $2,651,000); and

Fourth – KERP Charge (to the maximum amount of $132,100).

43. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

44. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

45. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the DIP Lender's Charge, unless the Applicants also obtain the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Charges, or further Order of this Court.

46. **THIS COURT ORDERS** that the Charges and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by: (i) the pendency of these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (iv) the provisions of any federal or provincial statutes; or (v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds any of the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Agreement or the Definitive Documents shall create or be deemed to constitute a breach by any of the Applicants of any Agreement to which the applicable Applicant(s) is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the DIP Agreement or the Definitive Documents, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order, the DIP Agreement or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

47. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Applicant's interest in such real property leases.

CORPORATE MATTERS

48. **THIS COURT ORDERS** that Indiva Limited is hereby relieved of any obligation to call and hold an annual meeting of its shareholders until further Order of this Court.

RELIEF FROM REPORTING AND FILING OBLIGATIONS

49. **THIS COURT ORDERS** that the decision by Indiva Limited to incur no further expenses in relation to any filings (including financial statements), disclosures, core or non-core documents, restatements, amendments to existing filings, press releases or any other actions (collectively, the "**Securities Filings**") that may be required by any federal, provincial or other law respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange, including, without limitation, the *Securities Act* (Ontario), RSO 1990, c S.5 and comparable statutes enacted by other provinces of Canada, and any rules, regulations and policies of the TSX Venture Exchange (collectively, the "**Securities Provisions**"), is hereby authorized, provided that nothing in this paragraph shall prohibit any securities regulator or stock

exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of Indiva Limited failing to make any Securities Filings required by the Securities Provisions.

50. **THIS COURT ORDERS** that none of the directors, officers, employees, and other representatives of Indiva Limited nor the Monitor shall have any personal liability for any failure by Indiva Limited to make any Securities Filings required by the Securities Provisions during the Stay Period, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have against the directors, officers, employees and other representatives of the Applicants of a nature described in section 11.1(2) of the CCAA as a consequence of such failure by Indiva Limited. For greater certainty, nothing in this Order is intended to or shall encroach on the jurisdiction of any securities regulatory authorities (the "**Regulators**") in the matter of regulating the conduct of market participants and to issue cease trade orders if and when required pursuant to applicable securities law. Further, nothing in this Order shall constitute or be construed as an admission by the Regulators that the Court has jurisdiction over matters that are within the exclusive jurisdiction of the Regulators under the Securities Legislation.

"STATUS QUO" OF CANNABIS EXCISE LICENSE

51. **THIS COURT ORDERS** that (a) the status quo in respect of Indiva Inc.'s cannabis excise license (the "**License**") shall be preserved and maintained during the pendency of the Stay Period; and (b) to the extent the License may expire during the Stay Period, the term of the License shall be deemed to be extended by a period equal to the Stay Period

SERVICE AND NOTICE

52. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in *The Globe and Mail (National Edition)* a notice containing the information prescribed under the CCAA, and (ii) within five (5) days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, or cause to be sent, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with

Section 23(1)(a) of the CCAA and the regulations made thereunder; provided that the Monitor shall not be required to make the claims, names and addresses of individuals who are creditors publicly available unless otherwise ordered by this Court.

53. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<www.pwc.com/ca/indiva>'.

54. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants, the Monitor, and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile or other electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service, distribution or notice by courier, personal delivery or facsimile or other electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. Any such service or distribution shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of Subsection 3(c) of the *Electronic Commerce Protection Regulations* (SOR/2013-221).

55. **THIS COURT ORDERS** that the Monitor shall maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the case website as part of the public materials in relation to this proceeding. Notwithstanding the foregoing, the

Monitor nor its counsel shall have any liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

SEALING

56. **THIS COURT ORDERS** that Confidential Exhibit "D" to the Second Marotta Affidavit is hereby sealed pending further Order of the Court and shall not form part of the public record.

GENERAL

57. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order; provided, however, that the Chargees shall be entitled to rely on this Order as granted and on the Charges and priorities set forth in paragraph 42 and 44 hereof with respect to any fees, expenses and disbursements incurred, as applicable, until the date this Order may be amended, varied or stayed.

58. **THIS COURT ORDERS** that, notwithstanding paragraph 57 of this Order, each of the Applicants, the Monitor or the DIP Lender may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of its powers and duties hereunder or in the interpretation of this Order.

59. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

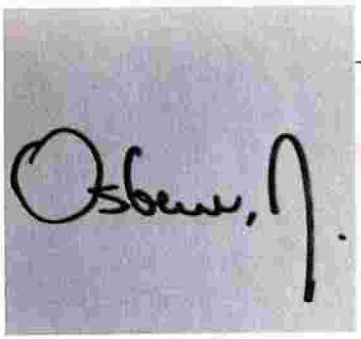
60. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

61. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the

Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

62. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

63. **THIS COURT ORDERS** that the Initial Order of this Court dated June 13, 2024 is hereby amended and restated pursuant to this Order, and this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order without the need for entry or filing.



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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 INDIVA LIMITED, INDIVA AMALCO LTD., INDIVA INC., VIEVA CANADA LIMITED, AND 2639177 ONTARIO INC.

Court File No.: CV-24-00722044-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings Commenced in Toronto

AMENDED AND RESTATED INITIAL ORDER

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Lawyers for the Applicants

Court File No. CV-23-00696017-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	MONDAY, THE 20th
	)	
JUSTICE CONWAY	)	DAY OF MARCH, 2023

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 LOYALTYONE, CO.

(the "**Applicant**")

SISP APPROVAL ORDER

THIS MOTION, made by the Applicant pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an order, *inter alia*, approving the Sale and Investment Solicitation Process in respect of the business and assets of the Applicant and its affiliate, LoyaltyOne Travel Services Co./Cie Des Voyages LoyaltyOne, in the form attached hereto as **Schedule "A"** (the "**SISP**") and certain related relief, was heard this day by judicial videoconference via Zoom in Toronto, Ontario.

ON READING the affidavit of Shawn Stewart sworn March 10, 2023 and the Exhibits thereto (the "**Stewart Affidavit**"), the pre-filing report of KSV Restructuring Inc. ("**KSV**") as the proposed Monitor dated March 10, 2023, the affidavit of Shawn Stewart sworn March 13, 2023 and the Exhibits thereto (the "**Second Stewart Affidavit**"), the first report of KSV as the Court-appointed monitor of the Applicant (in such capacity, the "**Monitor**") dated March 16, 2023 and the affidavit of Alec Hoy sworn March 18, 2023 and the Exhibits thereto, and on being advised that the secured creditors who are likely to be affected by the charge created herein were given notice, and on hearing the submissions of counsel for the Applicant, the Monitor, Bank of Montreal (the "**Stalking Horse Purchaser**"), and the other parties listed on the counsel slip, no one appearing for any other party although duly served as appears from the affidavits of service of Alec Hoy sworn March 10, March 13, March 17 and March 18, 2023,

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP, the Amended and Restated Initial Order of this Court dated March 20, 2023 (the "**ARIO**"), the Stewart Affidavit or the Second Stewart Affidavit, as applicable.

SALE AND INVESTMENT SOLICITATION PROCESS

3. **THIS COURT ORDERS** that the SISP is hereby approved and the Applicant is hereby authorized and directed to implement the SISP pursuant to the terms thereof. The Applicant, the Monitor and the Financial Advisor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder, subject to prior approval of the Court being obtained before completion of any transaction(s) under the SISP.

4. **THIS COURT ORDERS** that the Applicant, the Monitor and the Financial Advisor and their respective affiliates, partners, directors, officers, employees, legal advisors, representatives, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of the Applicant, the Monitor or the Financial Advisor, as applicable, in performing their obligations under the SISP, as determined by this Court in a final order that is not subject to appeal or other review.

5. **THIS COURT ORDERS** that in overseeing the SISP, the Monitor shall have all of the benefits and protections granted to it under the CCAA, the ARIO and any other Order of this Court in the within proceeding.

STALKING HORSE PURCHASE AGREEMENT

6. **THIS COURT ORDERS** that the Applicant is hereby authorized and empowered to enter into the purchase agreement dated March 9, 2023 (the "**Stalking Horse Purchase Agreement**") between the Applicant and the Stalking Horse Purchaser attached as Exhibit "O" to the Stewart Affidavit, *nunc pro tunc,* and such minor amendments as may be acceptable to each of the parties thereto, in consultation with the Consenting Stakeholders (solely in the case of the Applicant) and with the approval of the Monitor; provided that, nothing herein approves the sale and the vesting of any Property to the Stalking Horse Purchaser (or any of its designees) pursuant to the Stalking Horse Purchase Agreement and that the approval of any sale and vesting of any such Property shall be considered by this Court on a subsequent motion made to this Court if the transaction set out in the Stalking Horse Purchase Agreement is the Successful Bid pursuant to the SISP.

7. **THIS COURT ORDERS** that, as soon as reasonably practicable following the Applicant and the Stalking Horse Purchaser agreeing to any amendment to the Stalking Horse Purchase Agreement permitted pursuant to the terms of this Order, the Applicant shall: (a) file a copy thereof with this Court; (b) serve a copy thereof on the Service List; and (c) provide a copy thereof to each SISP Participant (as hereinafter defined), excluding from the public record any confidential information that the Applicant and the Stalking Horse Purchaser, with the consent of the Monitor, agree should be redacted.

BID PROTECTONS

8. **THIS COURT ORDERS** that the Bid Protections are hereby approved and the Applicant is hereby authorized and directed to pay the Bid Protections to the Stalking Horse Purchaser (or

to such other person as it may direct) in the manner and circumstances described in the Stalking Horse Purchase Agreement.

9. **THIS COURT ORDERS** that the Stalking Horse Purchaser shall be entitled to the benefit of and is hereby granted a charge (the "**Bid Protections Charge**") on the Property, which charge shall not exceed US$4,000,000, as security for payment of the Bid Protections in the manner and circumstances described in the Stalking Horse Purchase Agreement.

10. **THIS COURT ORDERS** that the filing, registration or perfection of the Bid Protections Charge shall not be required, and that the Bid Protections Charge shall be valid and enforceable for all purposes, including against any right, title or interest filed, registered, recorded or perfected subsequent to the Bid Protections Charge, notwithstanding any such failure to file, register, record or perfect.

11. **THIS COURT ORDERS** that the Bid Protections Charge shall constitute a charge on the Property and the Bid Protections Charge shall rank in priority to all other Encumbrances in favour of any Person notwithstanding the order of perfection or attachment, other than (i) any Person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable legislation; (ii) the Reserve Trustee in respect of the Reserve Security; and (iii) the Charges.

12. **THIS COURT ORDERS** that except for the Charges or as may be approved by this Court on notice to parties in interest, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Bid Protections Charge, unless the Applicant also obtains the prior written consent of the Monitor and the Stalking Horse Purchaser, or further Order of this Court.

13. **THIS COURT ORDERS** that the Bid Protections Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Stalking Horse Purchaser shall not otherwise

be limited or impaired in any way by: (i) the pendency of these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) or receivership order(s) issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") or otherwise, or any bankruptcy order or receivership order made pursuant to such applications; (iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (iv) the provisions of any federal or provincial statutes; or (v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Bid Protections Charge nor the execution, delivery, perfection, registration or performance of the Stalking Horse Purchase Agreement shall create, cause or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;

(b) the Stalking Horse Purchaser shall not have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Bid Protections Charge or the execution, delivery or performance of the Stalking Horse Purchase Agreement; and

(c) the payments made by the Applicant pursuant to this Order, the Stalking Horse Purchase Agreement and the granting of the Bid Protections Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

14. **THIS COURT ORDERS** that the Bid Protections Charge created by this Order over leases of real property in Canada shall only be a charge in the Applicant's interest in such real property lease.

15. **THIS COURT ORDERS AND DECLARES** that the Stalking Horse Purchaser, with respect to the Bid Protections Charge only, shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the BIA.

PIPEDA

16. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 and any similar legislation in any other applicable jurisdictions the Monitor, the Applicant, the Financial Advisor and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants that are party to a non-disclosure agreement with the Applicant (each, a "**SISP Participant**") and their respective advisors personal information of identifiable individuals, but only to the extent required to negotiate or attempt to complete a transaction pursuant to the SISP (a "**Transaction**"). Each SISP Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation for the purpose of effecting a Transaction, and, if it does not complete a Transaction, shall return all such information to the Monitor, the Financial Advisor or the Applicant, or, in the alternative, destroy all such information and provide confirmation of its destruction if requested by the Monitor, the Financial Advisor or the Applicant. Any bidder with a Successful Bid shall maintain and protect the privacy of such information and, upon closing of the Transaction(s) contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Applicant, and shall return

all other personal information to the Monitor, the Financial Advisor or the Applicant, or ensure that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor, the Financial Advisor or the Applicant.

GENERAL

17. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

18. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal and regulatory or administrative bodies, having jurisdiction in Canada or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicant, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

19. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Eastern Time) on the date of this Order without the need for entry or filing.

SCHEDULE "A"
SALE AND INVESTMENT SOLICITATION PROCESS

Sale and Investment Solicitation Process

1. On March 10, 2023, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted an order (the "**Initial Order**"), among other things, granting LoyaltyOne, Co. (the "**Applicant**") relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

2. On March 20, 2023, the Court granted (i) an order amending and restating the Initial Order (the "**ARIO**"), and (ii) an order (the "**SISP Approval Order**") that, among other things: (a) authorized the Applicant to implement a sale and investment solicitation process ("**SISP**") in accordance with the terms hereof; (b) authorized and empowered the Applicant to enter into the Stalking Horse Purchase Agreement; (c) approved the Bid Protections; and (d) granted the Bid Protections Charge. Capitalized terms that are not otherwise defined herein have the meanings ascribed to them in the ARIO or the SISP Approval Order, as applicable. Copies of the ARIO and the SISP Approval Order can be found at https://www.ksvadvisory.com/experience/case/loyaltyone.

3. This SISP sets out the manner in which: (a) binding bids for executable transaction alternatives that are superior to the sale transaction contemplated by the Stalking Horse Purchase Agreement involving the business and assets of the Applicant and its subsidiary, LoyaltyOne Travel Services Co./Cie Des Voyages (together with the Applicant, the "**LoyaltyOne Entities**"), will be solicited from interested parties; (b) any such bids received will be addressed; (c) any Successful Bid (as defined below) will be selected; and (d) Court approval of any Successful Bid will be sought. Such transaction alternatives may include, among other things, a sale of some or all of the Applicant's assets and/or business and/or an investment in the Applicant, each of which shall be subject to all terms set forth herein.

4. The SISP shall be conducted by the Applicant with the assistance of PJT Partners LP (the "**Financial Advisor**") under the oversight of KSV Restructuring Inc., in its capacity as Court-appointed monitor (the "**Monitor**") of the Applicant and the Monitor shall be entitled to receive all information in relation to the SISP.

5. Parties who wish to have their bids considered must participate in the SISP as conducted by the Applicant with the assistance of the Financial Advisor.

6. The SISP will be conducted such that the Applicant and the Financial Advisor will (under the oversight of the Monitor):

    a) disseminate marketing materials and a process letter to potentially interested parties identified by the Applicant and the Financial Advisor;
    b) solicit interest from parties with a view to such interested parties entering into non-disclosure agreements (parties shall only obtain access to the data room and be permitted to participate in the SISP if they execute a non-disclosure agreement and agree to the additional measures that are required by the Applicant to protect competitively sensitive information, in form and substance satisfactory to the Applicant);
    c) provide applicable parties with access to a data room containing diligence information; and
    d) request that such parties (other than the Stalking Horse Purchaser or its designee) submit a binding offer meeting at least the requirements set forth in Section 8

below, as determined by the Applicant in consultation with the Monitor (a "**Qualified Bid**"), by the Qualified Bid Deadline (as defined below).

7. The SISP shall be conducted subject to the terms hereof and the following key milestones:

   a) the Court issues the SISP Approval Order approving the: (i) SISP and (ii) the Stalking Horse Purchase Agreement as the stalking horse in the SISP and the Applicant entering into same – by no later than March 20, 2023;[1]
   b) the Applicant to commence solicitation process by no later than March 23, 2023;
   c) deadline to submit a Qualified Bid – 5:00 p.m. Eastern Time on April 27, 2023 (the "**Qualified Bid Deadline**");
   d) deadline to determine whether a bid is a Qualified Bid and, if applicable, to notify those parties who submitted a Qualified Bid of the Auction (as defined below) – by no later than 5:00 p.m. Eastern Time on May 1, 2023;
   e) the Applicant to hold an Auction (if applicable) and select a Successful Bid – by no later than 10:00 a.m. Eastern Time on May 4, 2023;
   f) Approval and Vesting Order (as defined below) hearing:
      - (if there is no Auction) – by no later than May 15, 2023, subject to Court availability; or
      - (if there is an Auction) – by no later than May 18, 2023, subject to Court availability; and
   g) closing of the Successful Bid as soon thereafter as possible and, in any event, by not later than June 30, 2023, provided that such date shall be extended by up to 90 days where regulatory approvals are the only material remaining conditions to closing (the "**Outside Date**").

