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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANDESTO ENTERPRISES CORP., D3 INFRASTRUCTURE SERVICES INC. and SAFE ROADS ALBERTA LTD.

APPLICANTS	CANDESTO ENTERPRISES CORP., D3 INFRASTRUCTURE SERVICES INC. and SAFE ROADS ALBERTA LTD.
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**

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I. OVERVIEW AND CAUSES OF INSOLVENCY

1. Candesto Enterprises Corp. ("**CEC**"), D3 Infrastructure Services Inc. ("**D3**") and Safe Roads Alberta Ltd. ("**Safe Roads**" and together with CEC and D3, the "**Applicants**"), and certain other non-applicant related corporations (the "**Candesto Group**") have been leaders in providing construction and installation services in Western Canada for traffic control, roadside safety and barrier systems for over 25 years.[1]

2. Over the course of that history, the Applicants have worked on some of the largest and most complex road construction projects in Alberta, including construction of the south segment of the West Calgary ring road (the "**Ring Road Project**").[2]

3. The Applicants are typically engaged on such projects as a subcontractor to a general contractor, who in turn has contracted with a level of government for the construction of road infrastructure. Larger projects (and some smaller projects) require that one or more of the Applicants provide a labour and material bond, a performance bond, or both for the benefit of its subcontractors.[3]

4. The Applicants' business is facing unprecedented challenges as a result, among others, of the COVID-19 global pandemic and the related supply chain disruptions and lockdowns, subsequent inflationary pressures and interest rate increases, among other things. This led to significant financial pressure as well as issues with quality control for the Applicants who were faced with looming and compounding delinquent payments. These issues were exacerbated by the Applicants' poor record keeping and the previous managements' failure to disclose material issues in the entities. The Applicants, therefore, significantly fell short in meeting contractual deadlines for the projects.[4]

5. As set out in greater detail in the Affidavit of Jan van Bruggen, sworn December 18, 2023 (the "**van Bruggen Affidavit**"), several unprofitable contracts have put a considerable financial strain on the operations of the Applicants. Due to the losses associated with such contracts, as well as challenges associated with inflation (including cost increases during the lag time between providing bids on projects and their execution), the Applicants are insolvent.

6. In light of the foregoing, the Applicants are of the view that they are unable to continue in active business and wish to wind up their affairs in an orderly fashion, pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**").

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[1] Affidavit of Jan van Bruggen, sworn December 18, 2023 ["**van Bruggen Affidavit**"] at para 7.
[2] van Bruggen Affidavit at para 7.
[3] van Bruggen Affidavit at para 8.
[4] van Bruggen Affidavit at para 85.

II. INTRODUCTION

7. This bench brief is submitted on behalf of the Applicants in support of the Applicants' request for the following relief:

   (a) an initial order (the "**Initial Order**") pursuant to the CCAA, among other things:

      (i) abridging the time for service and deeming service of the Originating Application and supporting materials to be good and sufficient;

      (ii) declaring each of the Applicants to be a company to which the CCAA applies;

      (iii) granting a stay of proceedings, for an initial period, up to and including December 30, 2024 (the "**Stay Period**"), in favour of the Applicants and their officers and directors (the "**D&Os**");

      (iv) granting a temporary stay of proceedings for the Stay Period in favour of 1964740 Alberta Inc. ("**196 Inc.**"), Batavi Venture Group Inc. ("**Batavi**") and Barricades and Signs Ltd. ("**Barricades**") (together with the Applicants, the "**Indemnitors**") with respect to any claim that relates to any obligations of the Indemnitors under the Indemnity Agreement in favour of Trisura Guarantee Insurance Company ("**TGIC**") and/or Trisura Insurance Company ("**TIC**" and together with TGIC, "**Trisura**") dated July 22, 2022 (the "**Indemnity Agreement**");

      (v) granting a stay of proceedings for the Stay Period in favour of Batavi with respect to a share pledge agreement dated January 31, 2022 between Batavi, Vor Allem Consulting Ltd. (formerly 411850 Alberta Ltd.) ("**VAC Ltd.**") and Chris Bokenfohr ("**Bokenfohr**") (the "**Pledge Agreement**"), including but not limited to the enforcement of any rights under the Pledge Agreement;

