

**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 MCEWAN ENTERPRISES INC.**

Applicant

AMENDED NOTICE OF MOTION
(returnable December 3, 2021)

McEwan Enterprises Inc. (“**MEI**”, the “**McEwan Group**” or the “**Applicant**”) will make a motion before Chief Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) on December 3, 2021, at 10:00 a.m. or as soon thereafter as the motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- ☐ In writing under subrule 37.12.1 (1);
- ☐ In writing as an opposed motion under subrule 37.12.1(4);
- ☐ In person;
- ☐ By telephone conference
- ☒ By video conference

at a Zoom link to be provided in advance of the hearing.

THE MOTION IS FOR:

1. An Order (the “**Sale Procedures Order**”) pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) among other things:¹

- (a) abridging the time for and validating the service of this Amended Notice of Motion and dispensing with further service thereof;
- (b) approving the sale procedures on the terms attached at Appendix “A” of this Amended Notice of Motion (the “**Sale Procedures**”);
- (a) authorizing the Applicant to implement the Sale Procedures, supervised by Alvarez & Marsal Canada Inc. (“**A&M**”), in its capacity as the Court-appointed monitor of the Applicant (in such capacity, the “**Monitor**”);
- (b) extending the Stay Period (as defined in the Initial Order granted by this Court on September 28, 2021, as amended and restated on October 7, 2021 (the “**Amended and Restated Initial Order**”)) to and including December 22, 2021; and
- (c) such further and other relief as counsel may request and this Court may permit.

¹ Capitalized terms used but not otherwise defined herein have the meanings given to them in the Affidavit of Dennis Mark McEwan sworn October 1, 2021 (the “**October Affidavit**”) attached at Tab 4B of the Applicant’s Motion Record dated November 12, 2021 (the “**Motion Record**”) or the Affidavit of Dennis Mark McEwan sworn November 12, 2021 (the “**November Affidavit**”) attached at Tab 4 of the Motion Record.

THE GROUNDS FOR THE MOTION are as follows:

Background

2. The McEwan Group is recognized as one of Canada’s premier hospitality companies with a portfolio of innovative, high-end restaurants, gourmet grocery stores, gourmet food halls and catering services (the “**Business**”) operating primarily in the Greater Toronto Area. The Applicant operates six restaurants (collectively, the “**McEwan Restaurants**”), two food-hall locations and one gourmet grocery location (collectively with the McEwan Restaurants, the “**McEwan Locations**”).

3. On September 28, 2021, the Applicant commenced these proceedings under the CCAA, and A&M was appointed as the Monitor of the Applicant.

4. The principal objectives of the Applicant’s CCAA proceedings are to ensure the ongoing operations of the McEwan Group for the benefit of its many stakeholders and to effectuate a restructuring of the Applicant and its Business in order to provide for a right-sized, sustainable Business going forward. As part of its restructuring efforts, the Applicant is seeking to complete the proposed CCAA Transaction (as defined below).

5. Many of the McEwan Locations have been historically successful and profitable; however, certain unprofitable and operationally expensive locations have been underperforming for a number of years, causing an overall significant strain on the Applicant’s profitability and liquidity. The McEwan Group as a whole has not been profitable since 2017.

6. The underperforming locations, even without taking into account the impacts of the COVID-19 pandemic, have proven to be unsustainable based on their negative financial results.

Changes to and/or closures of such locations are necessary to enable the Business to operate on a sustainable basis.

7. Commencing in March 2020, the significant and detrimental impacts of the COVID-19 pandemic greatly exacerbated the Applicant's pre-existing financial and liquidity challenges, and as a result, the Business has experienced significantly reduced revenues for 2020 and 2021.

8. The Applicant implemented extensive cost-saving and cash conservation measures to address the COVID-19 challenges, negotiated various rent concessions and obtained various government subsidies and support. Those efforts, together with the Applicant's existing credit facilities and shareholder equity financing provided in early 2020, were insufficient to address the Applicant's liquidity needs during the COVID-19 pandemic, and the Applicant required additional funding in order to be able to satisfy its operational needs, which it obtained from Fairfax Financial Holdings Limited ("**Fairfax**") by way of a number of unsecured loans provided in 2020 and 2021, further increasing the Applicant's overall debt obligations.