8. In order to constitute a Qualified Bid, a bid must comply with the following:

   a) it provides for aggregate consideration, payable in full on closing, in an amount equal to or greater than US$165 million (the "**Consideration Value**"), and provides a detailed sources schedule that identifies, with specificity, the composition of the Consideration Value and any assumptions that could reduce the net consideration payable including details of any material liabilities that are being assumed or being excluded;
   b) it includes an assumption of all obligations of the Applicant: (i) to consumers enrolled in the AIR MILES® Reward Program; and (ii) pursuant to the terms of that certain Amended and Restated Redemption Reserve Agreement dated December 31, 2001 and that certain Amended and Restated Security Agreement dated as of December 31, 2001, each such agreement between Loyalty Management Group Canada Inc. and Royal Trust Corporation of Canada;
   c) as part of the Consideration Value, it provides cash consideration sufficient to pay: (i) all outstanding obligations under the DIP Term Sheet; (ii) any obligations in priority to amounts owing under the DIP Term Sheet, including any applicable charges granted by the Court in the Applicant's CCAA proceeding; (iii) an amount of US$5 million to fund a wind-up of the Applicant's CCAA proceeding and any further proceedings or wind-up costs; and (iv) an amount of US$4 million to satisfy the Bid Protections;

[1] To the extent any dates would fall on a non-business day, they shall be deemed to be the first business day thereafter.

d) closing of the transaction by not later than the Outside Date;
e) it contains:
    i. duly executed binding transaction document(s);
    ii. the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, and the name(s) of its controlling equityholder(s);
    iii. a redline to the Stalking Horse Purchase Agreement;
    iv. evidence of authorization and approval from the bidder's board of directors (or comparable governing body) and, if necessary to complete the transaction, the bidder's equityholder(s);
    v. disclosure of any connections or agreements with the LoyaltyOne Entities or any of their affiliates, any known, potential, prospective bidder, or any officer, manager, director, member or known equity security holder of the LoyaltyOne Entities or any of their affiliates; and
    vi. such other information reasonably requested by the Applicant or the Monitor;
f) it includes a letter stating that the bid is submitted in good faith, is binding and is irrevocable until closing of the Successful Bid; provided, that if such bid is not selected as the Successful Bid or as the next-highest or otherwise best Qualified Bid as compared to the Successful Bid (such bid, the "**Back-Up Bid**") it shall only remain irrevocable until selection of the Successful Bid;
g) it provides that the bid will serve as a Back-Up Bid if it is not selected as the Successful Bid and if selected as the Back-Up Bid it will remain irrevocable until the earlier of (i) closing of the Successful Bid or (ii) closing of the Back-Up Bid;
h) it provides written evidence of a bidder's ability to fully fund and consummate the transaction (including financing required, if any, prior to the closing of the transaction to finance the proceedings) and satisfy its obligations under the transaction documents, including binding equity/debt commitment letters and/or guarantees covering the full value of all cash consideration and the additional items (in scope and amount) covered by the guarantees provided by affiliates of the bidder in connection with the Successful Bid;
i) it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;
j) it is not conditional upon:
    i. approval from the bidder's board of directors (or comparable governing body) or equityholder(s);
    ii. the outcome of any due diligence by the bidder; or
    iii. the bidder obtaining financing;
k) it includes an acknowledgment and representation that the bidder (i) has had an opportunity to conduct any and all required due diligence prior to making its bid, and has relied solely upon its own independent review, investigation and inspection in making its bid, (ii) is not relying upon any written or oral statements, representations, promises, warranties, conditions, or guaranties whatsoever, whether express or implied (by operation of law or otherwise), made by any person or party, including the Applicant, the Financial Advisor, the Monitor and their respective employees, officers, directors, agents, advisors and other representatives, regarding the proposed transactions, this SISP, or any information (or the completeness of any information) provided in connection therewith, except as expressly stated in the proposed transaction documents; (iii) is making its bid on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Applicant, the Financial

Advisor, the Monitor or any of their respective employees, officers, directors, agents, advisors and other representatives, except to the extent set forth in the proposed transactions documents (iv) is bound by this SISP and the SISP Approval Order, and (v) is subject to the exclusive jurisdiction of the Court with respect to any disputes or other controversies arising under or in connection with the SISP or its bid;

l) it specifies any regulatory or other third-party approvals the party anticipates would be required to complete the transaction (including the anticipated timing necessary to obtain such approvals);

m) it includes full details of the bidder's intended treatment of the LoyaltyOne Entities' employees under the proposed bid;

n) it is accompanied by a cash deposit (the "**Deposit**") by wire transfer of immediately available funds equal to 10% of the Consideration Value, which Deposit shall be retained by the Monitor in an interest bearing trust account in accordance with the terms hereof;

o) it includes a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and

p) it is received by the Applicant, with a copy to the Financial Advisor and the Monitor, by the Qualified Bid Deadline at the email addresses specified on Schedule "B" hereto.

9. The Qualified Bid Deadline may be extended by: (a) the Applicant for up to no longer than seven days with the consent of the Monitor; or (b) further order of the Court. In such circumstances, the milestones contained in Subsections 7 (d) to (f) shall be extended by the same amount of time.

10. The Applicant, in consultation with the Monitor, may waive compliance with any one or more of the requirements specified in Section 8 above and deem a non-compliant bid to be a Qualified Bid, provided that the Applicant shall not waive compliance with the requirements specified in Subsections 8 (a), (b), (c), (d), (e)(i), (e)(ii), (e)(iv), (f), (k) or (n) without the prior written consent of the Stalking Horse Purchaser, acting reasonably.

11. Notwithstanding the requirements specified in Section 8 above, the transaction contemplated by the Stalking Horse Purchase Agreement (the "**Stalking Horse Bid**"), is deemed to be a Qualified Bid, provided that, for greater certainty: (i) no Deposit shall be required to be submitted in connection with the Stalking Horse Bid; and (ii) the Stalking Horse Bid shall not serve as a Back-Up Bid.

12. If one or more Qualified Bids (other than the Stalking Horse Bid) has been received by the Applicant on or before the Qualified Bid Deadline, the Applicant shall proceed with an auction process to determine the successful bid(s) (the "**Auction**"), which Auction shall be administered in accordance with Schedule "A" hereto. The successful bid(s) selected pursuant to the Auction shall constitute the "**Successful Bid**". Forthwith upon determining to proceed with an Auction, the Applicant shall provide written notice to each party that submitted a Qualified Bid (including the Stalking Horse Bid) of which Qualified Bid is the highest or otherwise best bid (as determined by the Applicant, in consultation with the Monitor) along with a copy of such bid.

13. If by the Qualified Bid Deadline, no Qualified Bid (other than the Stalking Horse Bid) has been received by the Applicant, then the Stalking Horse Bid shall be deemed the Successful Bid and shall be consummated in accordance with and subject to the terms of the Stalking Horse Purchase Agreement.

14. Following selection of a Successful Bid, the Applicant, with the assistance of its advisors, shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bid in accordance with the milestones set out in Section 7. Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by the Applicant, in consultation with the Monitor, the Applicant shall apply to the Court for an order or orders approving such Successful Bid and/or the mechanics to authorize the Applicant to complete the transactions contemplated thereby, as applicable, and authorizing the Applicant to: (a) enter into any and all necessary agreements and related documentation with respect to the Successful Bid; (b) undertake such other actions as may be necessary to give effect to such Successful Bid; and (c) implement the transaction(s) contemplated in such Successful Bid (each, an "**Approval and Vesting Order**"). If the Successful Bid is not consummated in accordance with its terms, the Applicant shall be authorized, but not required, to elect that the Back-Up Bid (if any) is the Successful Bid.

15. If a Successful Bid is selected and an Approval and Vesting Order authorizing the consummation of the transaction contemplated thereunder is granted by the Court, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Qualified Bid that is not selected as a Successful Bid will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten (10) business days) after the date upon which the Successful Bid is approved pursuant to an Approval and Vesting Order or such earlier date as may be determined by the Applicant, in consultation with the Monitor; provided, the Deposit in respect of the Back-Up Bid shall not be returned to the applicable bidder until the closing of the Successful Bid.

16. The Applicant shall provide information in respect of the SISP to consenting stakeholders who are party to support agreements with the Applicant (the "**Consenting Stakeholders**") on a confidential basis and who have agreed to not submit a bid in connection with the SISP, including (A) access to the data room, (B) copies (or if not provided to the Applicant in writing, a description) of any Qualified Bid, no later than one (1) calendar day following receipt thereof by the Applicant or its advisors and (C) such other information as reasonably requested by the Consenting Stakeholders or their respective legal counsel or financial advisors (including Piper Sandler Corp. and FTI Consulting Canada Inc. (collectively, the "**Lender FAs**")) or as necessary to keep the Consenting Stakeholders informed no later than one (1) calendar day after any such request or any material change to the proposed terms of any bid received, including any Qualified Bid, as to the terms of any bid, including any Qualified Bid, (including any changes to the proposed terms thereof) and the status and substance of discussions related thereto. The Financial Advisor shall consult with the Lender FAs in respect of the Applicant's conduct of the SISP and prior to the Applicant making decisions in respect of the SISP (and during an Auction include the Lender FAs in discussions with Qualified Bidders, where practicable).

17. The Applicant shall be permitted, in its discretion, to provide general updates and information in respect of the SISP to counsel to any creditor (each a "**Creditor**") on a confidential basis, upon: (a) the irrevocable confirmation in writing from such counsel that the applicable Creditor will not submit any bid in the SISP; and (b) counsel to such Creditor executing confidentiality agreements with the Applicant, in form and substance satisfactory to the Applicant and the Monitor.

18. Any amendments to this SISP may only be made by the Applicant with the written consent of the Monitor, or by further order of the Court, provided that the Applicant shall not amend the requirements specified in Subsections 8(a), (b), (c), (d), (e)(i), (e)(ii), (e)(iv), (f), (k) or (n) without the prior written consent of the Stalking Horse Purchaser, acting reasonably.

SCHEDULE "A": AUCTION PROCEDURES

1. **Auction.** If the Applicant receives at least one Qualified Bid (other than the Stalking Horse Bid), the Applicant will conduct and administer the Auction in accordance with the terms of the SISP. Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.

2. **Participation.** Only parties that provided a Qualified Bid by the Qualified Bid Deadline, including, for greater certainty, the Stalking Horse Bid (collectively, the "**Qualified Parties**" and each a "**Qualified Party**"), shall be eligible to participate in the Auction. No later than 5:00 p.m. Eastern Time on the day prior to the Auction, each Qualified Party must inform the Applicant and the Monitor in writing whether it intends to participate in the Auction. The Applicant will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party (including the Stalking Horse Purchaser) provides such expression of intent, the highest or otherwise best Qualified Bid as determined by the Applicant, in consultation with the Monitor, shall be designated as the Successful Bid (as defined below).

3. **Auction Procedures.** The Auction shall be governed by the following procedures:

   a. **Attendance.** Only the Applicant, the Qualified Parties, the Monitor, and Consenting Stakeholders, and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any Overbids (as defined below) at the Auction;

   b. **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (a) it has not engaged in any collusion with respect to the Auction and the bid process; and (b) its bid is a good-faith *bona fide* offer, it is irrevocable and it intends to consummate the proposed transaction if selected as the Successful Party (as defined below);

   c. **Minimum Overbid and Back-Up Bid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by the Applicant, in consultation with the Monitor (the "**Initial Bid**"), and any bid made at the Auction by a Qualified Party subsequent to the Applicant's announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional cash increments of US$1,000,000, and all such Overbids shall be irrevocable until closing of the Successful Bid; provided, that if such Overbid is not selected as the Successful Bid or as the Back-Up Bid (if any) it shall only remain irrevocable until selection of the Successful Bid;

   d. **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video-conference, on an open basis, and all Qualified Parties will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each

subsequent Qualified Bid will be fully disclosed to all other Qualified Parties throughout the entire Auction; provided, however, that the Applicant, in its discretion, may establish separate video conference rooms to permit interim discussions among the Applicant, the Monitor and individual Qualified Parties with the understanding that all formal bids will be delivered in one group video conference, on an open basis;

e. **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit an Overbid with full knowledge and confirmation of the then-existing highest or otherwise best bid and no Qualified Party submits an Overbid; and

f. **No Post-Auction Bids**. No bids will be considered for any purpose after the Successful Bid has been designated, and therefore the Auction has concluded.

Selection of Successful Bid

4. **Selection.** During the Auction, the Applicant, in consultation with the Monitor, will: (a) review each subsequent Qualified Bid, considering the factors set out in Section 8 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in (i) above, (iii) the likelihood of the Qualified Party's ability to close a transaction by not later than the Outside Date (including factors such as: the transaction structure and execution risk; conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to the Applicant and its stakeholders and (vi) any other factors the directors or officers of Applicant may, consistent with their fiduciary duties, reasonably deem relevant; and (b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").

5. **Acknowledgement.** The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by the Applicant in its sole discretion, subject to the milestones set forth in Section 7 of the SISP.

SCHEDULE "B": E-MAIL ADDRESSES FOR DELIVERY OF BIDS

To the counsel for the Applicant:

rjacobs@cassels.com; jdietrich@cassels.com; jroy@cassels.com; cground@cassels.com; jbornstein@cassels.com; pdublin@akingump.com; skuhn@akingump.com; emcgrady@akingump.com; mlahaie@akingump.com; alaves@akingump.com

with a copy to the Financial Advisor:

baird@pjtpartners.com; daniel.degosztonyi@pjtpartners.com

and with a copy to the Monitor and counsel to the Monitor:

dsieradzki@ksvadvisory.com; ngoldstein@ksvadvisory.com; boneill@goodmans.ca; carmstrong@goodmans.ca

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 LOYALTYONE, CO.

Court File No. CV-23-00696017-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

SISP APPROVAL ORDER

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Toronto Superior Court of Justice / Cour supérieure de justice

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 18TH
	)	
JUSTICE MCEWEN	)	DAY OF AUGUST, 2022

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant**", and collectively, the "**Applicants**")

SISP APPROVAL ORDER

THIS MOTION, made by the Applicants (together, the Applicants and the partnerships listed on **Schedule "A"** hereto, the "**Just Energy Entities**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an order, *inter alia*, approving the Sale and Investment Solicitation Process in respect of the Just Energy Entities attached hereto as **Schedule "B"** (the "**SISP**") and certain related relief, was heard on August 17, 2022 by judicial videoconference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

ON READING the affidavit of Michael Carter sworn August 4, 2022 and the Exhibits thereto (the "**Carter Affidavit**"), the Eleventh Report of FTI Consulting Canada Inc. (the "**Eleventh Report**"), in its capacity as monitor (the "**Monitor**"), dated August 13, 2022, and on hearing the submissions of counsel for the Just Energy Entities, the Monitor, the Sponsor (as hereinafter defined), and such other counsel who were present, no one else appearing although duly served as appears from the affidavits of service of Emily Paplawski sworn August 5, August 8, August 11 and August 16, 2022.

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion was properly returned on August 17, 2022 and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP, the Second Amended and Restated Initial Order of this Court dated May 26, 2021 (the "**Second ARIO**"), the Claims Procedure Order of this Court dated September 15, 2021 (the "**Claims Procedure Order**"), or the Support Agreement attached as Exhibit "I" to the Carter Affidavit (the "**Support Agreement**"), as applicable.

SALES AND INVESTMENT SOLICITATION PROCESS

3. **THIS COURT ORDERS** that the SISP is hereby approved and the Just Energy Entities are hereby authorized to implement the SISP pursuant to the terms thereof. The Just Energy Entities, the Monitor and the Financial Advisor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder and as directed by the Court in this Order and the related endorsement dated August 18, 2022.

4. **THIS COURT ORDERS** that the Monitor and the Financial Advisor, and their respective affiliates, partners, directors, employees, and agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of the Monitor or Financial Advisor, as applicable, in performing their obligations under the SISP, as determined by this Court.