      (vi) appointing Alvarez & Marsal Canada Inc. ("**A&M**" or the "**Proposed Monitor**") to act as monitor (the "**Monitor**") of the Applicants in these CCAA proceedings (the "**CCAA Proceedings**");

      (vii) approving the execution by the Applicants of an interim loan facility term sheet (the "**Term Sheet**") with Durisol Ltd. (the "**Interim Lender**"), pursuant to which the Interim Lender will advance up $1,400,000 which will be made available to the Applicants during these CCAA Proceedings;

      (i) authorizing the Applicants to make payments, with the consent of the Monitor, in respect of certain pre-filing amounts owing for goods or services supplied to the

Applicants, if in the reasonable opinion of the Applicants and the Monitor such supplier is critical to the business and ongoing operations of the Applicants; and

(viii) granting the Administration Charge, the Interim Lender's Charge and the D&O Charge (each as defined below, and together, the "**Priority Charges**"); and

(b) an amended and restated initial order ("**ARIO**"), granting substantially the same relief as the Initial Order and extending the Stay Period until and including January 12, 2024.

8. Terms not otherwise defined herein shall have the meaning ascribed to them in the van Bruggen Affidavit.

III. FACTS

9. The facts relevant to the Application are set out in detail in the van Bruggen Affidavit. A summary of the key facts as they relate to the relief requested in the Application is set out below.

A Background and Operations

10. CEC and D3 (the "**Operating Entities**") are the primary operating entities of the Applicants and perform services in six primary categories: (i) guardrail and high-tension cable barrier systems; (ii) concrete and steel barriers; (iii) overhead signs and structures; (iv) overhead sign foundations and caissons; (v) non-overhead and ground mounted signage; and (vi) engineering and planning. These services extend to the installation of these items, systems and structures on roadways.[5]

11. Each of the Applicants are direct subsidiaries of one or more of 196 Inc., Batavi and/or Barricades. In addition, the Applicants, along with the rest of the Candesto Group, are effectively controlled by Batavi and 1288078 Ontario Inc. ("**128 Inc.**").[6] Batavi acquired its shareholdings in each of CEC, D3 and Safe Roads through a share purchase agreement dated January 31, 2022 (the "**SPA**") between Batavi, VAC Ltd. and Bokenfohr.[7]

12. As outlined in the van Bruggen Affidavit, the operations of the Candesto Group are highly centralized and integrated. The following list contains provides examples of these centralized services:

(a) employees – all of the employees that work for the Applicants are employed by CEC directly and are utilized by D3 on an as needed basis. As of December 18, 2023, CEC

[5] van Bruggen Affidavit at para 14.
[6] van Bruggen Affidavit at para 15.
[7] van Bruggen Affidavit at para 22.

employed 14 employees, nearly all of whom are employed on a full-time, permanent basis (although CEC also employs some seasonal labourers);[8]

(b) human resources ("**HR**") – the internal HR employees of Barricades provide all HR functions of the Applicants including, for example, employee training, recruitment, and benefits administration;[9]

(c) marketing – the internal marketing team at Barricades provides services for the Applicants including website design, social media management, trade shows, events, branding, promotional and ad campaigns;[10]

(d) information technology services ("**IT**") – the internal IT support team provides the Applicants with mobile IT security, hardware and software integration and management and on demand IT assistance;[11]

(e) government relations – the government relations specialist employed at Barricades manages all matters for the Applicants relating to, among other things, government and regulatory approvals, licencing and management of government approvals;[12]

(f) client relationship management - individuals at various levels throughout Barricades have been engaged in client relationship management related to the Applicants;[13] and

(g) finance – all internal finance matters of the Applicants are completed through Barricades. This includes, among other things, project accounting, invoicing and government remittances.[14]

13. As stated above, the Applicants are facing considerable financial issues due to losses from several unprofitable contracts (and one in particular) as well as challenges associated with inflation. This has put the Applicants' existing obligations under various contracts and the continued employment of their 14 employees at risk.