9. While the government-mandated restrictions on dining began to be eased most recently in June and July 2021, a number of the McEwan Locations continue to be negatively impacted by the impacts of the COVID-19 pandemic.

10. There remains much uncertainty with respect to the ongoing COVID-19 pandemic and its continued impact on the McEwan Group and the restaurant industry as a whole.

11. The Applicant expects that, even without taking into account the Excluded Locations which cause a significant drain on the Business, the McEwan Group will require additional

funding to continue operating until the COVID-19 related factors cease negatively impacting the Business and revenues improve more significantly.

12. In connection with granting the Applicant relief under the CCAA, this Court found that based on the evidence submitted, the Applicant is insolvent.

Strategic Review Efforts

13. Commencing in the summer of 2021, the McEwan Group engaged legal counsel to assist it in reviewing and assessing its various potential options and alternatives, in light of the financial difficulties facing the McEwan Group.

14. The McEwan Group reviewed and considered various potential alternatives with the assistance of its legal counsel, including, among other things, further negotiations with landlords, additional financing (debt or equity), reducing the size of the Business, a sale of the Business, and combinations thereof in light of the financial difficulties facing the McEwan Group, including impending liquidity issues and the ongoing challenges and impacts of the COVID-19 pandemic.

15. The McEwan Group made extensive efforts, with the assistance of its advisors, to seek consensual arrangements with its landlords in respect of its leases, to improve lease terms and reduce those lease obligations that are unsustainable and/or to exit certain locations, but has been unable to achieve a comprehensive out-of-court resolution that would result in the long term viability of the McEwan Group and its Business.

16. The McEwan Group has five leases with the Cadillac Fairview Entities and is working to finalize satisfactory arrangements on a consensual basis with the Cadillac Fairview Entities.

MEI and First Capital Holdings (Ontario) Corporation (“**First Capital**”) have not reached a consensual arrangement in respect of the McEwan Yonge & Bloor location. MEI does not expect to seek amendments to the lease for the Fabbrica Thornbury location.

17. After extensive review and consideration of its circumstances and its options and alternatives, and following efforts to reach consensual arrangements with its landlords, the Applicant determined that the best available alternative that could be implemented in the circumstances that would preserve the value of the Business for the benefit of the McEwan Group’s many stakeholders, would be a sale of substantially all of the assets of the Business to the Applicant’s current shareholders pursuant to the transaction (the “**CCAA Transaction**”) contemplated by the purchase agreement dated September 27, 2021 (the “**CCAA Purchase Agreement**”) between the Applicant and 2864785 Ontario Corp. (the “**Purchaser**”), a company owned by Mark McEwan and Fairfax, and the continuation of the Business with a reduced number of McEwan Locations, to result in a right-sizing of the Business on a sustainable basis going forward.

18. The Applicant considered conducting a third party sale process as part of considering its various potential options and alternatives, and determined that a third party sale process would have a negative effect on the ongoing Business of the McEwan Group.

19. On September 27, 2021, the Applicant entered into the CCAA Purchase Agreement with the Purchaser, pursuant to which, subject to Court approval, the parties would complete the CCAA Transaction contemplated thereby. The Applicant reviewed and discussed the proposed CCAA Transaction and CCAA Purchase Agreement with A&M as part of determining to enter into the CCAA Purchase Agreement.

20. On October 15, 2021, the Applicant sought this Court's approval of the CCAA Transaction under section 36 of the CCAA. The Court issued its decision on November 1, 2021 (the "**November 1 Decision**"), finding that the Applicant had not satisfied the requirements of section 36(4) of the CCAA and the Court did not approve the CCAA Transaction.

21. Since the issuance of the November 1 Decision, the Applicant has reviewed and assessed its potential options and alternatives, has discussed and reviewed such matters with the Monitor, and engaged in discussions and consulted with various stakeholders.

22. Among other things, the Applicant has further discussed with the Monitor in connection with potential alternatives in respect of advancing the CCAA Transaction, which the Applicant continues to believe is in the best interests of stakeholders, and discussed with the Monitor in further detail on the negative impacts that the time, costs and uncertainty associated with a sale process would have on the Business and the significant associated risks.