SUPPORT AGREEMENT

5. **THIS COURT ORDERS** that the Support Agreement is hereby approved and the Just Energy Entities are authorized and empowered to enter into the Support Agreement, *nunc pro tunc*, subject to such minor amendments as may be consented to by the Monitor and as may be acceptable to each of the parties thereto, and are authorized, empowered and directed to take all steps and actions in respect of, and to comply with all of their obligations pursuant to, the Support Agreement.

6. **THIS COURT ORDERS** that, notwithstanding the stay of proceedings imposed by the Second ARIO, a counterparty to the Support Agreement may exercise any termination right that may become available to such counterparty pursuant to the Support Agreement, provided that such termination right must be exercised pursuant to and in accordance with the Support Agreement.

STALKING HORSE TRANSACTION AGREEMENT

7. **THIS COURT ORDERS** that Just Energy Group Inc. ("**Just Energy**") is hereby authorized and empowered to enter into the stalking horse transaction agreement (the "**Stalking Horse Transaction Agreement**") dated as of August 4, 2022, between Just Energy and LVS III

SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP, and CBHT Energy I LLC (collectively, the "**Sponsor**") and attached as Exhibit "A" to the Carter Affidavit, *nunc pro tunc,* and such minor amendments as may be acceptable to each of the parties thereto, with the approval of the Monitor and subject to the terms of the Support Agreement; provided that, nothing herein approves the sale and the vesting of any Property to the Sponsor (or any of its designees) pursuant to the Stalking Horse Transaction Agreement and that the approval of any sale and vesting of any such Property shall be considered by this Court on a subsequent motion made to this Court if the Stalking Horse Transaction is the Successful Bid pursuant to the SISP.

8. **THIS COURT ORDERS** that, as soon as reasonably practicable following Just Energy (a) entering into any amendment to the Stalking Horse Transaction Agreement permitted pursuant to the terms of this Order; or (b) agreeing upon the final Implementation Steps (as defined in the Stalking Horse Transaction Agreement), the Just Energy Entities shall, in each such case, (i) file a copy thereof with this Court, (ii) serve a copy thereof on the Service List, and (iii) provide a copy thereof to each SISP Participant (as hereinafter defined), excluding from the public record any confidential information that Just Energy and the Sponsor, with the consent of the Monitor, agree should be redacted.

BID PROTECTIONS

9. **THIS COURT ORDERS** that the Break-Up Fee is hereby approved and Just Energy is hereby authorized and directed to pay the Break-Up Fee to the Sponsor (or as it may direct) in the manner and circumstances described in the Stalking Horse Transaction Agreement.

10. **THIS COURT ORDERS** that the Sponsor shall be entitled to the benefit of and is hereby granted a charge (the "**Bid Protections Charge**") on the Property, which charge shall not exceed

US$14,660,000, as security for payment of the Break-Up Fee in the manner and circumstances described in the Stalking Horse Transaction Agreement.

11. **THIS COURT ORDERS** that Paragraphs 53, 54 and 56 of the Second ARIO shall be, and are hereby, amended in the manner detailed below:

(a) Paragraph 53 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that the priorities of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge, the Cash Management Charge and the Bid Protections Charge (as defined in the Order in these proceedings dated August 18, 2022), as among them, shall be as follows:
>
> > First – Administration Charge and FA Charge (to the maximum amount of C$3,000,000 and C$8,600,000, respectively), on a *pari passu* basis;
> >
> > Second – Directors' Charge (to the maximum amount of C$44,100,000);
> >
> > Third – KERP Charge (to the maximum amounts of C$2,012,100 and US$3,876,024);
> >
> > Fourth – DIP Lenders' Charge (to the maximum amount of the Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time) and the Priority Commodity/ISO Charge, on a *pari passu* basis; ~~and~~
> >
> > Fifth – Cash Management Charge; and~~.~~
> >
> > Sixth – Bid Protections Charge (in the amount of US$14,660,000).

(b) Paragraph 54 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge the Cash Management Charge, or the Bid Protections Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

(c) Paragraph 56 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court on notice to parties in interest, the Just Energy Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Just Energy Entities also obtain the prior written consent of the Monitor, the DIP Agent on behalf of the DIP Lenders and the beneficiaries of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the Priority Commodity/ISO Charge, the Cash Management Charge and the Bid Protections Charge or further Order of this Court.

PIPEDA

12. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Monitor, the Just Energy Entities and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants (each, a "**SISP Participant**") and their advisors personal information of identifiable individuals but only to the extent desirable or required to negotiate or attempt to complete a transaction pursuant to the SISP (a "**Transaction**"). Each SISP Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation for the purpose of effecting a Transaction, and if it does not complete a Transaction, shall return all such information to the Monitor or the Just Energy Entities, or in the alternative destroy all such information and provide confirmation of its destruction if requested by the Monitor or the Just Energy Entities. Any Successful Party shall maintain and protect the privacy of such information and, upon closing of the Transaction(s) contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Just Energy Entities, and shall return all other personal information to the Monitor or the Just Energy Entities, or ensure

that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor or the Just Energy Entities.

THIRD KEY EMPLOYEE RETENTION PLAN

13. **THIS COURT ORDERS** that the Third KERP, as described in the Carter Affidavit and attached as Confidential Exhibit "L" thereto, is hereby approved and the Just Energy Entities are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the Third KERP.

14. **THIS COURT ORDERS** that the Just Energy Entities, in consultation with the Monitor, are authorized and empowered to reallocate funds under the Third KERP originally allocated to Key Employees who have resigned, or will resign, from their employment with the Just Energy Entities, or who have declined, or will decline, to receive payments(s) under the Third KERP, to remaining Key Employees or other employees of the Just Energy Entities that the Just Energy Entities, in consultation with the Monitor, identify as critical to their ongoing business.

15. **THIS COURT ORDERS** that the KERP Charge established at paragraph 24 of the Second ARIO shall apply equally to, and secure, any remaining payments under the KERP and the Second KERP (as defined in the Order of this Court dated November 10, 2021) to the Key Employees and the payments contemplated to the Key Employees referred to in the Third KERP.

STAY EXTENSION

16. **THIS COURT ORDERS** that the Stay Period is hereby extended until and including October 31, 2022.

APPROVAL OF MONITOR'S REPORTS

17. **THIS COURT ORDERS** that the activities and conduct of the Monitor prior to the date hereof in relation to the Just Energy Entities and these CCAA proceedings are hereby ratified and approved.

18. **THIS COURT ORDERS** that each of the Tenth Report of the Monitor dated May 18, 2022, the Supplement to the Tenth Report of the Monitor dated June 1, 2022, and the Eleventh Report be and are hereby approved.

19. **THIS COURT ORDERS** that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way the approvals set forth in paragraphs 17 and 18 of this Order.

CLAIMS PROCEDURE

20. **THIS COURT ORDERS** that the ongoing claims review, claims determination and dispute resolution processes under (a) the Claims Procedure Order; (b) the Order of this Court dated March 3, 2022, among other things, appointing the Honourable Justice Dennis O'Connor as Claims Officer for the purposes set forth therein; and (c) the Endorsement of this Court dated June 10, 2022, shall be suspended pending further Order of this Court; provided that, for certainty, (x) where (i) a Claimant has not submitted a Proof of Claim or D&O Proof of Claim by the applicable Bar Date, (ii) a Negative Notice Claimant has not submitted a Notice of Dispute of Claim by the applicable Bar Date, or (iii) a Claim or D&O Claim has already been disallowed or revised in accordance with the Claims Procedure Order and the applicable period of time to dispute such revision or disallowance has expired without the Claimant submitting a Notice of Dispute of Revision or Disallowance, such Claimant will continue to be barred from pursuing such Claim or

D&O Claim pursuant to the relevant provisions of the Claims Procedure Order and (y) this Order does not impact the acceptance of any Claims or other final determination or agreement in respect of Claims made pursuant to the Claims Procedure Order prior to the date of this Order; provided further that, notwithstanding anything to the contrary herein, the Just Energy Entities shall be permitted, with the consent of the Monitor, to refer any Claim to a Claims Officer or this Court for adjudication for the purposes of determining entitlement to proceeds to be distributed in accordance with a transaction completed pursuant to the SISP.

GENERAL

21. **THIS COURT ORDERS** that Confidential Exhibits "J" and "L" to the Carter Affidavit shall be and is hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

22. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal and regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, including the United States Bankruptcy Court for the Southern District of Texas overseeing the Just Energy Entities' proceedings under Chapter 15 of the Bankruptcy Code in Case No. 21-30823 (MI), or in any other foreign jurisdiction, to give effect to this Order and to assist the Just Energy Entities, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Just Energy Entities and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order

or to assist the Just Energy Entities and the Monitor and their respective agents in carrying out the terms of this Order.

McEwen T.

SCHEDULE "A"
PARTNERSHIPS

- JUST ENERGY ONTARIO L.P.
- JUST ENERGY MANITOBA L.P.
- JUST ENERGY (B.C.) LIMITED PARTNERSHIP
- JUST ENERGY QUÉBEC L.P.
- JUST ENERGY TRADING L.P.
- JUST ENERGY ALBERTA L.P.
- JUST GREEN L.P.
- JUST ENERGY PRAIRIES L.P.
- JEBPO SERVICES LLP
- JUST ENERGY TEXAS LP

SCHEDULE "B"
SALE AND INVESTMENT SOLICITATION PROCESS

1. On August 18, 2022, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted an order (the "**SISP Order**") that, among other things, (a) authorized Just Energy (as defined below) to implement a sale and investment solicitation process ("**SISP**") in accordance with the terms hereof, (b) approved the Support Agreement, (c) authorized and directed Just Energy Group Inc. to enter into the Stalking Horse Transaction Agreement, (d) approved the Break-Up Fee, and (e) granted the Bid Protections Charge. Capitalized terms that are not defined herein have the meanings ascribed thereto in the Second Amended & Restated Initial Order granted by the Court in Just Energy's proceedings under the *Companies' Creditors Arrangement Act* on May 26, 2021, as amended, restated or supplemented from time to time or the SISP Order, as applicable.

2. This SISP sets out the manner in which (i) binding bids for executable transaction alternatives that are superior to the sale transaction to be provided for in the Stalking Horse Transaction Agreement involving the shares and/or the business and assets of Just Energy Group Inc. and its direct and indirect subsidiaries (collectively, "**Just Energy**") will be solicited from interested parties, (ii) any such bids received will be addressed, (iii) any Successful Bid (as defined below) will be selected, and (iv) Court (as defined below) approval of any Successful Bid will be sought. Such transaction alternatives may include, among other things, a sale of some or all of Just Energy's shares, assets and/or business and/or an investment in Just Energy, each of which shall be subject to all terms set forth in this SISP.

3. The SISP shall be conducted by Just Energy under the oversight of FTI Consulting Canada Inc., in its capacity as court-appointed monitor (the "**Monitor**"), with the assistance of BMO Capital Markets (the "**Financial Advisor**").

4. Parties who wish to have their bids considered shall be expected to participate in the SISP as conducted by Just Energy and the Financial Advisor.

5. The SISP will be conducted such that Just Energy and the Financial Advisor will (under the oversight of the Monitor):

    a) prepare marketing materials and a process letter;
    b) prepare and provide applicable parties with access to a data room containing diligence information;
    c) solicit interest from parties to enter into non-disclosure agreements (parties shall only obtain access to the data room and be permitted to participate in the SISP if they execute a non-disclosure agreement that is in form and substance satisfactory to Just Energy); and
    d) request that such parties (other than the Sponsor or its designee) submit (i) a notice of intent to bid that identifies the potential purchaser and a general description of the assets and/or business(es) of the Just Energy Entities that would be the subject of the bid and that reflects a reasonably likely prospect of culminating in a Qualified Bid (as defined below), as determined by the Just Energy Entities in consultation with the Monitor and the Credit Facility Agent (subject to the confidentiality requirements set forth in Section 15 below) (a "**NOI**") by the NOI Deadline (as defined below) and, if applicable, (ii) a binding offer meeting at least the requirements set forth in Section 7 below, as determined by the Just Energy Entities in consultation with the Monitor (a "**Qualified Bid**") by the Qualified Bid Deadline (as defined below).

6. The SISP shall be conducted subject to the terms hereof and the following key milestones:

    a) Just Energy to commence solicitation process on the date of service of the motion for approval of the SISP – August 4, 2022;[1]
    b) Court approval of SISP and authorizing Just Energy to enter into the Stalking Horse Transaction Agreement – August 18, 2022;
    c) Deadline to submit NOI – 11:59 p.m. Eastern Daylight Time on September 8, 2022 (the "**NOI Deadline**");
    d) Deadline to submit a Qualified Bid – 11:59 p.m. Eastern Daylight Time on October 13, 2022 (the "**Qualified Bid Deadline**");
    e) Deadline to determine whether a bid is a Qualified Bid and, if applicable, to notify those parties who submitted a Qualified Bid of the Auction (as defined below) – 5:00 p.m. Eastern Daylight Time on October 20, 2022;
    f) Just Energy to hold Auction (if applicable) – 10:00 a.m. Eastern Daylight Time on October 22, 2022; and
    g) Implementation Order (as defined below) hearing:
        - (if no NOI is submitted) – by no later than September 16, 2022, subject to Court availability.
        - (if there is no Auction) – by no later than October 29, 2022, subject to Court availability.
        - (if there is an Auction) – by no later than twelve (12) days after completion of the Auction, subject to Court availability.

7. In order to constitute a Qualified Bid, a bid must comply with the following:

    a. it provides for (i) the payment in full in cash on closing of the BP Commodity/ISO Services Claim (as defined in the Support Agreement), unless otherwise agreed to by the holder of such claim in its sole discretion; (ii) the payment in full in cash on closing of the Credit Facility Claims, unless otherwise agreed to by the Credit Facility Agent in its sole discretion; (iii) the payment in full in cash on closing of any claims ranking in priority to the claims set forth in subparagraphs (i) or (ii) including any claims secured by Court-ordered charges, unless otherwise agreed to by the applicable holders thereof in their sole discretion (iv) the return of all outstanding letters of credit and release of all Credit Facility LC Claims or arrangements satisfactory to the applicable Credit Facility Lenders in their discretion to secure with cash collateral or otherwise any Credit Facility LC Claims not released, and (v) the payment in full in cash on closing of any outstanding Cash Management Obligations or arrangements satisfactory to the applicable Credit Facility Lenders or their affiliates to secure with cash collateral or otherwise any outstanding Cash Management Obligations.
    b. it provides a detailed sources and uses schedule that identifies, with specificity, the amount of cash consideration (the "**Cash Consideration Value**") and any assumptions that could reduce the net consideration payable. At a minimum, the Cash Consideration Value plus Just Energy's cash on hand must be sufficient for payment in full of the items contemplated in Sections 7(a)(i) and 7(a)(ii) herein, 3.2 of the Stalking Horse Transaction Agreement and the Break-Up Fee, plus USD$1,000,000, on closing, which Cash Consideration Value is estimated to be USD$460,000,000 as of December 31, 2022.

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[1] To the extent any dates would fall on a non-business day, to be the first business day thereafter.

c. it is reasonably capable of being consummated by 90 days after completion of the Auction if selected as the Successful Bid;
d. it contains:
    i. duly executed binding transaction document(s);
    ii. the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, and the name(s) of its controlling equityholder(s);
    iii. a redline to the form of transaction document(s) provided by Just Energy, if applicable;
    iv. evidence of authorization and approval from the bidder's board of directors (or comparable governing body) and, if necessary to complete the transaction, the bidder's equityholder(s);
    v. disclosure of any connections or agreements with Just Energy or any of its affiliates, any known, potential, prospective bidder, or any officer, manager, director, or known equity security holder of Just Energy or any of its affiliates; and
    vi. such other information reasonably requested by Just Energy or the Monitor;
e. it includes a letter stating that the bid is submitted in good faith, is binding and is irrevocable until the selection of the Successful Bid; provided, however, that if such bid is selected as the Successful Bid, it shall remain irrevocable until the closing of the Successful Bid;
f. it provides written evidence of a bidder's ability to fully fund and consummate the transaction and satisfy its obligations under the transaction documents, including binding equity/debt commitment letters and/or guarantees covering the full value of all cash consideration and the additional items (in scope and amount) covered by the guarantees provided by affiliates of the Purchaser in connection with the Transaction Agreement;
g. it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;
h. it is not conditional upon:
    i. approval from the bidder's board of directors (or comparable governing body) or equityholder(s);
    ii. the outcome of any due diligence by the bidder; or
    iii. the bidder obtaining financing;
i. it includes an acknowledgment and representation that the bidder has had an opportunity to conduct any and all required due diligence prior to making its bid;
j. it specifies any regulatory or other third-party approvals the party anticipates would be required to complete the transaction (including the anticipated timing necessary to obtain such approvals) and, in connection therewith, specifies whether the bidder or any of its affiliates is involved in any part of the energy sector, including an electric utility, retail service provider, a company with a tariff on file with the Federal Energy Regulatory Commission, or any intermediate holding company;
k. it includes full details of the bidder's intended treatment of Just Energy's employees under the proposed bid;
l. it is accompanied by a cash deposit (the "**Deposit**") by wire transfer of immediately available funds equal to 10% of the Cash Consideration Value, which Deposit shall be retained by the Monitor in a non-interest bearing trust account in accordance with this SISP;
m. a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and
n. it is received by the Qualified Bid Deadline.