B Financial Circumstances

(i) Assets

14. An unaudited balance sheet summary of the assets of the Applicants is set out in the chart below:

[8] van Bruggen Affidavit at paras 28 – 29.
[9] van Bruggen Affidavit at para 34(a).
[10] van Bruggen Affidavit at para 34(b).
[11] van Bruggen Affidavit at para 34(c).
[12] van Bruggen Affidavit at para 34(d).
[13] van Bruggen Affidavit at para 34(e).
[14] van Bruggen Affidavit at para 34(f).

Assets of the Applicants as of October 31, 2023			
	CEC	**D3**	**Safe Roads**
Cash	$ (750,544.89)	$ 25,643.46	$ 1,604.18
Accounts Receivable and Holdbacks	$ 3,889,381.19	$ 435,153.51	$ 463,374.95
Prepaid Expenses	$ 51,569.78	$ 21,000.00	$ -
Inventory	$ 171,011.24	$ -	$ -
Goodwill	$ 331,828.00	$ -	$ -
Fixed Assets	$ 1,880,622.50	$ 435,891.00	$ -
Accumulated Depreciation	$ (794,281.99)	$ (229,579.00)	$ -
Total Assets	**$ 4,779,585.83**	**$ 688,108.97**	**$ 464,979.13**

15. Since October 31, 2023, the Accounts Receivable and Holdbacks figure of CEC has been reduced to approximately $2.7 million.[15]

(ii) Material Contracts

16. The Operating Entities are parties to the following types of material contracts:

(a) contracts relating to projects that have been partially completed or have not yet started;

(b) contracts for completed projects with outstanding holdbacks or receivables; and

(c) contracts involving the correction of deficiency work,

(collectively, the "**Material Contracts**").[16]

17. By the end of December 2023, CEC will have four ongoing projects and D3 will have three ongoing projects.[17]

18. The Material Contracts include both bonded and unbonded projects, as more particularly described below.

(iii) Liabilities

19. Based upon analysis performed by the Proposed Monitor, bonded projects of the Operating Entities that are either complete and awaiting payment or which are in progress are in an aggregate deficit position of approximately $2.2 million. Unbonded contracts at a similar stage are in an aggregate deficit position of $621,000, for a total combined bonded/unbonded project loss of approximately

[15] van Bruggen Affidavit at para 46.
[16] van Bruggen Affidavit at para 47.
[17] van Bruggen Affidavit at para 48, 57.

$2.8 million. The contract with the Calgary Safelink Partners consortium for the Ring Road Project makes up the largest portion of such losses, totaling approximately $1.6 million.[18]

20. These losses have resulted in the Applicants having considerable liquidity challenges. Based on estimates of the Proposed Monitor effective December 31, 2023, on the Operating Entities' bonded projects, the Operating Entities will have accounts payable of approximately $4.1 million, on which there are only offsetting receivables of approximately $1.05 million and holdbacks of approximately $875,000. On bonded and unbonded projects combined, the Operating Entities will owe payables of approximately $5.6 million, with offsetting receivables of approximately $1.67 million and holdbacks of $188,000. The Applicants do not have the liquidity to pay the shortfall of approximately $3.7 million in payables on such projects, which are now either due or coming due.[19]

21. As at December 18, 2023, the Applicants are indebted to various creditors (secured and unsecured) in the approximate amounts set out below:

    (a) CEC – $9,308,905.90

    (b) D3 – $1,183,716.71

    (c) Safe Roads – $1,130,258.00

IV. ISSUES

22. The Applicants submit that the principal issues to be determined by this Honourable Court are whether:

    (a) the Applicants are eligible for relief under the CCAA;

    (b) a stay of proceedings in favour of the Applicants and their officers and directors is necessary and appropriate in the circumstances;

    (c) it is necessary and appropriate to grant the Indemnitor Stay and the SPA Stay;

    (d) the Proposed Monitor should be appointed as Monitor;

    (e) the Interim Lending Facility should be approved and the Term Sheet should be authorized;

    (f) pre-filing payments to certain critical suppliers should be authorized;

    (g) the proposed Priority Charges are necessary and appropriate in the circumstances; and

[18] van Bruggen Affidavit at para 86.
[19] van Bruggen Affidavit at para 87.