23. The Applicant has reviewed and considered First Capital's proposed form of purchase agreement, as subsequently amended (the "**First Capital Offer**") and financing and discussed with the Monitor in connection therewith. The Applicant has also engaged in discussions with respect to a potential consensual resolution of matters with First Capital.

24. The Applicant reviewed and considered potential changes to the CCAA Transaction and CCAA Purchase Agreement and determined to enter into an amending agreement with the Purchaser dated November 12, 2021 (the "**Amending Agreement**"), amending the CCAA Purchase Agreement (as amended, the "**CCAA Amended Purchase Agreement**") and the CCAA Transaction (as amended, the "**CCAA Amended Transaction**"), to provide for, among other things: (a) an increased Base Purchase Price of \$2,200,000 (inclusive of all applicable

HST) (increased from \$520,000), which cash would be paid to First Capital on closing of the CCAA Amended Transaction, and (b) the assignment of certain equipment located at the McEwan Yonge & Bloor location to First Capital.

25. On November 12, 2021, the Applicant served its Motion Record in connection with its motion originally returnable on November 26, 2021 (the “**Applicant’s November 26 Motion**”) seeking, among other things: (a) approval of the CCAA Amended Transaction pursuant to the CCAA, or (b) in the alternative, approval of the CCAA Amended Transaction pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “**Receivership Transaction**”) to be implemented pursuant to an alternative receivership and bankruptcy process (together, the “**Applicant’s Previously Proposed Relief**”), all as set forth in greater detail in the Applicant’s Notice of Motion dated November 12, 2021. First Capital filed materials opposing the Applicant’s November 26 Motion and filed a motion seeking to appoint a receiver to conduct a sale process in respect of the Applicant’s Business.

26. At the hearing in respect of the Applicant’s November 26 Motion, part of the Applicant’s November 26 Motion was adjourned on consent of the Applicant and First Capital to December 3, 2021 or such other date as may be set by the Court, to provide the Applicant and First Capital some additional time to continue certain ongoing discussions among the parties.

27. Following the adjournment of the Applicant’s November 26 Motion, the Applicant and First Capital continued their discussions. At this time, the parties have not agreed to a consensual resolution.

28. The Applicant is at this time withdrawing the Applicant’s Previously Proposed Relief (without prejudice) and requesting the Court’s approval of the Sale Procedures Order. The

Applicant believes that its amended relief set forth in this Amended Notice of Motion will reduce the matters in dispute between the Applicant and First Capital, limit the additional costs incurred by the parties and protect the Business.

29. The Applicant remains very concerned that further ongoing time and uncertainty in these CCAA proceedings and further delays in implementing a going concern restructuring transaction that protects all stakeholders will cause irreparable harm and damage to the Business and stakeholders.

30. First Capital has taken a number of steps against the Applicant to advance its own agenda and creating additional risk and uncertainty for all other stakeholders of the McEwan Group.

31. The Applicant believes that a short and limited process that provides an opportunity for each of the Purchaser and First Capital to provide its respective best and final offer to acquire the Business is, at this time, the best approach to advance these proceedings, limit the significant additional costs being incurred as result of the dispute among the parties, and limit the harm and risk being inflicted on the Business. A broader third party sale process would not result in a higher offer for the Business than an offer from the Purchaser or First Capital.

32. First Capital has stated that “Even without considering other offers that may be submitted, First Capital has the resources necessary to acquire and operate the business, and has already indicated that it is prepared to do so pending its satisfaction of a short due diligence process.”

33. Each of the Purchaser and First Capital has already submitted offers to purchase the Business, and the Applicant has provided significant detailed confidential information to assist

First Capital with its due diligence pursuant to a confidentiality agreement executed by the parties on November 11, 2021.

34. The Applicant believes that the proposed Sale Procedures provide a fair, reasonable and appropriate amount of time for each of the Purchaser and First Capital to submit its respective best and final offer, while balancing the need to protect the overall Business in the interests of stakeholders.