8. The Qualified Bid Deadline may be extended by (i) Just Energy for up to no longer than seven days with the consent of the Monitor, the Credit Facility Agent and the Sponsor, acting reasonably, or (ii) further order of the Court. In such circumstances, the milestones contained in Subsections 6(f) and (g) shall be extended by the same amount of time.

9. Just Energy, in consultation with the Monitor, may waive compliance with any one or more of the requirements specified in Section 7 above and deem a non-compliant bid to be a Qualified Bid, provided that Just Energy shall not waive compliance with the requirements specified in Subsections 7(a), (b), (d), (e), (f), (g), (i) or (l) without the prior written consent of the Sponsor and Credit Facility Agent, each acting reasonably.

10. Notwithstanding the requirements specified in Section 7 above, the transactions contemplated by the Stalking Horse Transaction Agreement (the "**Stalking Horse Transaction**"), is deemed to be a Qualified Bid, provided that, for greater certainty, no Deposit shall be required to be submitted in connection with the Stalking Horse Transaction.

11. If one or more Qualified Bids (other than the Stalking Horse Transaction) has been received by Just Energy on or before the Qualified Bid Deadline, Just Energy shall proceed with an auction process to determine the successful bid(s) (the "**Auction**"), which Auction shall be administered in accordance with Schedule "A" hereto. The successful bid(s) selected within the Auction shall constitute the "**Successful Bid**". Forthwith upon determining to proceed with an Auction, Just Energy shall provide written notice to each party that submitted a Qualified Bid (including the Stalking Horse Transaction), along with copies of all Qualified Bids and a statement by Just Energy specifying which Qualified Bid is the leading bid.

12. If, by the NOI Deadline no NOI has been received, then the SISP shall be deemed to be terminated and the Stalking Horse Transaction shall be the Successful Bid and shall be consummated in accordance with and subject to the terms of the Support Agreement and the Stalking Horse Transaction Agreement. If no Qualified Bid (other than the Stalking Horse Transaction) has been received by Just Energy on or before the Qualified Bid Deadline, then the Stalking Horse Transaction shall be the Successful Bid and shall be consummated in accordance with and subject to the terms of the Support Agreement and the Stalking Horse Transaction Agreement.

13. Following selection of a Successful Bid, Just Energy, with the assistance of its advisors, shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bid in accordance with the key milestones set out in Section 6. Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by Just Energy, in consultation with the Monitor, Just Energy shall apply to the Court for an order or orders approving such Successful Bid and/or the mechanics to authorize Just Energy to complete the transactions contemplated thereby, as applicable, and authorizing Just Energy to (i) enter into any and all necessary agreements and related documentation with respect to the Successful Bid, (ii) undertake such other actions as may be necessary to give effect to such Successful Bid, and (iii) implement the transaction(s) contemplated in such Successful Bid (each, an "**Implementation Order**").

14. All Deposits shall be retained by the Monitor in a non-interest bearing trust account. If a Successful Bid is selected and an Implementation Order authorizing the consummation of the transaction contemplated thereunder is granted, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Qualified Bid that is not selected as a Successful Bid, will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten

(10) business days) after the date upon which the Successful Bid is approved pursuant to an Implementation Order or such earlier date as may be determined by Just Energy, in consultation with the Monitor.

15. Just Energy shall provide information in respect of the SISP to the DIP Lenders, the holder of the BP Commodity/ISO Services Claim and the Supporting Secured CF Lenders on a confidential basis, including (A) copies (or if not provided to the Just Energy Entities in writing, a detailed description) of any NOI and any bid received, including any Qualified Bid, no later than one (1) calendar day following receipt thereof by the Just Energy Entities or their advisors and (B) such other information as reasonably requested by the DIP Lenders', the holder of the BP Commodity/ISO Services Claim or the Supporting Secured CF Lenders' respective legal counsel or financial advisors or as necessary to keep the DIP Lenders, the holder of the BP Commodity/ISO Services Claim or the Supporting Secured CF Lenders informed no later than one (1) calendar day after any such request or any material change to the proposed terms of any bid received, including any Qualified Bid, as to the terms of any bid, including any Qualified Bid, (including any changes to the proposed terms thereof) and the status and substance of discussions related thereto. Just Energy shall be permitted, in its discretion, to provide general updates and information in respect of the SISP to counsel to any unsecured creditor of Just Energy (a "**General Unsecured Creditor**") on a confidential basis, upon: (i) the irrevocable confirmation in writing from such counsel that the applicable General Unsecured Creditor will not submit any NOI or bid in the SISP, and (ii) counsel to such General Unsecured Creditor executing confidentiality agreements with Just Energy, in form and substance satisfactory to Just Energy and the Monitor.

16. Any amendments to this SISP may only be made by Just Energy with the written consent of the Monitor and after consultation with the Credit Facility Agent, or by further order of the Court, provided that Just Energy shall not amend Subsections 7(a), (b), (d), (e), (f), (g), (i) or (l) or Section 14 without the prior written consent of the Sponsor and the Credit Facility Agent.

SCHEDULE "A": AUCTION PROCEDURES

1. **Auction**. If Just Energy receives at least one Qualified Bid (other than the Stalking Horse Transaction), Just Energy will conduct and administer the Auction in accordance with the terms of the SISP. Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.

2. **Participation**. Only parties that provided a Qualified Bid by the Qualified Bid Deadline, including the Stalking Horse Transaction (collectively, the "**Qualified Parties**"), shall be eligible to participate in the Auction. No later than 5:00 p.m. Eastern Daylight Time on the day prior to the Auction, each Qualified Party (other than the Sponsor) must inform Just Energy whether it intends to participate in the Auction. Just Energy will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party provides such expression of intent, the Stalking Horse Transaction shall be the Successful Bid.

3. **Auction Procedures**. The Auction shall be governed by the following procedures:

   (a) **Attendance.** Only Just Energy, the other counterparties to the Support Agreement, the Qualified Parties, the Monitor and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any subsequent Overbids (as defined below) at the Auction;

   (b) **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (i) it has not engaged in any collusion with respect to the Auction and the bid process; and (ii) its bid is a good-faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bid (as defined below);

   (c) **Minimum Overbid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by Just Energy, in consultation with the Monitor (the "**Initial Bid**"), and any bid made at the Auction by a Qualified Party subsequent to Just Energy's announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional cash increments of USD$1,000,000;

   (d) **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video-conference, on an open basis, and all Qualified Parties will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each subsequent bid will be fully disclosed to all other Qualified Parties throughout the entire Auction; provided, however, that Just Energy, in its discretion, may establish separate video conference rooms to permit interim discussions between Just Energy and individual Qualified Parties with the understanding that all formal bids will be delivered in one group video conference, on an open basis;

   (e) **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit one or more additional bids with full knowledge and written confirmation of the then-existing highest bid(s); and

(f) **No Post-Auction Bids**. No bids will be considered for any purpose after the Auction has concluded.

Selection of Successful Bid

4. **Selection**. Before the conclusion of the Auction, Just Energy, in consultation with the Monitor, will: (a) review each Qualified Bid, considering the factors set out in Section 7 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in prong (i) above; (iii) the likelihood of the Qualified Party's ability to close a transaction by 90 days after completion of the Auction and the timing thereof (including factors such as the transaction structure and execution risk, including conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to Just Energy and (vi) any other factors Just Energy may, consistent with its fiduciary duties, reasonably deem relevant; and (b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").

5. **Acknowledgement**. The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by Just Energy in its sole discretion, subject to the milestones set forth in Section 6 of the SISP.

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

Court File No: CV-21-00658423-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., et al.

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

SISP APPROVAL ORDER

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Lawyers for the Just Energy Entities

Court File No. CV-18-603054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE DUNPHY	)	WEDNESDAY, THE 10TH DAY OF OCTOBER, 2018

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 ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC.

Applicants

CLAIMS PROCEDURE ORDER

THIS MOTION, made by Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. (together the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order approving a procedure for the solicitation of claims against the Applicants and the Directors and Officers of the Applicants was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Adrian Adams sworn October 1, 2018 and the Exhibits attached thereto, the affidavit of Kathryn Esaw sworn October 10, 2018 and Exhibits attached thereto, and the report dated October 5, 2018 by Richter Advisory Group Inc., in its capacity as Court-appointed Monitor (the "**Monitor**"), and on hearing the submissions of counsel for the Applicants and the Monitor, Deerfield Private Design Fund III, L.P. and Deerfield Partners L.P. ("**Deerfield**"), Nuvo Pharmaceuticals Inc., and the Official Committee of the Unsecured Creditors, no one else appearing for any other person on the service list,

although duly served as appears from the affidavit of service of Nicholas Avis sworn October 2, 2018 and filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that, for the purposes of this Order (the "**Claims Procedure Order**"), in addition to the terms defined elsewhere herein, the following terms shall have the following meanings:

(a) "**Assessments**" means Claims of Her Majesty the Queen in Right of Canada or of any Province or Territory or Municipality or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts which may arise or have arisen under any notice of assessment, notice of reassessment, notice of objection, notice of appeal, audit, investigation, demand or similar request from any taxation authority;

(b) "**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario;

(c) "**CCAA Proceedings**" means the proceedings commenced by the Applicants in the Court under Court File No. CV-18-603054-00CL;

(d) "**Chapter 11 Entities**" means Aralez Pharmaceuticals Management Inc.; Aralez Pharmaceuticals R&D Inc.; Aralez Pharmaceuticals U.S. Inc.; POZEN Inc.; Halton Laboratories LLC; Aralez Pharmaceuticals Holdings Limited; and Aralez Pharmaceuticals Trading DAC;

(e) "**Claims**" means D&O Claims, Pre-filing Claims and Restructuring Claims, provided that "Claims" shall not include Excluded Claims;

(f) "**Claimant**" means a Person asserting a Claim other than a D&O Claim;

(g) "**Claims Bar Date**" means: (i) with respect to a Pre-filing Claim or a D&O Claim, 5:00 p.m. on November 29, 2018, in Toronto, Ontario; and (ii) with respect to a Restructuring Claim, the Restructuring Claims Bar Date;

(h) "**Claims Package**" means the Instruction Letter, the Notice Letter, the Proof of Claim and any other documentation the Applicants, in consultation with the Monitor, may deem appropriate;

(i) "**Claims Procedure**" means the procedures outlined in this Claims Procedure Order in connection with the assertion and determination of Claims against the Applicants or the Directors or Officers or any of them, as amended or supplemented by further order of the Court;

(j) "**Court**" means the Ontario Superior Court of Justice (Commercial List) in the City of Toronto, in the Province of Ontario;

(k) "**D&O Claim**" means any existing or future right or claim of any Person against one or more of the Directors and/or Officers of the Applicants which arose or arises as a result of such Director's or Officer's position, supervision, management or involvement as a Director or Officer of the Applicants, whether such right, or the circumstances giving rise to it arose before or after the Initial Order up to and including the date of this Claims Procedure Order and whether enforceable in any civil, administrative or criminal proceeding (each a "**D&O Claim**" and collectively the "**D&O Claims**"), including any right:

a. in respect of which a Director or Officer may be liable in his or her capacity as such concerning employee entitlements to wages or other debts for services rendered to the Applicants or any one of them or for vacation pay, pension contributions, benefits or other amounts related to employment or pension plan rights or benefits or for taxes owing by the Applicants or amounts which were required by law to be withheld by the Applicants;

b. in respect of which a Director or Officer may be liable in his or her capacity as such as a result of any act, omission, or breach of a duty; or

c. that is or is related to a penalty, fine or claim for damages or costs;

(l) "**D&O Claimant**" means a Person asserting a D&O Claim;

(m) "**Directors**" means all current and former directors (or their estates) of the Applicants, in such capacity, and "**Director**" means any one of them;

(n) "**Deerfield Facility Agreement**" means the secured loan agreement between, *inter alia*, API and Deerfield dated as of June 8, 2015 (as amended or amended and restated from time to time, including on December 7, 2015);

(o) "**Equity Claim**" has the meaning set forth in Section 2(1) of the CCAA;

(p) "**Excluded Claims**" means:

a. Claims secured by any of the Charges (as that term is defined in the Initial Order or any subsequent or amended orders of the Court); and

b. Pre-filing secured debt in favour of Deerfield owed by the Applicants;

(q) "**Filing Date**" means August 10, 2018;

(r) "**Initial Order**" means the Initial Order under the CCAA dated August 10, 2018, as amended, restated or varied from time to time;

(s) "**Instruction Letter**" the means the document substantially in the form attached hereto as Schedule "A" regarding the information sheet supplied to Claimants to assist them in completing the Proof of Claim;

(t) "**Known Creditors**" means with respect to the Applicants, or the Directors or Officers or any of them:

a. any Person that the books and records of the Applicants disclose is owed monies by the Applicants as of the Filing Date, where such monies remain unpaid in full or in part as of the date hereof;

b. any Person who commenced a legal proceeding against the Applicants or one or more Directors or Officers in respect of a Claim, which legal proceeding was commenced and served prior to the Filing Date; and

c. any other Person of whom the Applicants have knowledge as at the date of this Claims Procedure Order as being owed monies by the Applicants and for whom the Applicants have a current address or other contact information;

(u) "**Meeting**" means a meeting of the creditors of the Applicants called for the purpose of considering and voting in respect of a Plan;

(v) "**Monitor's Website**" means the webpages operated by the Monitor for the purpose of these CCAA Proceedings, which can be found at http://insolvency.richter.ca/A/Aralez-Pharmaceuticals;

(w) "**Notice Letter**" means the document substantially in the form attached hereto as Schedule "B" regarding notification of the Claims Bar Date and how to submit a Proof of Claim;

(x) "**Officers**" means all current and former officers (or their estates) of the Applicants, in such capacity, and "**Officer**" means any one of them;

(y) "**Person**" means any individual, partnership, limited partnership, joint venture, trust, corporation, unincorporated organization, government or agency or instrumentality thereof, or any other corporate, executive, legislative, judicial, regulatory or administrative entity howsoever designated or constituted, including, without limitation, any present or former shareholder, supplier, customer, employee, agent, client, contractor, lender, lessor, landlord, sublandlord, tenant, sub-tenant, licensor, licensee, partner or advisor;

(z) "**Plan**" means a plan of compromise or arrangement or plan of reorganization filed by or in respect of the Applicants;

(aa) "**Pre-filing Claim**" means any right or claim of any Person against any of the Applicants, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind of any of the Applicants in existence on the Filing Date, whether or not such right or claim is reduced to judgement, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, unknown, by guarantee, by surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessment and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts that existed prior to the Filing Date and any other claims that would have been claims provable in bankruptcy had such Applicants become bankrupt on the Filing Date, including for greater certainty any Equity Claim; any costs, damages, or other obligations arising from litigation or legal proceedings; any unpaid employee wages or salaries; any inter-company debts or obligations owing to affiliated entities; and any claim against the Applicants for indemnification by any Director or Officer in respect of a D&O Claim (but excluding any such claim for indemnification that is covered by the Directors' Charge (as defined in the Initial Order)), in each case, where such monies remain unpaid as of the date hereof (each, a "**Pre-filing Claim**" and collectively, the "**Pre-filing Claims**");

(bb) "**Proof of Claim**" means a Proof of Claim form in substantially the form attached hereto as Schedule "C";

(cc) "**Restructuring Claim**" means any existing or future right or claim by any Person against any of the Applicants in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Applicants to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach by the Applicants on or after the Filing Date of any contract, lease or other agreement or arrangement

whether written or oral (each, a "**Restructuring Claim**", and collectively, the "**Restructuring Claims**"); and

(dd) "**Restructuring Claims Bar Date**" means, with respect to a Restructuring Claim, the later of (i) 5:00 p.m. in Toronto, Ontario, on the Claims Bar Date for Pre-filing Claims and D&O Claims (which, for greater certainty, is November 29, 2018) and (ii) the date that is 10 Business Days after the Monitor sends a Claims Package with respect to a Restructuring Claim in accordance with the Claims Procedure Order.