(h) the Initial Order and ARIO should be granted concurrently.

V. LAW & ANALYSIS

A The Applicants are Eligible for Relief under the CCAA

(i) The Applicants Meet the Statutory Criteria to Qualify for Relief

23. The CCAA applies to a "debtor company or affiliated debtor companies if the total claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000."[20]

24. The terms "company" and "debtor company" are defined in section 2(1) of the CCAA as:

> **company** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, 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*, 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 bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or
>
> (d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent.[21]

25. Each of the Applicants are a "company" under the CCAA as each Applicant was incorporated under the "legislature of a province".[22] As set out in the van Bruggen Affidavit, each of the Applicants are incorporated under the Alberta *Business Corporations Act*.[23]

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[20] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 3(1) [CCAA] [TAB 2].
[21] CCAA, s 2(1) "company", "debtor company" [TAB 2].
[22] CCAA, s 2(1) [TAB 2]; van Bruggen Affidavit at paras 18 – 20.
[23] van Bruggen Affidavit at paras 18 – 20.

26. Although the CCAA does not define "insolvent", the Ontario Superior Court of Justice has held that the definition of "insolvent person" under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**") is applicable.[24]

27. The term "insolvent person" is defined in section 2 of the BIA as:

> *insolvent person* means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (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.

28. The Court in *Stelco* has also held that a company is insolvent for the purposes of the CCAA if there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity condition or crisis which will result in the company running out of "cash" to pay its debts as they generally become due in the future without the benefits of the protection and procedure authorized by the court.[25]

29. Each of the Applicants are insolvent, at a minimum, on the basis of clauses (a) and (b) of the BIA definition of "insolvent person" and the basis of the definition of "insolvent person" in *Stelco*.[26] In particular, the Applicants are facing an approximate pending deficit of $3.7 million on recent projects, and the Applicants have insufficient liquidity to repay this indebtedness.[27]

30. The claims against CEC exceed the $5 million statutory requirement.[28] As noted above, s. 3(1) of the CCAA requires the total claims against the debtor company or affiliated debtor companies to exceed $5 million.[29] Under the CCAA, companies are affiliated if both companies are subsidiaries of the same company or each of them is controlled by the same person.[30]

31. While D3 and Safe Roads Financial Statements do not individually meet the $5 million statutory requirement, each of them qualifies as "affiliated debtor companies" as they are practically owned

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[24] *Re Stelco Inc.*, 48 CBR (4th) 299 [*Stelco*] at paras 26-28 [TAB 20].
[25] *Stelco* at para 40 [TAB 20].
[26] van Bruggen Affidavit at paras 64 – 83.
[27] van Bruggen Affidavit at para 83.
[28] van Bruggen Affidavit at paras 64 – 83.
[29] CCAA, s 2(1) "company", "debtor company", s 3(1) [TAB 2]; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 2 "insolvent person" [BIA] [TAB 1] ; *Stelco* at paras 21 – 26 [TAB 20]
[30] CCAA, s 3(2) [TAB 2].

and controlled (explained further below) by the same entities and persons,[31] as the case may be, as CEC. In particular, D3, CEC and Safe Roads are controlled by two or more companies (being 196 Inc. and Batavi), holding more than 50% of the votes that may be cast to elect directors of those companies.

32. In *Victorian Order of Nurses for Canada,* the Ontario Superior Court determined that even if "applicants do not, on a standalone basis, face claims in excess of $5 million, the applicants as a group, clearly [can]".[32] The ONSC also noted that strict conformity to parent/subsidiary structures typically found in business corporations is not necessary. The ONSC was satisfied that the applicants were under the control of the parent company from a practical perspective; "[t]hey [were] all affiliated companies with the same board of directors".[33] For these reasons the Ontario Superior Court ruled that it was necessary and appropriate to grant CCAA protection.