35. The Sale Procedures provide for a stalking horse bid by the Purchaser on no less favourable terms and conditions (individually or in the aggregate) than the terms and conditions set forth in the CCAA Amended Purchase Agreement, other than the Purchaser may amend the consideration to be provided to First Capital under the CCAA Amended Purchase Agreement (the “**Stalking Horse Bid**”). The Applicant believes that providing a Stalking Horse Bid is beneficial to the Applicant’s stakeholders and provides them certainty with respect to their treatment under the ultimate transaction, and provides certainty and reduces risk for the Business as a whole.

Extension of the Stay Period

36. The Stay Period (as defined in the Amended and Restated Initial Order) currently expires on December 15, 2021. The Applicant is seeking an extension of the Stay Period to and including December 22, 2021, to provide the time to advance the proposed Sale Procedures and the Applicant’s next steps in these proceedings in the interests of its stakeholders.

37. The Applicant is expected to have sufficient funding to operate the Business during the proposed extension of the Stay Period.

38. No creditor will suffer any material prejudice as a result of the extension of the Stay Period.

39. The Applicant has been and is continuing to act in good faith and with due diligence.

General

40. The provisions of the CCAA and this Court's equitable and statutory jurisdiction thereunder.

41. Rules 1.04, 1.05, 2.03, 3.02, 16, and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

42. Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media regarding Expanded Operations of Ontario Superior Court of Justice dated May 13, 2020, as amended.

43. Changes to Commercial List Operations in light of COVID-19 dated March 16, 2020.

44. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

45. the November Affidavit and the exhibits thereto, filed;

46. the October Affidavit and the exhibits thereto, filed;

47. the Affidavit of Dennis Mark McEwan sworn September 27, 2021 (the "**Initial Affidavit**") and the exhibits thereto, filed;

48. the transcripts of the cross-examinations of Dennis Mark McEwan in respect of the Initial Affidavit, the October Affidavit and, if applicable, the November Affidavit, and the subsequent responses delivered in connection therewith, if any;
49. the Affidavit of Jordan Robins sworn November 4, 2021, and the exhibits thereto, filed;
50. the Second Report of the Monitor dated October 14, 2021, and the appendices attached and supplements thereto, filed;
51. the Third Report of the Monitor dated November 24, 2021 (the “**Third Report**”), and the appendices attached thereto, filed;
52. any supplement to the Third Report; and
53. such further and other materials as counsel may advise and this Court may permit.

Date: November 30, 2021

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Appendix “A” – Sale Procedures

(see attached)

Sale Procedures

Sale Process Supervised by the Monitor

1. The sale process (the “**Sale Process**”) in respect of McEwan Enterprises Inc. (“**MEI**”) shall be supervised by Alvarez & Marsal Canada Inc. in its capacity as Court-appointed monitor of MEI (the “**Monitor**”) on the terms set forth herein.

Participating Bidders

2. The parties eligible to participate in the Sale Process are: (i) 2864785 Ontario Corp. (“**286Co**”) and (ii) First Capital Holdings (Ontario) Corporation (each, a “**Participating Bidder**”), and no other parties.

Defined Terms

3. All capitalized terms used but not otherwise defined herein have the meanings given to them in the purchase agreement dated September 27, 2021 between MEI and 286Co, as amended by the Amending Agreement dated November 12, 2021 between MEI and 286Co (the “**Purchase Agreement**”).

Bid Deadline

4. In order to participate in the Sale Process, a Participating Bidder must submit its offer (in each case, a “**Bid**”) to the Monitor (by email at gkarpel@alvarezandmarsal.com and jnevsky@alvarezandmarsal.com) by no later than 5:00 p.m. (Toronto time) on December 10, 2021 (the “**Bid Deadline**”).

Stalking Horse Bid

5. 286Co has agreed and confirmed that its Bid to be submitted pursuant to the Sale Process shall be on no less favourable terms and conditions (individually or in the aggregate) than the terms and conditions set forth in the Purchase Agreement, other than 286Co may amend the consideration to be provided to the Y&B Landlord under the Purchase Agreement, which Bid will serve as a stalking horse bid (the “**Stalking Horse Bid**”) for purposes of the Sale Process, provided that 286Co shall be entitled to a stalking horse break fee in an amount to be agreed with the Monitor and in any event no greater than \$390,000 (the “**Stalking Horse Fee**”).