INTERPRETATION

3. **THIS COURT ORDERS** that all references to time herein shall be measured in the Eastern Time Zone, specifically the City of Toronto, Ontario, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein.

4. **THIS COURT ORDERS** that all references to the word "including" shall mean "including without limitation".

5. **THIS COURT ORDERS** that all references to the singular herein include the plural, the plural include the singular and any gender includes the other gender(s).

GENERAL

6. **THIS COURT ORDERS** that the Claims Procedure and the forms attached as schedules to the Claims Procedure Order are hereby approved and, if applicable, arrangements shall be made for French language translations of such forms. Notwithstanding the foregoing, the Monitor may, from time to time, make non-substantive changes to the forms as the Monitor, in its sole discretion, may consider necessary or desirable.

7. **THIS COURT ORDERS** that, notwithstanding anything else in this Claims Procedure Order, Persons asserting a Claim in respect of the Deerfield Facility Agreement are not required to file a Proof of Claim, pending further order of the Court.

8. **THIS COURT ORDERS** that the Applicants and the Monitor are hereby authorized to (a) use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed, and may waive strict compliance with the requirements of the Claims Procedure Order as to completion, execution and submission of such forms; and (b) request any such further documentation from a Claimant that the Applicants or Monitor may reasonably require in order to enable them to determine the validity and amount of a Claim; provided, however, that neither the Monitor nor the Applicants shall have any discretion to accept any Claim submitted subsequent to the Claims Bar Date.

9. **THIS COURT ORDERS** that all Claims shall be denominated in Canadian dollars. Any Claims denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada daily average exchange rate on the Filing Date.

10. **THIS COURT ORDERS** that amounts claimed in Assessments whether issued before or after the Filing Date shall be subject to this Claims Procedure Order and there shall be no presumption of validity or deeming of the amount due in respect of amounts claimed in any Assessment.

11. **THIS COURT ORDERS** that copies of all forms delivered hereunder, as applicable, shall be provided to and maintained by the Monitor.

ROLE OF THE MONITOR

12. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA and under the Initial Order, shall assist the Applicants in the administration of the Claims Procedure provided for herein and is hereby directed and empowered to take such other actions and fulfill such other roles as are contemplated by this Claims Procedure Order.

13. **THIS COURT ORDERS** that the Monitor shall (a) have all protections afforded to it by the CCAA, this Claims Procedure Order, the Initial Order, any other Orders of the Court in these proceedings and other applicable law in connection with its activities in respect of this Claims Procedure Order, including the stay of proceedings in its favour provided

pursuant to the Initial Order; and (b) incur no liability or obligation as a result of carrying out the provisions of this Claims Procedure Order, other than in respect of gross negligence or wilful misconduct.

14. **THIS COURT ORDERS** that the Applicants, the Officers, the Directors and their respective employees, agents and representatives and any other Person given notice of this Claims Procedure Order shall fully cooperate with the Monitor in the exercise of its powers and the discharge of its duties and obligations under this Claims Procedure Order.

CLAIMS PROCEDURE

Notice to Claimants

15. **THIS COURT ORDERS** that:

(a) the Monitor shall cause to be published, for at least one Business Day, on or before October 17, 2018, the Notice Letter in The Globe and Mail (National Edition);

(b) the Monitor shall post a copy of this Claims Procedure Order, the Applicants' Motion Record in respect of this Claims Procedure Order and the Claims Package on the Monitor's Website as soon as practicable and no later than 5:00 pm on the first Business Day following the date of this Order;

(c) the Monitor shall, within three Business Days of the date of this Order, send a Claims Package to each Known Creditor by regular prepaid mail, facsimile or email to the address of such Known Creditor as set out in the books and records of the Applicants and to any Claimant or D&O Claimant who requests these documents; and

(d) with respect to Restructuring Claims arising from the restructuring, disclaimer, resiliation, termination or breach of any lease, contract, or other agreement or obligation, on or after the date of this Claims Procedure Order, the Monitor shall send to the counterparty(ies) to such lease, contract or other agreement or obligation a Claims Package no later than five Business Days following the date of the restructuring, disclaimer, resiliation, termination or breach of any lease, contract, or other agreement or obligation.

16. **THIS COURT ORDERS** that upon request by a Claimant for a Claims Package or documents or information relating to the Claims Procedure prior to the Claims Bar Date, as applicable, the Monitor shall forthwith send a Claims Package, direct such Person to the documents posted on the Monitor's Website, or otherwise respond to the request for information or documents as the Monitor considers appropriate in the circumstances.

Deadline for Submitting a Claim or a D&O Claim

17. **THIS COURT ORDERS** that any Person that wishes to assert a Pre-filing Claim or a D&O Claim must submit a Proof of Claim evidencing such claim, accompanied with all relevant supporting documentation in respect of such Claim, and deliver that Proof of Claim to the Monitor via means permitted by this Order, so that it is actually received by the Monitor by no later than the Claims Bar Date.

18. **THIS COURT ORDERS** that any Person that wishes to assert a Restructuring Claim must submit a Proof of Claim evidencing such claim, accompanied with all relevant supporting documentation in respect of such Claim, and deliver that Proof of Claim to the Monitor via means permitted by this Order, so that it is actually received by the Monitor by no later than the Restructuring Claims Bar Date.

19. **THIS COURT ORDERS** that any Person that does not file a Proof of Claim with respect to a Claim, other than a D&O Claim, in the manner required by this Claims Procedure Order such that it is actually received by the Monitor on or before the Claims Bar Date or such other date as may be ordered by the Court, as applicable:

(a) shall not be entitled to attend or vote at a Meeting in respect of such Claim;

(b) shall not be entitled to receive any distribution in respect of such Claim pursuant to a Plan or otherwise;

(c) shall not be entitled to any further notice in the CCAA Proceedings (unless it has otherwise sought to be included on the service list); and

(d) shall be and is hereby forever barred from making or enforcing such Claim against the Applicants, or the Directors or Officers or any of them, and such Claim shall be and is hereby extinguished without any further act or notification.

For greater certainty, this paragraph shall not apply to Excluded Claims and the rights of any Person (including the Applicants) with respect to Excluded Claims are expressly reserved.

20. **THIS COURT ORDERS** that any Person who does not file a Proof of Claim with respect to a D&O Claim in accordance with this Order by the Claims Bar Date shall be forever barred from asserting or enforcing such D&O Claim against the Directors and Officers and the Directors and Officers shall not have any liability whatsoever in respect of such D&O Claim and such D&O Claim shall be extinguished without any further act or notification.

TRANSFER OF CLAIMS

21. **THIS COURT ORDERS** that if, after the Filing Date, the holder of a Claim transfers or assigns the whole of such Claim to another Person, neither the Monitor nor the Applicants shall be obligated to give notice or otherwise deal with the transferee or assignee of such Claim in respect thereof unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received and acknowledged by the relevant Applicant and the Monitor in writing and thereafter such transferee or assignee shall for the purposes hereof constitute the "Claimant" or "D&O Claimant" in respect of such Claim. Any such transferee or assignee of a Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with this Claims Procedure Order prior to receipt and acknowledgment by the Applicants and the Monitor of satisfactory evidence of such transfer or assignment. A transferee or assignee of a Claim takes the Claim subject to any right of set-off to which the Applicants may be entitled with respect to such Claim. For greater certainty, a transferee or assignee of a Claim is not entitled to set off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such Person to any of the Applicants.

22. **THIS COURT ORDERS** that if a Claimant or D&O Claimant or any subsequent holder of a Claim, who in any such case has previously been acknowledged by the Applicants and the Monitor as the holder of the Claim, transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person, such transfers or assignments shall not create separate Claims and such Claims shall continue to constitute and be dealt with as a single Claim notwithstanding such transfers or assignments. The Monitor shall not, in each case, be required to recognize or acknowledge any such transfers or assignments and shall be entitled to give notices to and to otherwise deal with such Claim only as a whole and then only to and with the Person last holding such Claim, provided such Claimant or D&O Claimant may, by notice in writing delivered to the Monitor, direct that subsequent dealings in respect of such Claim, but only as a whole, shall be dealt with by a specified Person and in such event, such Person shall be bound by any notices given or steps taken in respect of such Claim with such Claimant or D&O Claimant in accordance with the provisions of this Order.

23. **THIS COURT ORDERS** that the Applicants and the Monitor are not under any obligation to give any notice hereunder to any Person holding a security interest, lien or charge in, or a pledge or assignment by way of security in, a Claim.

SERVICE AND NOTICES

24. **THIS COURT ORDERS** that the Applicants and the Monitor may, unless otherwise specified by this Claims Procedure Order, serve and deliver or cause to be served and delivered any letters, notices or other documents to Claimants, D&O Claimants or any other interested Person by forwarding copies by ordinary mail, courier, personal delivery, facsimile or email to such Persons or their counsel (including counsel of record in any ongoing litigation) at the physical or electronic address, as applicable, last shown on the books and records of the Applicants or set out in such Claimant's Proof of Claim or D&O Claimant's Proof of Claim.

25. **THIS COURT ORDERS** that any notice or communication required to be provided or delivered by a Claimant or D&O Claimant to the Monitor under this Claims Procedure Order shall be delivered in writing in substantially the form, if any, provided for in this

Claims Procedure Order, shall be deemed to be received on the date that the Monitor actually receives such notice or communication, and will be sufficiently given only if delivered by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile or email addressed to:

Richter Advisory Group Inc., Court Appointed CCAA Monitor
of the Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals
Canada Inc.
Attention: Aralez CCAA Claims
181 Bay Street, 33rd Floor
Bay Wellington Tower
Toronto, ON M5J 2T3

Email: aralez@richter.ca
Phone: 1-877-676-4390
Fax: 1-877-676-4383

26. **THIS COURT ORDERS** that service and delivery by the Monitor or the Applicants of notices or communications contemplated in this Order shall be deemed to have been received: (a) if sent by ordinary mail, on the third Business Day after mailing within Canada, and the fifth Business Day after mailing internationally; (b) if sent by courier or personal delivery, on the next Business Day following dispatch; and (c) if delivered by facsimile or email by 5:00 p.m. on a Business Day, on such Business Day, or if delivered after 5:00 p.m. or on a day other than on a Business Day, on the following Business Day.

27. **THIS COURT ORDERS** that if during any period during which notices or other communications are being given pursuant to this Claims Procedure Order, a postal strike or postal work stoppage of general application should occur, such notices, notifications or other communications sent by ordinary mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, facsimile or email in accordance with this Claims Procedure Order.

28. **THIS COURT ORDERS** that in the event that this Claims Procedure Order is amended by further Order of the Court, the Monitor shall post such further Order on the

Monitor's Website and such posting shall constitute adequate notice to all Persons of such amended claims procedure.

29. **THIS COURT ORDERS** that the forms of notice to be provided in accordance with this Claims Procedure Order shall constitute good and sufficient service and delivery of notice of this Claims Procedure Order, the Claims Bar Date on all Persons who may be entitled to receive notice and who may assert a Claim and no other notice or service need be given or made and no other documents or material need be sent to or served upon any Person in respect of this Claims Procedure Order.

DETERMINATION OF CLAIMS AND RESTRUCTURING CLAIMS

30. **THIS COURT ORDERS** that the applicable procedures for reviewing and determining Claims shall be established by further Order of the Court. Notice of such procedures shall be provided to the service list in this CCAA proceeding and any Person who has filed a Proof of Claim against the Applicants in accordance with the Claims Procedure.

MISCELLANEOUS

31. **THIS COURT ORDERS** that notwithstanding any other provisions of this Claim Procedure Order, the solicitation by the Monitor or the Applicants of Claims and the filing by any Claimant or D&O Claimant of any Claims shall not, for that reason only, grant any Person any standing in these proceedings.

32. **THIS COURT ORDERS** that, notwithstanding the terms of this Claims Procedure Order, the Applicants or the Monitor may from time to time apply to this Court to amend, vary, supplement or replace this Claims Procedure Order or for advice and directions concerning the discharge of their respective powers and duties under this Claims Procedure Order or the interpretation or application of this Claims Procedure Order.

33. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative

bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

OCT 1 1 2018

PER / PAR:

SCHEDULE "A"

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC.

THIS INFORMATION SHEET IS SUPPLIED IN ORDER TO ASSIST YOU IN COMPLETING THE PROOF OF CLAIM

PARAGRAPH 1 OF THE PROOF OF CLAIM AND GENERAL COMMENTS

- ☐ The Claimant must state the full and complete legal name of the Claimant.
- ☐ The Claimant must give the complete address (including the postal code) where all notices and correspondence are to be forwarded. In addition, the Claimant and/or the authorized representative must indicate their telephone number, their facsimile and their e-mail address.
- ☐ The Claimant must advise as to whether or not the claim was acquired by assignment and, if so, provide full particulars/support evidencing assignment and provide the full legal name of the original creditor(s).

PARAGRAPH 2 OF THE PROOF OF CLAIM

- ☐ If the individual completing the Proof of Claim is not themselves the Claimant, they must state their position or title.

PARAGRAPHS 3, 4 AND 5 OF THE PROOF OF CLAIM

- ☐ A detailed, complete statement of account must be attached to the Proof of Claim. Provide all particulars of the Claim and supporting documents, including the amount and description of transaction(s) or agreements(s) giving rise to the Claim. The amount on the statement of account must correspond with the amount claimed on the Proof of Claim. The detailed statement of account must show the date, the invoice number and the amount of all invoices or charges, together with the date, the number and the amount of all credits or payments. A statement of account is not complete if it begins with an amount brought forward. If the Claim cannot be evidenced through a statement of account, the Claimant must provide a sworn affidavit providing all particulars of the Claim, together with all supporting documents.
- ☐ With respect to priority claims under section 136 of the *Bankruptcy and Insolvency Act* (Canada), please attach a detailed explanation supporting any priority claim.
- ☐ With respect to secured claims, please provide a detailed, complete statement of any particulars of the security, including the date on which the security was given and the value at which you assess the security and attach a copy of the security documents.
- ☐ If the Claim is in a foreign currency, it shall be converted to Canadian dollars at the Bank of Canada daily average exchange rate for August 10, 2018: CDN$1.3113/USD$1.00.

PARAGRAPH 6 OF THE PROOF OF CLAIM

- ☐ The Proof of Claim must be received by the Monitor before 5:00 p.m. in Toronto, Ontario, on the Claims Bar Date. For Pre-filing Claims and all D&O Claims, the Claims Bar Date is November 29, 2018. For Restructuring Claims, the Claims Bar Date

is the Restructuring Claims Bar Date, that being the later of (i) 5:00 p.m. in Toronto, Ontario, on the Claims Bar Date for Pre-filing Claims and D&O Claims (which is November 29, 2018) and (ii) the date that is 10 Business Days after the Monitor sends a Claims Package with respect to a Restructuring Claim in accordance with the Claims Procedure Order.

- ☐ Completed forms must be delivered to the Monitor by ordinary prepaid mail, registered mail, courier, personal delivery or email to the address below:

  Richter Advisory Group Inc., Court Appointed CCAA Monitor
  of the Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals
  Canada Inc.
  Attention: Aralez CCAA Claims
  181 Bay Street, 33rd Floor
  Bay Wellington Tower
  Toronto, ON M5J 2T3

  Email: aralez@richter.ca
  Phone: 1-877-676-4390
  Fax: 1-877-676-4383

- ☐ Claimants are responsible for proving receipt of documents by the Monitor.

PARAGRAPH 7 OF THE PROOF OF CLAIM

- ☐ The Proof of Claim must be signed by the Claimant or its duly authorized representative and must also be signed by a witness.

SCHEDULE "B"

NOTICE TO CLAIMANTS FOR THE CLAIMS PROCEDURE OF:

Aralez Pharmaceuticals Inc. and
Aralez Pharmaceuticals Canada Inc.
(the "Applicants") and/or
its former and current Directors or Officers (the "Directors")

RE: NOTICE OF CLAIMS PROCEDURE, CLAIMS BAR DATE and RESTRUCTURING CLAIMS BAR DATE

NOTICE IS HEREBY GIVEN that this notice is being published pursuant to an order of the Ontario Superior Court of Justice (Commercial List) made October 10, 2018 (the "**Claims Procedure Order**"). All capitalized terms herein shall have the meanings given to them in the Claims Procedure Order. The Court has authorized the Court-appointed Monitor of the Applicants, Richter Advisory Group Inc. (the "**Monitor**"), to assist the Applicants in conducting a claims procedure (the "**Claims Procedure**") with respect to claims against the Applicants and the Directors in accordance with the terms of the Claims Procedure Order.