33. In the present case, each of CEC, D3 and the majority of Safe Roads are owned by the same shareholders, namely, Batavi and, or, 196 Inc. in the following structures:

(a) the common shares of CEC are held 50% by each of 196 Inc. and Batavi;

(b) the common shares of D3 are held 80% by 196 and 20% by Batavi; and

(c) the common shares of Safe Roads are held 60% by 196 Inc., 20% by Batavi and 20% by Barricades.[34]

34. Further, the board of directors of each of CEC, Safe Roads and Barricades is comprised of Matthew Powell and Jan van Bruggen.[35] The board of directors of D3, in addition to Matthew Powell and Jan van Bruggen, includes William Powell.[36]

35. Each of the Applicants, therefore, are practically owned by the same entities and controlled by the same board.

36. The board of directors of each of the Applicants have also resolved to seek relief under the CCAA.[37]

(ii) The Applicants' request for a liquidating CCAA should be granted

37. Liquidating CCAAs, in which there is no contemplation of a plan of arrangement being put to creditors, have become "common place" in CCAA jurisprudence.[38] Liquidating CCAAs align with

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[31] *Victorian Order of Nurses for Canada (Re),* 2015 ONSC 7371 para 10 [*Victorian Order Nurses for Canada*] [TAB 23].
[32] *Victorian Order of Nurses for Canada*, para 10 [TAB 23].
[33] *Victorian Order of Nurses for Canada,* para 10 [TAB 23].
[34] van Bruggen Affidavit at para 15.
[35] van Bruggen Affidavit at para 21.
[36] van Bruggen Affidavit at para 21.
[37] van Bruggen Affidavit at para 90.
[38] *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10 at para 42 [*Calladius*] [TAB 3].

the CCAA's objectives including to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business."[39]

38. Further, such relief may be granted even in the absence of a plan of arrangement. This was confirmed by the B.C. Court of Appeal in *Port Capital Development (EV) Inc. v. 1296371* B.C. Ltd.[40] which held that the absence of a planned compromise was not a crucial factor in the judge's discretionary analysis of appropriateness under section 11 of the CCAA.

39. For all of the foregoing reasons, the Applicants submit that it is not inappropriate for the Court to exercise its discretion grant the Initial Order solely on the gound that this is a contemplated liquidating CCAA.

B The Stay of Proceedings under the CCAA Should be Granted

40. On an initial application, a Court may grant a stay of proceedings of up to 10 days, provided it is satisfied that such a stay is appropriate.[41]

41. Appropriateness under the CCAA is assessed by asking whether the order sought advances the policy objectives underlying the CCAA.[42] The remedial purposes of the CCAA have been characterized as "avoiding the social and economic losses resulting from liquidation of an insolvent company"[43] as well as "maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress [...] and enhancement of the credit system generally."[44]

42. The stay of proceedings sought by the Applicants is necessary for the Applicants to pursue an orderly wind-down of its operations. Without the benefit of the stay of proceedings, creditors may exercise self-help remedies, which would not permit the Applicants to take the steps necessary to maximize value for the benefit of their stakeholders through an orderly completion of certain contracts, the collection of accounts receivable and sales of assets.

43. For all of the foregoing reasons, the Applicants submit that it is appropriate for the Court to exercise its discretion to grant the stay of proceedings in favour of the Applicants.

44. Further, it is relatively customary in CCAA proceedings to extend the benefit of the stay of proceedings to the directors and officers of the Applicants. The ongoing assistance of the directors and officers of the Applicants is critical to the orderly wind down of the Applicants' business, which

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[39] *Callidus,* at para 45 [TAB 3].
[40] *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.,* 2021 BCCA 382 at paras 77 to 79 [TAB 16].
[41] CCAA, s 11.02(1) and (3) [TAB 2].
[42] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 70 [*Century Services*] [TAB 6].
[43] *Century Services,* at para 70 [TAB 6].
[44] *Callidus,* at paras 40-42 [TAB 3].

is expected to maximize value for all stakeholders. The focus of such directors and officers should not be subject to the potential distraction and risk associated with potential creditor claims against them personally.