Terms and Conditions of Bids

6. Any Bid submitted by a Participating Bidder may not be subject to any due diligence or financing conditions.
7. Any Bid submitted by a Participating Bidder must be executed by the Participating Bidder and irrevocable.

8. Any Bid submitted by a Participating Bidder must be no less favourable than the Stalking Horse Bid and, in the case of First Capital Holdings (Ontario) Corporation, provide for payment of the Stalking Horse Fee in cash to 286Co.

Review of Bids

9. All Bids should reflect the Participating Bidder's best and final offer and the Participating Bidder should not assume that it will be given an opportunity to rebid, renegotiate, or improve any terms of its bid. Notwithstanding the foregoing, the Monitor shall have the discretion to review, analyze and seek clarification from the Participating Bidders in respect of their respective Bids.
10. All Bids must be accompanied by a bid letter, and include the following information:
 - a. *Purchase Price and Form of Consideration*: The Bid must provide for a fixed amount of consideration that is a single number and not a range of values and must be supported in the bid letter by: (i) a sources and uses table, and (ii) a description of the legal basis for the assumption of any obligations, accompanied by any required counterparty consents.
 - b. *Identity & Contact Information*: The identity of all parties sponsoring or participating in the Bid, including the names, titles and contact information of key individuals. If the Bid will be relying on external sources of financing, provide the contact information for each such source with whom financing arrangements can be discussed, and authorize the Monitor to have such discussions.
 - c. *Financing*: If the Bid is relying on external financing (debt and/or equity), the Bid must be accompanied by fully executed copies of commitment letters from parties evidencing the irrevocable commitment to invest or lend sufficient funds to complete the transaction. The Bid must confirm that such financing is not conditional upon completion of further due diligence.
 - d. *Conditionality*: The Bid should have no conditions to closing other than those in the definitive agreement and must not be subject to a financing or due diligence condition. The level of conditionality will be a material consideration in evaluating bids received.
 - e. *Approvals*: All regulatory and other approvals, including internal, board, credit committee or other approvals and consents must be obtained prior to submitting the Bid. The Bid must include a statement confirming that all consents and approvals necessary to permit the Participating Bidder to close the transaction have been obtained.
 - f. *Business Plan*: Provide details of any contemplated changes to the current terms and conditions of employment for employees, any contemplated changes to the current operations and/or locations of the business and details regarding the go-forward capital structure of the business.

- g. *Expected Timing of Closing*: The bid must include a description of the expected time frame to complete the transaction, including key milestones and any other relevant information which may influence the Participating Bidder's ability to consummate the transaction expeditiously and in accordance with the Bid.
 - h. *Expiration*: The bid must remain open for acceptance by MEI and be irrevocable until at least 10 days following the Bid Deadline, provided that if the Participating Bidder is selected as the successful bidder, the Bid will remain irrevocable until the earlier of the closing of the transaction and the termination of the purchase agreement in accordance with its terms.
11. The Monitor shall prepare a report to the Court in respect of the Bids received and provide its recommendation in respect of the best Bid, taking into account all relevant facts and considerations the Monitor considers appropriate, including, without limitation, structure, purchase price, conditions, timing, certainty of closing, and impact on, and support of, stakeholders.

Due Diligence

12. MEI, in consultation with the Monitor, will work in good faith to provide such reasonable additional due diligence as may be required by a Participating Bidder, acting reasonably, in order for such Participating Bidder to assess the value of MEI's business and submit a Bid in the Sale Process, and not for any other purposes, subject to any applicable confidentiality restrictions that MEI may be subject to.
13. For certainty, the Confidentiality and Non-Disclosure Agreement made between First Capital Real Estate Investment Trust, First Capital Holdings (Ontario) Corporation, and MEI dated November 11, 2021 shall apply in respect of information provided to First Capital Holdings (Ontario) Corporation pursuant to the Sale Process.

Reservation of Rights

14. MEI reserves all of its rights in its CCAA proceedings in all respects and shall not be required to accept or complete any Bid submitted under the Sale Process.

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

Court File No. CV-21-00669445-00CL

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Proceeding commenced at Toronto

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