PLEASE TAKE NOTICE that the claims procedure applies only to the Claims described in the Claims Procedure Order. Reference should be made to the Claims Procedure Order for the complete definition of "**Pre-filing Claim**", "**D&O Claim**" and "**Restructuring Claim**". The Claims Procedure Order and related materials and forms may be accessed from the Monitor's website at http://insolvency.richter.ca/A/Aralez-Pharmaceuticals.

If you believe that you have a Claim against the Applicants or the D&O of the Applicants, you must file a Proof of Claim with the Monitor by completing the Proof of Claim form, a copy of which can be obtained from the Monitor's website or by contacting **1-877-676-4390** (phone), **1-877-676-4383** (fax) or **aralez@richter.ca**. All Claimants must submit their Claim to the Monitor (at the address noted below) by the Claims Bar Date, as defined below.

THE CLAIMS BAR DATE with respect to a Pre-filing Claim or a D&O Claim is 5:00 p.m. in Toronto, Ontario, on November 29, 2018. The Claims Bar Date with respect to a Restructuring Claim is the Restructuring Claims Bar Date.

THE RESTRUCTURING CLAIMS BAR DATE is the later of (i) 5:00 p.m. in Toronto, Ontario, on November 29, 2018 and (ii) the date that is 10 Business Days after the Monitor sends a Claims Package with respect to a Restructuring Claim in accordance with the Claims Procedure Order.

PROOFS OF CLAIM MUST BE COMPLETED AND RECEIVED BY THE MONITOR BY THE CLAIMS BAR DATE OR THE CLAIM WILL BE FOREVER BARRED AND EXTINGUISHED.

HOLDERS OF CLAIMS who do not file a Proof of Claim with respect to a Claim by the Claims Bar Date will not be entitled to vote at any Meeting regarding a Plan or participate in any distribution under a Plan or otherwise in respect of such Claims.

The Monitor can be contacted at the following address to request relevant documents or for any other notices or enquiries with respect to the Claims Procedure:

Richter Advisory Group Inc., Court Appointed CCAA Monitor
of the Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals
Canada Inc.
Attention: Aralez CCAA Claims
181 Bay Street, 33rd Floor
Bay Wellington Tower
Toronto, ON M5J 2T3

Email: aralez@richter.ca
Phone: 1-877-676-4390
Fax: 1-877-676-4383

DATED at Toronto, Ontario this 10th day of October, 2018.

SCHEDULE "C"

Court File No. CV-18-603054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC.
(the "Applicants")

PROOF OF CLAIM

Please read carefully the Claims Procedure Order and the schedules appended to the Claims Procedure Order prior to completing this form.

1. **PARTICULARS OF THE CLAIMANT:**

A.	Full Legal Name of Claimant	_____
		_____ (the "**Claimant**")
B.	Full Mailing Address of the Claimant	_____
		_____
		_____
		_____
C.	Telephone Number	_____
D.	Email Address	_____
E.	Fax Number	_____
F.	Name of the Authorized Representative of the Claimant	_____
		_____
G.	Email address of the Authorized Representative	_____

H. Have you acquired this claim by assignment? Yes: ☐ No: ☐

If yes, please attach documents evidencing assignment and provide the full legal name of the original creditor(s):

_____

_____

2. DECLARATION:

I, _____
(name of Claimant or Authorized Representative of the Claimant)

☐ am the Claimant of Aralez Pharmaceuticals Inc. and/or Aralez Pharmaceuticals Canada Inc.;

☐ have a claim against one or more Directors/Officers:

_____
(please specify the individual Directors/Officers)

☐ am _____ of
(indicate the title or function)

_____
(name of Claimant)

which is a Claimant of Aralez Pharmaceuticals Inc. and/or Aralez Pharmaceuticals Canada Inc.;

☐ have knowledge of all the circumstances connected with the Claim described herein.

3. PROOF OF CLAIM:

The Applicant(s) and/or the Directors/Officers of the Applicants were and still are indebted to the Claimant as follows:

(A restructuring claim against the Applicants means any existing or future right or claim by any Person against any of the Applicants in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Applicants to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach by the Applicants on or after the Filing Date (namely August 10, 2018) of any contract, lease or other agreement or arrangement whether written or oral.)

(Claims in a foreign currency are to be converted to Canadian Dollars at the Bank of Canada daily average exchange rate for August 10, 2018: CDN$1.3113/USD$1.00.)

i. **PRE-FILING CLAIM AGAINST THE APPLICANTS**

a. ARALEZ PHARMACEUTICALS INC. CA $_____
b. ARALEZ PHARMACEUTICALS CANADA INC. CA $_____

ii. **RESTRUCTURING CLAIM AGAINST THE APPLICANTS:**

a. ARALEZ PHARMACEUTICALS INC. CA $_____
b. ARALEZ PHARMACEUTICALS CANADA INC. CA $_____

iii. **DIRECTOR/OFFICER CLAIM AGAINST THE DIRECTORS/OFFICERS OF THE APPLICANTS:**

a. ARALEZ PHARMACEUTICALS INC. CA $_____
b. ARALEZ PHARMACEUTICALS CANADA INC. CA $_____

iv. **TOTAL CLAIM (sum of (i), (ii) and (iii)):**

a. ARALEZ PHARMACEUTICALS INC. CA $_____
b. ARALEZ PHARMACEUTICALS CANADA INC. CA $_____

4. **NATURE OF CLAIM:**

Applicant (circle as applicable):

Aralez Pharmaceuticals Inc. / Aralez Pharmaceuticals Canada Inc.

(a) **UNSECURED CLAIM** in the amount of CA$_____ / _____.
In respect of this debt, I do not hold any security and:

(i) □ Regarding the amount of CA$_____ / _____, I do not claim a right to priority.

(ii) □ Regarding the amount of CA$_____ / _____, I claim a right to a priority under section 136 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") or would claim such a priority if this Proof of Claim were being filed in accordance with the BIA.

Please attach a detailed explanation supporting any priority claim.

(b) **SECURED CLAIM** in the amount of CA$_____ / _____.
In respect of this debt, I hold security valued at CA$_____ / _____, particulars of which are attached to this Proof of Claim form.

Please provide a detailed, complete statement of any particulars of the security, including the date on which the security was given and the value at which you assess the security and attach a copy of the security documents.

5. PARTICULARS OF CLAIM

The particulars of the undersigned's total Claim (including Pre-filing Claims, Restructuring Claims and D&O Claims) are attached.

(Provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed. If a Claim cannot be evidenced through a statement of account, the Claimant must provide a sworn affidavit attesting to the particulars of the Claim, together with all supporting documents. If a claim is made against any Directors or Officers, specify the applicable Directors or Officers and the legal basis for the Claim against them.)

6. FILING OF CLAIM

This Proof of Claim must be received by the Monitor on or before the Claims Bar Date. With respect to Pre-filing Claims and D&O Claims, the Claims Bar Date means 5:00 p.m. in Toronto, Ontario, on November 29, 2018. With respect to Restructuring Claims, the Claims Bar Date means the later of (i) 5:00 p.m. in Toronto, Ontario, on November 29, 2018 and (ii) the date that is 10 Business Days after the Monitor sends a Claims Package with respect to a Restructuring Claim in accordance with the Claims Procedure Order.

Failure to file your Proof of Claim as directed by the Claims Bar Date will result in your Claim being extinguished and barred and in you being prevented from making or enforcing a Claim against the Applicants or Director/Officer, as applicable.

All future correspondence will be directed to the email designated in the contact details unless you specifically request that hardcopies be provided.

☐ I require hardcopy correspondence.

DATED at _____ this ___ day of _____, 201___.

_____
(Signature of Witness)

_____
(Signature of Claimant or its authorized representative)

_____
(Please print name)

_____
(Please print name)

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 ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC.

Court File No: CV-18-603054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

CLAIMS PROCEDURE ORDER

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Lawyers for the Applicants

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	~~THURS~~FRIDAY, THE 15TH
	)	
JUSTICE MORAWETZ	)	DAY OF JUNE, 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

(the "Applicants")

ORDER
(Claims Procedure)

THIS MOTION, made by Timminco Limited and Bécancour Silicon Inc. (collectively, the "**Timminco Entities**") for an order approving a procedure for the solicitation, determination and resolution of claims against the Timminco Entities and the Directors and Officers of the Timminco Entities, in accordance with the terms of the Claims Procedure (as these terms are defined below), was heard June 14, 2012 at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Peter A.M. Kalins sworn June 7, 2012 and the Eleventh Report of FTI Consulting Canada Inc. in its capacity as the monitor of the Timminco Entities (the "**Monitor**"), and on hearing the submissions of counsel to the Timminco Entities, the Monitor, the Directors and Officers, Mercer Canada, the

Administrator of the Haley Pension Plan, BSI Non-Union Employee Pension Committee, no one appearing for any other person on the Service List, although properly served as appears from the affidavit of service, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and Motion Record in respect of this Motion is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that, for purposes of this Order establishing a claims procedure for the Timminco Entities and their Directors and Officers (the "**Claims Procedure Order**"), in addition to terms defined elsewhere herein, the following terms shall have the following meanings:

   (a) "**9:30 Appointment**" means a chambers appointment with a Justice of the Court which may be scheduled for 9:30 a.m. on any day on which the Court is sitting;

   (b) "**Assessments**" means Claims of Her Majesty the Queen in Right of Canada or of any Province or Territory or Municipality or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts which may arise or have arisen under any notice of assessment, notice of reassessment, notice of appeal, audit, investigation, demand or similar request from any taxation authority;

   (c) "**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario;

   (d) "**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

   (e) "**CCAA Proceedings**" means the proceedings commenced by the Timminco Entities in the Court under Court File No. CV-12-9539-00CL;

(f) "**Claim**" means:

(i) any right or claim of any Person against one or more of the Timminco Entities, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of one or more of the Timminco Entities in existence prior to the Filing Date, and any accrued interest thereon and costs payable in respect thereof to the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts which existed prior to the Filing Date, and includes any claims that would have been claims provable in bankruptcy had the applicable Timminco Entity become bankrupt on the Filing Date (each, a "**Pre-filing Claim**", and collectively, the "**Pre-filing Claims**");

(ii) any existing or future right or claim of any Person against one or more of the Timminco Entities in connection with any indebtedness, liability or obligation of any kind whatsoever owed by one or more of the Timminco Entities to such Person arising on or after the Filing Date as a result of any disclaimer, resiliation, termination or breach on or after the Filing Date of any contract, lease, permit, authorization or other agreement whether written or oral and whether such disclaimer, resiliation, termination or breach took place or takes place before or after the date of this Claims Procedure Order, including any accrued interest thereon and costs payable in respect thereof to the date of such disclaimer, resiliation, termination or breach, to the extent provided for in the contract, lease, permit, authorization or other agreement each, a "**Restructuring Claim**", and collectively, the "**Restructuring Claims**"); and

(iii) any existing or future right or claim of any Person against one or more of the Directors and/or Officers of a Timminco Entity which arose or arises as a result of such Director's or Officer's position, supervision, management or involvement as a Director or Officer of a Timminco Entity, whether such right, or the

circumstances giving rise to it arose before or after the Initial Order up to and including the date of this Claims Procedure Order and whether enforceable in any civil, administrative or criminal proceeding (each a "**D&O Claim**", and collectively the "**D&O Claims**"), including any right:

A. relating to any of the categories of obligations described in paragraph 9 of the Initial Order, whether accrued or falling due before or after the Initial Order, in respect of which a Director or Officer may be liable in his or her capacity as such;

B. in respect of which a Director or Officer may be liable in his or her capacity as such concerning employee entitlements to wages or other debts for services rendered to the Timminco Entities or any one of them or for vacation pay, pension contributions, benefits or other amounts related to employment or pension plan rights or benefits or for taxes owing by the Timminco Entities or amounts which were required by law to be withheld by the Timminco Entities;

C. in respect of which a Director or Officer may be liable in his or her capacity as such as a result of any act, omission, or breach of a duty; or

D. that is or is related to a penalty, fine or claim for damages or costs;

provided however that in any case "Claim" shall not include an Excluded Claim;

(g) "**Claimant**" means a Person asserting a Claim other than a D&O Claim;

(h) "**Claims Bar Date**" means 5:00 p.m. (Toronto Time) on July 23, 2012;

(i) "**Claims Officer**" means any individual designated by the Monitor or the Court pursuant to paragraph 34 of this Claims Procedure Order;

(j) "**Claims Procedure**" means the procedures outlined in this Order, including the Schedules;

(k) "**Claims Procedure Order**" means this Order;

(l) "**Court**" means the Ontario Superior Court of Justice (Commercial List) in the City of Toronto, in the Province of Ontario;

(m) "**D&O Claim**" has the meaning ascribed to that term in paragraph 2(f)(iii) of this Claims Procedure Order;

(n) "**D&O Claimant**" means a Person asserting a D&O Claim;

(o) "**D&O Counsel**" means Fraser Milner Casgrain LLP in its capacity as independent counsel to the Directors and Officers;

(p) "**D&O Dispute Package**" means with respect to any D&O Claim, a copy of all information submitted via the FTI Claims Site or otherwise provided to, or delivered by, the Monitor in accordance with this Order with respect to the applicable D&O Claim;

(q) "**Directors**" means the directors and former directors of each of the Timminco Entities and "**Director**" means any one of them;

(r) "**Dispute Package**" means with respect to any Claim means with respect to any Claim, a copy of all information submitted via the FTI Claims Site or otherwise provided to, or delivered by, the Monitor in accordance with this Order with respect to the applicable Claim;

(s) "**Excluded Claim**" means (i) claims secured by any of the "Charges", as defined in the Initial Order, provided that Excluded Claims shall not include D&O Claims, (ii) Claims secured by the KERP Charge, as defined in the Order of Justice Morawetz dated January 16, 2012, (iii) claims secured by the DIP Lender's Charge, as defined in the Order of Justice Morawetz dated February 7, 2012, (iv) any claim against a Director that cannot be compromised due to the provisions of subsection 5.1(2) of the CCAA; and (v) the secured claims of IQ;

(t) "**Filing Date**" means January 3, 2012 as of 12:01 am EST;

(u) "**FTI Claims Site**" means https://cmsi.ftitools.com/timminco;

(v) "**Information Submission Form**" means a form substantially in accordance with the form attached hereto as Schedule "3";

(w) "**Initial Order**" means the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012, as extended and amended from time to time;

(x) "**Known Creditor**" means a Person who the Timminco Entities received actual notice may have a Claim against either of the Timminco Entities or that the books and records of the Timminco Entities show as owed an amount as at the Filing Date and/or an amount arising subsequent to the Filing Date that constitutes damages as a result of the

disclaimer, resiliation, termination or breach on or after the Filing Date of any contract, lease, permit, authorization or other agreement whether written or oral;

(y) "**Monitor**" means FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Timminco Entities;

(z) "**Monitor's Website**" means http://cfcanada.fticonsulting.com/timminco;

(aa) "**Notice of Claims Procedure and Claims Bar Date**" means the notice for publication, substantially in the form attached as Schedule "1";

(bb) "**Notice of Restructuring Claims Bar Date**" means the notice for publication, substantially in the form attached as Schedule "2";

(cc) "**Officers**" means the officers and former officers of each of the Timminco Entities and "**Officer**" means any one of them;

(dd) "**Orders**" means any and all orders issued by the Court, including the Initial Order;

(ee) "**Person**" means any individual, partnership, firm, joint venture, trust, entity, corporation, unincorporated organization, trade union, pension plan administrator, pension plan regulator, governmental authority or agency, employee or other association, or similar entity, howsoever designated or constituted;

(ff) "**Pre-filing Claim**" has the meaning ascribed to that term in paragraph 2(f)(i);

(gg) "**Proven Claim**" means the amount of a Claim and its classification as a secured Claim or an unsecured Claim, as finally determined in accordance with this Claims Procedure;

(hh) "**Restructuring Claim**" has the meaning ascribed to that term in paragraph 2(f)(ii) of this Claims Procedure Order; and

(ii) "**Restructuring Claims Bar Date**" means 5:00 p.m. on a date to be determined by the Timminco Entities, in consultation with the Monitor;

(jj) "**Supporting Documentation Submission Form**" means a form substantially in accordance with the form attached hereto as Schedule "4".

INTERPRETATION

3. **THIS COURT ORDERS** that all references as to time herein shall mean local time in Toronto, Ontario, Canada, and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day, unless otherwise indicated herein.

4. **THIS COURT ORDERS** that all references to the word "including" shall mean "including without limitation".

5. **THIS COURT ORDERS** that all references to the singular herein include the plural, the plural include the singular, and any gender includes the other gender.

GENERAL PROVISIONS

6. **THIS COURT ORDERS** that the Monitor, in consultation with the Timminco Entities, is hereby authorized to (a) use reasonable discretion as to the adequacy of compliance with respect to the manner in which the fields of the FTI Claims Site or any forms delivered hereunder are completed and executed, and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Claims Procedure Order as to the completion and execution of such data fields and forms, and (b) request such further documentation from a Claimant or D&O Claimant that the Timminco Entities and the Monitor may reasonably require in order to enable them to determine the validity of a Claim. Notwithstanding anything contained herein, neither the Monitor nor the Timminco Entities shall have any discretion to accept any Claim submitted subsequent to the Claims Bar Date or the Restructuring Claims Bar Date.

7. **THIS COURT ORDERS** that any Claims denominated in a foreign currency shall be converted to Canadian dollars for the purposes of this Claims

Procedure on the basis of the average Bank of Canada Canadian dollar noon exchange rate at the close of business on the Filing Date.

8. **THIS COURT ORDERS** that interest and penalties that would otherwise accrue after the Filing Date shall not be included in any unsecured Claim. Amounts claimed in Assessments whether issued before or after the Filing Date shall be subject to this Claims Procedure Order and there shall be no presumption of validity or deeming of the amount due in respect of the Claim set out in any Assessment.

MONITOR'S ROLE

9. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA and under the Orders, is hereby directed and empowered to take such other actions and fulfill such other roles as are contemplated by this Claims Procedure Order.

10. The Monitor, in carrying out the terms of the Claims Procedure Order, shall have all of the protections given it by the CCAA and the Initial Order or as an officer of this Court, including the stay of proceedings in its favour, shall incur no liability or obligation as a result of the carrying out of its obligations under this Claims Procedure Order, shall be entitled to rely on the books and records of the Timminco Entities, and any information provided by the Timminco Entities or a Claimant, and shall not be liable for any claims or damages resulting from any errors or omissions in such books, records, or information.

CLAIMS PROCEDURE

Notice of Claims Bar Date – Pre-filing Claims and D&O Claims

11. **THIS COURT ORDERS** that:

(a) The Monitor shall cause the Notice of Claims Procedure and Claims Bar Date to be placed in each of the Globe and Mail (national edition), the

National Post (national edition) and *La Presse* as soon as practicable after the date of this order; and

(b) The Monitor shall cause the Notice of Claims Procedure and Claims Bar Date to be posted on the Monitor's Website as soon as practicable after the date of this Order and cause it to remain posted thereon until its discharge as Monitor of the Timminco Entities.

Notice of Restructuring Claims Bar Date – Restructuring Claims

12. **THIS COURT ORDERS** that:

(a) The Monitor shall cause the Notice of Restructuring Claims Bar Date to be placed in each of the Globe and Mail (national edition), the National Post (national edition) and *La Presse* at least 28 days before the Restructuring Claims Bar Date; and

(b) The Monitor shall cause the Notice of Restructuring Claims Bar Date to be posted on the Monitor's Website at least 28 days before the Restructuring Claims Bar Date and cause it to remain posted thereon until its discharge as Monitor of the Timminco Entities.

13. **THIS COURT ORDERS** that each of the Timminco Entities shall provide a list of Known Creditors to the Monitor by no later than 5:00 pm on the first Business Day following the date of this Order.

14. **THIS COURT ORDERS** that the Monitor shall as soon as practicable after the date of this Order and receipt of the list of Known Creditors from the Timminco Entities send a Notice of Claims Procedure and Claims Bar Date and a copy of this Claims Procedure Order to each Known Creditor by regular prepaid mail or electronic mail to the address of such Known Creditor as set out in the books and records of the Timminco Entities and to any Claimant or D&O Claimant who requests these documents.

15. **THIS COURT ORDERS** that the Timminco Entities shall not disclaim, resiliate, terminate or breach any contract, lease, permit, authorization or other agreement, whether written or oral, after the Notice of Restructuring Claims

Bar Date has been published in the manner set out in paragraph 12 of this Order.

Deadline for Submitting a Claim or a D&O Claim

16. **THIS COURT ORDERS** that any Person that wishes to assert a Pre-filing Claim or a D&O Claim must submit proof of such Claim, together with all relevant supporting documentation in respect of such Claim, via the FTI Claims Site or as otherwise permitted by this Order, on or before the Claims Bar Date.

17. **THIS COURT ORDERS** that any Person that wishes to assert a Restructuring Claim must file proof of such Claim, together with all relevant supporting documentation in respect of such Claim, via the FTI Claims Site or as otherwise permitted by this Order, on or before the Restructuring Claims Bar Date.

18. **THIS COURT ORDERS** that any Person who does not file proof of a Claim in accordance with this Order with the Monitor by the Claims Bar Date or such other date as may be ordered by the Court, or the Restructuring Claims Bar Date or such other date as may be ordered by the Court, as applicable, shall be forever barred from asserting or enforcing such Claim against the Timminco Entities and the Timminco Entities shall not have any liability whatsoever in respect of such Claim and such Claim shall be extinguished without any further act or notification by the Timminco Entities.

19. **THIS COURT ORDERS** that any Person who does not file a proof of a D&O Claim in accordance with this Order by the Claims Bar Date or such other later date as may be ordered by the Court shall be forever barred from asserting or enforcing such D&O Claim against the Directors and Officers and the Directors and Officers shall not have any liability whatsoever in respect of

such D&O Claim and such D&O Claim shall be extinguished without any further act or notification.

ADJUDICATION OF CLAIMS

Adjudication of Pre-filing Claims and Restructuring Claims

20. **THIS COURT ORDERS** that the Monitor, with the assistance of the Timminco Entities, shall review the information filed by each Claimant with respect to a Pre-filing Claim or a Restructuring Claim that is received by the Claims Bar Date or the Restructuring Claims Bar Date, as applicable, and may accept, revise or disallow such Pre-filing Claim or Restructuring Claim. At any time, the Timminco Entities or the Monitor may request additional information from the Claimant with respect to any Pre-filing Claim or Restructuring Claim.

21. **THIS COURT ORDERS** that the Monitor, with the assistance of the Timminco Entities, may attempt to consensually resolve the classification and amount of any Pre-filing Claim or Restructuring Claim with the Claimant prior to accepting, revising or disallowing such Pre-filing Claim or Restructuring Claim.

22. **THIS COURT ORDERS** that if the Monitor, with the assistance of the Timminco Entities, determines to revise or disallow a Pre-filing Claim or Restructuring Claim, the Monitor shall notify the Claimant of the revision or disallowance via email through the FTI Claims Site or as otherwise provided in this Order.

23. **THIS COURT ORDERS** that if a Claimant disputes the classification or amount of its Pre-filing Claim or Restructuring Claim as set forth by the Monitor via the FTI Claims Site or as otherwise provided by this Order, then such Claimant may dispute such revision or disallowance via the FTI Claims

Site or as otherwise provided in this Order, so that it is received by no later than 5:00 p.m. (Toronto time) on the date which is fourteen days after the date of the notification of such revision or disallowance or such later date as the Court may order.

24. **THIS COURT ORDERS** that any Claimant who fails to dispute a revision or disallowance by the deadline and in the manner set forth in paragraph 23 shall be deemed to accept the classification and amount of its Pre-filing Claim or Restructuring Claim as set out in the revision or disallowance and the Pre-filing Claim or Restructuring Claim as set out in the revision or disallowance shall constitute a Proven Claim.

25. **THIS COURT ORDERS** that if a Claimant disputes a revision or disallowance of its Pre-filing Claim or Restructuring Claim, the Monitor, in consultation with the Timminco Entities, may:

(a) attempt to consensually resolve the classification and the amount of the Pre-filing Claim or the Restructuring Claim with the Claimant;

(b) deliver a Dispute Package to the Claims Officer; and/or

(c) schedule a 9:30 Appointment with the Court for the purpose of scheduling a motion to resolve the Pre-filing Claim or Restructuring Claim and at such motion the Claimant shall be deemed to be the applicant and the Timminco Entities shall be deemed to be the respondent. The Monitor may participate in such proceedings as it deems appropriate, which may include providing information regarding the disallowance or revision of the Pre-filing Claim or the Restructuring Claim to the parties and the Court.

26. **THIS COURT ORDERS THAT,** notwithstanding anything contained herein, in respect of any Pre-filing Claim or Restructuring Claim filed by or on behalf of one of the Timminco Entities as against the other, or by any other affiliate or party related to either of the Timminco Entities, including, without limitation, Quebec Silicon Limited Partnership, Quebec Silicon General Partner Inc., AMG Advanced Metallurgical Group N.V. and all of its subsidiaries (the

"**Related Party Claims**"), following the adjudication of all Related Party Claims in accordance with paragraphs 20-23 and 25(a) of this Claims Procedure Order, the Monitor shall prepare a report reporting on the adjudication of the Related Party Claims and the results of the adjudication process (the "**Related Party Claims Report**"). The Monitor shall serve the Related Party Claims Report on the service list and post it on the Monitor's Website. Any party who intends to object to any conclusions of the Monitor as set out in the Related Party Claims Report shall, within 14 days of the date of service of the Related Party Claims Report (the "**Objection Date**"), deliver to the Monitor a letter setting out in detail the grounds for its objection. If no Objection is delivered to the Monitor by the Objection Date, the Monitor shall complete the adjudication of the Related Party Claims in accordance with paragraphs 25(b) and (c) and 35-40 of this Claims Procedure Order and the result of that process shall be final and binding subject to any appeal rights of any party asserting or defending the relevant Related Party Claim and no other party may object to, appeal or participate in the adjudication process of the Related Party Claims. If an Objection is delivered to the Monitor by the Objection Date, the Monitor shall schedule a 9:30 Appointment as soon as practicable thereafter for the purposes of seeking further directions from the Court in respect of the process for the further adjudication of the Related Party Claims and Objections.

27. **THIS COURT ORDERS THAT**, notwithstanding any other provision hereof, with respect to any Pre-filing or Restructuring Claim arising from a cause of action for which the applicable Timminco Entity is fully insured, the Monitor, with the consent of the Timminco Entities, may agree with the applicable insurer that such Pre-filing or Restructuring Claim shall be adjudicated by way of an alternative process and not adjudicated in accordance with the procedure set out in this Order. In such case, the Timminco Entities shall

notify the Claimant of the decision to exclude the adjudication of the Claim from the procedure set out in this Order.

Adjudication of D&O Claims

28. **THIS COURT ORDERS** that the Monitor, in consultation with the Timminco Entities and the D&O Counsel, shall review the information filed by each D&O Claimant with respect to each D&O Claim that is received by the Claims Bar Date and, with the consent of the applicable Directors or Officers, may accept, revise or disallow the D&O Claim. At any time, the Timminco Entities, the Monitor or the D&O Counsel may request additional information from the D&O Claimant with respect to any D&O Claim.

29. **THIS COURT ORDERS** that the Monitor, with the consent of the applicable Directors or Officers and in consultation with the Timminco Entities, may attempt to consensually resolve the classification and amount of any D&O Claim with the D&O Claimant prior to the Timminco Entities accepting, revising or disallowing such D&O Claim.

30. **THIS COURT ORDERS** that if the Monitor, with the consent of the applicable Directors or Officers and in consultation with the Timminco Entities, determines to revise or disallow a D&O Claim, the Monitor shall notify the D&O Claimant of the revision or disallowance via email through the FTI Claims Site or as otherwise provided in this Order.

31. **THIS COURT ORDERS** that if a D&O Claimant disputes the classification or amount of its D&O Claim as set forth by the Monitor via the FTI Claims Site or as otherwise provided by this Order, then such Claimant may dispute such revision or disallowance via the FTI Claims Site or as otherwise provided in this Order, so that it is received by no later than 5:00 p.m. (Toronto time) on the day which is fourteen days after the date of notification of such revision or disallowance or such later date as the Court may order.

32. **THIS COURT ORDERS** that any D&O Claimant who fails to dispute a revision or disallowance by the deadline and in the manner set forth in paragraph 31 shall be deemed to accept the classification and amount of its D&O Claim as set out in the revision or disallowance and the D&O Claim as set out in the revision or disallowance shall constitute a Proven Claim.

33. **THIS COURT ORDERS** that if a D&O Claimant disputes a revision or disallowance of its D&O Claim, the Monitor, in consultation with the Timminco Entities and with the consent of the applicable Directors or Officers, may:

(a) attempt to consensually resolve the classification and the amount of the Claim with the D&O Claimant;

(b) deliver a D&O Dispute Package to the Claims Officer; and/or

(c) schedule a 9:30 Appointment with the Court for the purpose of scheduling a motion to resolve the D&O Claim and at such motion the D&O Claimant shall be deemed to be the applicant and the applicable Directors or Officers shall be deemed to be the respondent. The Monitor may participate in such proceedings as it deems appropriate, which may include providing information regarding the disallowance or revision of the D&O Claim to the parties and the Court.

34. **THIS COURT ORDERS THAT**, notwithstanding any other provision hereof, the Monitor may agree with all of the relevant Directors and Officers that a D&O Claim shall be adjudicated by way of an alternative process and not adjudicated in accordance with the procedure set out in this Order. In such case, the Monitor shall notify the D&O Claimant of the decision to exclude the adjudication of the D&O Claim from the procedure set out in this Order.

CLAIMS OFFICERS

35. **THIS COURT ORDERS** that the Monitor, with the consent of the Timminco Entities and D&O Counsel, where applicable, or the Court may appoint Claims Officers for the purposes of the Claims Procedure described herein.

36. **THIS COURT ORDERS** that if a Claim is referred to a Claims Officer for resolution, the Claims Officer shall determine the validity, amount and classification of disputed Claims in accordance with this Claims Procedure Order and to the extent necessary may determine whether any Claim or part thereof constitutes an Excluded Claim. A Claims Officer shall determine all procedural matters which may arise in respect of his or her determination of these matters, including the manner in which any evidence may be adduced. A Claims Officer shall have the discretion to determine by whom and to what extent the costs of any hearing before a Claims Officer shall be paid.

37. **THIS COURT ORDERS** that, notwithstanding anything to the contrary herein, the Monitor may at any time, in consultation with the Timminco Entities, refer a Claim to a Claims Officer or to the Court for resolution, where in the Monitor's view such a referral is preferable or necessary for the resolution of the Claim, provided that in respect of a D&O Claim, the Monitor shall also obtain the consent to such referral from the relevant Directors or Officers.

38. **THIS COURT ORDERS** that upon receipt of a Dispute Package or a D&O Dispute Package or referral for resolution pursuant to paragraph 37 hereof, the Claims Officer shall schedule and conduct a hearing to determine the validity, amount and/or classification of the Claim and shall as soon as practicable thereafter notify the Timminco Entities, the Monitor, the D&O Counsel where applicable, and the Claimant or the D&O Claimant of his or her determination.

39. **THIS COURT ORDERS** that the Timminco Entities, the Monitor, the Claimant, or, in the case of a D&O Claim, the D&O Claimant, or any relevant Directors or Officers, may appeal the Claims Officer's determination to this Court within ten days of the date on which notification is deemed to have been received of the Claims Officer's determination of such Claim by serving

upon the Timminco Entities, the Monitor, the Claimant or, in the case of a D&O Claim, the D&O Claimant, or any relevant Directors or Officers, as applicable, and filing with this Court a notice of motion returnable on a date to be fixed by this Court. If an appeal is not filed within such ten day period then the Claims Officer's determination shall, subject to a further order of the Court, be deemed to be final and binding and shall be a Proven Claim or Proven D&O Claim, as applicable.

40. **THIS COURT ORDERS** that the Timminco Entities shall pay the reasonable professional fees and disbursements of each Claims Officer in connection with such appointment as Claims Officer on presentation and acceptance of invoices from time to time. Each Claims Officer shall be entitled to a reasonable retainer against his or her fees and disbursements which shall be paid by the Timminco Entities upon request. Any dispute as to fees and disbursements shall be resolved by the Court.

SET-OFF

41. **THIS COURT ORDERS** that the Timminco Entities may set off (whether by way of legal, equitable or contractual set-off) against the Claims of any Claimant, any claims of any nature whatsoever that any of the Timminco Entities may have against such Claimant arising prior to the Filing Date, provided that it satisfies the requirements for legal, equitable or contractual set-off as may be determined by the Court if there is any dispute between the Timminco Entities and the applicable Claimant, however, neither the failure to do so nor the allowance of any Claim hereunder shall constitute a waiver or release by the Timminco Entities of any such claim that the Timminco Entities may have against such Claimant.

42. **THIS COURT ORDERS** that the Timminco Entities may set off (whether by way of legal, equitable or contractual set-off) against payments or other

distributions to be made to any Claimant, any claims of any nature whatsoever that any of the Timminco Entities may have against such Claimant arising after the Filing Date, provided that it satisfies the requirements for legal, equitable or contractual set-off as may be determined by the Court if there is any dispute between the Timminco Entities and the applicable Claimant, however, neither the failure to do so nor the allowance of any Claim hereunder shall constitute a waiver or release by the Timminco Entities of any such claim that the Timminco Entities may have against such Claimant.

NOTICE OF TRANSFEREES

43. **THIS COURT ORDERS** that if, after the Filing Date, the holder of a Claim transfers or assigns the whole of such Claim to another Person, neither the Monitor nor the Timminco Entities shall be obligated to give notice or otherwise deal with the transferee or assignee of such Claim in respect thereof unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received and acknowledged by the relevant Timminco Entity and the Monitor in writing and thereafter such transferee or assignee shall for the purposes hereof constitute the "Claimant" or "D&O Claimant" in respect of such Claim. Any such transferee or assignee of a Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with this Claims Procedure Order prior to receipt and acknowledgment by the Timminco Entity and the Monitor of satisfactory evidence of such transfer or assignment. A transferee or assignee of a Claim takes the Claim subject to any right of set-off to which the Timminco Entities may be entitled with respect to such Claim. For greater certainty, a transferee or assignee of a Claim is not entitled to set off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such Person to any of the Timminco Entities.

44. **THIS COURT ORDERS** that if a Claimant or D&O Claimant or any subsequent holder of a Claim, who in any such case has previously been acknowledged by the Timminco Entities and the Monitor as the holder of the Claim, transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person, such transfers or assignments shall not create separate Claims and such Claims shall continue to constitute and be dealt with as a single Claim notwithstanding such transfers or assignments. The Monitor shall not, in each case, be required to recognize or acknowledge any such transfers or assignments and shall be entitled to give notices to and to otherwise deal with such Claim only as a whole and then only to and with the Person last holding such Claim, provided such Claimant or D&O Claimant may, by notice in writing delivered to the Monitor, direct that subsequent dealings in respect of such Claim, but only as a whole, shall be dealt with by a specified Person and in such event, such Person shall be bound by any notices given or steps taken in respect of such Claim with such Claimant or D&O Claimant in accordance with the provisions of this Order.

45. **THIS COURT ORDERS** that the Timminco Entities and the Monitor are not under any obligation to give notice to any Person holding a security interest, lien or charge in, or a pledge or assignment by way of security in, a Claim, as applicable in respect of any Claim.

SUBMISSION OF INFORMATION AND SUPPORTING DOCUMENTATION BY PAPER COPY

46. **THIS COURT ORDERS** that any Claimant or D&O Claimant that is unwilling or unable to submit a Claim, information or dispute a notice of revision or disallowance via the FTI Claims Site may instead submit such information by paper copy to the Monitor using the Information Submission Form.

47. **THIS COURT ORDERS** that that the Monitor is authorized to input to the FTI Claims Site the information submitted using the Information Submission Form and that the Monitor shall have no liability for the information submitted other than as a result of gross negligence or wilful misconduct.

48. **THIS COURT ORDERS** that any Claimant or D&O Claimant that is unwilling or unable to submit supporting documentation via the FTI Claims Site may instead submit such supporting documentation by paper copy to the Monitor using the Supporting Documentation Submission Form.

49. **THIS COURT ORDERS** that the Monitor is authorized to upload to the FTI Claims Site the supporting documentation submitted using the Supporting Documentation Submission Form and that the Monitor shall have no liability for the information submitted other than as a result of gross negligence or wilful misconduct.

50. **THIS COURT ORDERS** that the Monitor is authorized to deliver any notification hereunder by paper copy.

SERVICE AND NOTICES

51. **THIS COURT ORDERS** any notice, notification or communication required to be delivered by the Monitor pursuant to this Order may be delivered via the FTI Claims Site or may be delivered by facsimile, email or electronic transmission, personal delivery, courier or prepaid mail to the address or number contained in the books and records of the Timminco Entities or as included in the information submitted by a Claimant in respect of its Claim.

52. **THIS COURT ORDERS** that any notice, notification, dispute, or communication required to be delivered by a Claimant pursuant to the terms of this Order must be delivered via the FTI Claims Site unless otherwise provided in this Order at paragraphs 46-50 above.

53. **THIS COURT ORDERS** that any paper copy of any notice, notification or communication required to be provided or delivered to the Monitor under this Claims Procedure Order will be sufficiently given only if delivered by prepaid registered mail, courier, personal delivery, facsimile transmission or email addressed to:

FTI Consulting Canada Inc.
In its capacity as Monitor of Timminco Limited and Bécancour Silicon Inc.
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario M5K 1G8

Attention: Toni Vanderlaan
Telephone: (416) 649-8125
Facsimile: (416) 649-8101
Email: timminco@fticonsulting.com

54. **THIS COURT ORDERS** that if during any period during which notices or other communications are being given pursuant to this Claims Procedure Order, a postal strike or postal work stoppage of general application should occur, such notices, notifications or other communications sent by ordinary mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, facsimile transmission or email in accordance with this Claims Procedure Order.

55. **THIS COURT ORDERS** that any notice delivered to a Claimant or D&O Claimant via email through the FTI Claims Site or by facsimile transmission shall be deemed to have been received by such Claimant or D&O Claimant on the date and at the time that it was sent, as evidenced by the time and date stamp on the email, if sent prior to 5:00 p.m. (local time) on a Business Day, or

if sent after 5:00 p.m. on a Business Day or on a non-Business Day, on the next following Business Day.

56. **THIS COURT ORDERS** that any notice delivered to a Claimant or D&O Claimant by mail, personal delivery or courier shall be deemed to have been received by such Claimant or D&O Claimant on the third Business Day after the notice was mailed, personally delivered or couriered.

57. **THIS COURT ORDERS** that in the event that this Claims Procedure Order is amended by further Order of the Court, the Timminco Entities or the Monitor may post such further Order on the Monitor's website and send an email to the service list created in the CCAA Proceedings and any Known Creditors affected by such amendment and such posting and mailing shall constitute adequate notice to Claimants and D&O Claimants of such amended claims procedure.

MISCELLANEOUS

58. **THIS COURT ORDERS** that notwithstanding any other provisions of this Claim Procedure Order, the solicitation by the Monitor or the Timminco Entities of Claims and the filing by any Claimant or D&O Claimant of any Claims shall not, for that reason only, grant any person any standing in these proceedings.

59. **THIS COURT ORDERS** that the forms of notice to be provided in accordance with this Claims Procedure Order shall constitute good and sufficient service and delivery of notice of this Claims Procedure Order, the Claims Bar Date and the Restructuring Claims Bar Date on all Persons who may be entitled to receive notice and who may assert a Claim and no other notice or service need be given or made and no other documents or material need be sent to or served upon any Person in respect of this Claims Procedure Order.

60. **THIS COURT ORDERS** that notwithstanding the terms of this Claims Procedure Order, the Monitor and the Timminco Entities may apply to this Court from time to time for directions from this Court with respect to the Claims Procedure Order, or for such further Order or Orders as either of them may consider necessary or desirable to amend, supplement or clarify the terms of this Claims Procedure Order.

61. **THIS COURT ORDERS AND REQUESTS** the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province and any court or any judicial regulatory body of the United States and the states or other subdivisions of the United States and of any other nation or state, to act in aid of and to be complementary to this Court in carrying out the terms of this Claims Procedure Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:
JUN 15 2012

Schedule "1"

NOTICE OF CLAIMS PROCEDURE AND CLAIMS BAR DATE

IN RESPECT OF CLAIMS AGAINST
TIMMINCO LIMITED AND BĒCANCOURT SILICON INC.

(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C.1985, c. C-36, as amended

NOTICE OF CLAIMS PROCEDURE AND CLAIMS BAR DATE FOR THE APPLICANTS PURSUANT TO THE COMPANIES' CREDITORS ARRANGEMENT ACT (THE "CCAA")

PLEASE TAKE NOTICE that this notice is being published pursuant to an order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice Commercial List dated June 15, 2012 (the "Claims Procedure Order").

Any person who believes that it has a Claim against an Applicant should go to the FTI Claims Site https://cmsi.ftitools.com/timminco to create a user account and submit their Claim online. A Claim is defined as a Prefiling Claim, a D&O Claim or a Restructuring Claim but does not include Excluded Claims. An Excluded Claim includes, among other things, the claim of any Person which is secured by a Charge, claim determined to be unaffected as arising from a cause of action for which the applicable Applicant is fully insured and any D&O Claim determined to be unaffected by the Claims Procedure Order. Please see the Claims Procedure Order for a detailed definition of Claims and Excluded Claims.

Creditors who are unable or unwilling to use the FTI Claims Site may request an Information Submission Form and a Supporting Documentation Submission Form from the Monitor by contacting (416) 649-8125 or timminco@fticonsulting.com. All creditors must submit their Claim to the Applicants c/o FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Applicants via the FTI Claims Site or the Information Submission Form by no later than by 5:00 p.m. (Eastern

Standard Time) on **July 23, 2012** or such other date as ordered by the Court (the "**Claims Bar Date**").

CLAIMS WHICH ARE NOT RECEIVED BY THE CLAIMS BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

Creditors will find a link to the FTI Claims Site and a copy of the Information Submission Form and the Supporting Documentation Submission Form on the Monitor's Website at http://cfcanada.fticonsulting.com/timminco or they may contact the Applicants, c/o FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Applicants **(Attention: Toni Vanderlaan,** Telephone: (416) 649-8125 to obtain the Information Submission Form and the Supporting Documentation Submission Form.

Creditors should file their Claim with the Monitor using the FTI Claims Site. The Information Submission Form and Supporting Documentation Submission Form may be submitted by mail, fax, email, courier or hand delivery. Creditors must ensure that the Claim is actually received by the Claims Bar Date at the address below.

Address of Monitor:

TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.
c/o FTI Consulting Canada,
79 Wellington St. W.
Suite 2010 Post Office Box 104
Toronto, Ontario M5K 1G8

Attention: Ms Toni Vanderlaan

Telephone: (416) 649 8125
Facsimile: (416) 649-8101
E-mail: timminco@fticonsulting.com

Dated at Toronto this [xx]th day of June, 2012.

Schedule "2"

NOTICE OF RESTRUCTURING CLAIMS BAR DATE

IN RESPECT OF CLAIMS AGAINST
TIMMINCO LIMITED AND BĒCANCOURT SILICON INC.

(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C.1985, c. C-36, as amended

NOTICE OF RESTRUCTURING CLAIMS BAR DATE FOR THE APPLICANTS PURSUANT TO THE COMPANIES' CREDITORS ARRANGEMENT ACT (THE "CCAA")

PLEASE TAKE NOTICE that this notice is being published pursuant to an order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice Commercial List dated June 15, 2012 (the "Claims Procedure Order").

Any person who believes that it has a Restructuring Claim against an Applicant should go to the FTI Claims Site https://cmsi.ftitools.com/timminco to create a user account and submit their Claim online.

Creditors who are unable or unwilling to use the FTI Claims Site may request an Information Submission Form and a Supporting Documentation Submission Form from the Monitor by contacting (416) 649-8125 or timminco@fticonsulting.com. All creditors must submit their Restructuring Claim to the Applicants c/o FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Applicants via the FTI Claims Site or the Information Submission Form by no later than by **●, 2012** or such other date as ordered by the Court (the "**Restructuring Claims Bar Date**").

RESTRUCTURING CLAIMS WHICH ARE NOT RECEIVED BY THE CLAIMS BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

Creditors will find a link to the FTI Claims Site and a copy of the Information Submission Form and the Supporting Documentation Submission Form on the Monitor's Website at http://cfcanada.fticonsulting.com/timminco or they may contact the Applicants, c/o FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Applicants **(Attention: Toni Vanderlaan,** Telephone: (416) 649-8125 to obtain the Information Submission Form and the Supporting Documentation Submission Form.

Creditors should file their Restructuring Claim with the Monitor using the FTI Claims Site. The Information Submission Form and Supporting Documentation Submission Form may be submitted by mail, fax, email, courier or hand delivery. Creditors must ensure that the Claim is actually received by the Restructuring Claims Bar Date at the address below.

Address of Monitor:

TIMMINCO LIMITED AND BĒCANCOUR SILICON INC.
c/o FTI Consulting Canada,
79 Wellington St. W.
Suite 2010 Post Office Box 104
Toronto, Ontario M5K 1G8

Attention: Ms Toni Vanderlaan

Telephone: (416) 649-8125
Facsimile: (416) 649-8101
E-mail: timminco@fticonsulting.com

Dated at Toronto this [xx]th day of June, 2012.

Schedule "3"

Information Submission Form

Add Contact

Name	_____
Attention	_____
Address 1	_____
Address 2	_____
City	_____
State/Province	_____
ZIP/Postal Code	_____
Country	_____
Phone	_____
Fax	_____
Email	_____
Type	☐ Assignee ☐ Lawyer ☐ CC only ☐ Claimant
Notice	☐ None ☐ Notice only ☐ Primary contact

Add Contact

Name	_____
Attention	_____
Address 1	_____
Address 2	_____
City	_____
State/Province	_____
ZIP/Postal Code	_____
Country	_____
Phone	_____
Fax	_____
Email	_____
Type	☐ Assignee ☐ Lawyer ☐ CC only ☐ Claimant
Notice	☐ None ☐ Notice only ☐ Primary contact

Add Claim

Claim Amount	_____
Currency	_____
Debtor Company Name	_____
Claim Type	☐ Prefiling ☐ Restructuring ☐ D&O Claim
Classification	☐ Secured ☐ Unsecured
Category 1	☐ Guarantee
Category 2	☐ Deficiency ☐ Pension ☐ Trade ☐ Landlord

Security Type ☐ Security Agreement ☐ Statutory Lien

Comments - Please add any comments that may assist us in reviewing your claim.

_____

_____

_____

_____

_____

Add Claim

Claim Amount _____

Currency _____

Debtor Company Name _____

Claim Type ☐ Prefiling ☐ Restructuring ☐ D&O Claim

Classification ☐ Secured ☐ Unsecured

Category 1 ☐ Guarantee

Category 2 ☐ Deficiency ☐ Pension ☐ Trade ☐ Landlord

Security Type ☐ Security Agreement ☐ Statutory Lien

Comments - Please add any comments that may assist us in reviewing your claim.

_____

_____

_____

_____

_____

Future correspondence

All future correspondence will be directed to the email designated in the contact details unless you specifically request that hardcopies be provided.

☐ Hardcopy of correspondence required

Acknowledgement

Signature _____

Date _____

Notice of Dispute

Original Claim Amount	_____
Revised Claim per Monitor	_____
Revised Claim per Claimant	_____
Currency	_____
Debtor Company Name	_____
Claim Type	☐ Prefiling ☐ Restructuring ☐ D&O Claim
Classification	☐ Secured ☐ Unsecured
Category 1	☐ Guarantee
Category 2	☐ Deficiency ☐ Pension ☐ Trade ☐ Landlord
Security Type	☐ Security Agreement ☐ Statutory Lien

Reason for Dispute - Please add any comments that may assist us in reviewing your claim.

_____

_____

_____

_____

_____

Notice of Dispute

Original Claim Amount	_____
Revised Claim per Monitor	_____
Revised Claim per Claimant	_____
Currency	_____
Debtor Company Name	_____
Claim Type	☐ Prefiling ☐ Restructuring ☐ D&O Claim
Classification	☐ Secured ☐ Unsecured
Category 1	☐ Guarantee
Category 2	☐ Deficiency ☐ Pension ☐ Trade ☐ Landlord
Security Type	☐ Security Agreement ☐ Statutory Lien

Reason for Dispute - Please add any comments that may assist us in reviewing your claim.

_____

_____

_____

_____

Acknowledgement

Signature _____

Date _____

Schedule "4"

Supporting Documentation Submission Form

Contact Details

Name _____
Attention _____
Address 1 _____
Address 2 _____
City _____
State/Province _____
ZIP/Postal Code _____
Country _____
Phone _____
Fax _____
Email _____

Supporting Documentation

Please attach hard copies of your supporting documentation to this form.

Comments _____

_____

_____

_____

_____

Future correspondence

All future correspondence will be directed to the email designated in the
contact details unless you specifically request that hardcopies be provided.

☐ Hardcopy of correspondence required

Acknowledgement

Signature _____
Date _____

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 TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Court File No: CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

CLAIMS PROCEDURE ORDER

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