C It is Necessary and Appropriate to Grant the Indemnitor Stay and the SPA Stay

(i) The Indemnitor Stay

45. The Court has the authority to grant an order extending the stay of proceedings to non-applicants, as result of its broad jurisdiction under ss. 11 and 11.02(1) of the CCAA to make an initial order on any terms that the Court may impose.[45] In *Laurentian University of Sudbury*, the Ontario Superior Court of Justice noted that it is "well-established" that it is appropriate for a court to extend a stay of proceedings to a third party that is integrally and closely interrelated with the debtor company's business or where doing so furthers the primary purpose of the CCAA, being the successful restructuring of an insolvent company. There are many instances in which Courts have extended a stay of proceedings to non-applicants, including:

(a) where it is important to the reorganization process or furthers the primary purpose of the CCAA;[46]

(b) where third party entities are integrally and closely interrelated to the debtor companies' business, such as where there are agreements among the entities, guarantees provided by certain entities in the group in respect of the obligations of other entities in the group or shared cash management systems;[47]

(c) against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies;[48] and

(d) affiliate companies were facing claims directly connected to the overall group's operations and have requested the expansion to "preserve the status quo, prevent unnecessary expenditures of effort on litigation, maximize recovery for all parties, and allow for an orderly determination of priority and claims".[49]

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[45] *Laurentian University of Sudbury*, 2021 ONSC 659, [*Laurentian University of Sudbury*] TAB 13].
[46] *Cinram International Inc. (Re)*, 2012 ONSC 3767 (CanLII) at para 64 [*Cinram*] [TAB 7]; *Laurentian University of Sudbury*, at para 40 [TAB 13].
[47] *Laurentian University of Sudbury*, at para 40 [TAB 13]; *Cinram,* at para 64 [TAB 7].
[48] *Canwest Global Communications Corp., Re,* [2009] OJ No 4286 at paras 29-30 [*Canwest Global*] [TAB 4]; *Jaguar Mining Inc., Re,* 2014 ONSC 494 at para 39 [*Jaguar Mining*] [TAB 12]; *SkyLink Aviation Inc., Re*, 2013 ONSC 1500 at paras 14, 25 [TAB 22]; *Cinram*, at para 64 [TAB 7].
[49] *Re Canada North Group Inc.*, 2017 ABQB 508 at para 28 [TAB 19].

46. As set out in the van Bruggen Affidavit, pursuant to the Indemnity Agreement, the Indemnitors agreed to indemnify Trisura as against all losses, charges, expenses, costs and other liabilities with respect to the bond obligations owed by the Applicants. By the terms of the Indemnity Agreement, the Indemnitors agreed to perform all of the conditions of each bonded and unbonded contract.[50]

47. As noted above, certain critical elements of the Applicants' operations are reliant upon services being provided by other members of the Candesto Group who are not Applicants, including Barricades (who is an Indemnitor). If Trisura were to commence legal proceedings or otherwise enforce upon its rights as against the Indemnitors (including Barricades), the operations of the Applicants could be negatively impacted through a potential interruption to the provision of shared services between Barricades and the Applicants. Further, with respect to 196 Inc. and Batavi, any actions undertaken by Trisura may threaten the ability of the Applicants to wind down their operations in an orderly fashion through the distraction of shared directors and management in responding to Trisura.

48. With the relief afforded by protection under the CCAA, the Applicants and Indemnitors will diligently pursue negotiations with Trisura in order to ensure that their financial exposure under the Indemnity Agreement is mitigated and, subject to the outcome of successful negotiations, directly assumed by one of the other members of the Candesto Group in a more orderly and consensual fashion than would occur through Trisura directly enforcing its rights under the Indemnity Agreement.[51]

49. The Applicants are accordingly seeking to stay the enforcement of Trisura's rights under the Indemnity Agreement as against the Indemnitors as a necessary element of the Applicants' plans to wind down their business. To permit Trisura to enforce upon its rights under the Indemnity Agreement would be to undo the entire purpose of an orderly, collective creditor process and could result in chaos.

(ii) The SPA Stay

50. In addition to being an Indemnitor, Batavi is the purchaser of certain shares under the SPA.[52] Concurrent to the SPA, the Pledge Agreement was executed as collateral security for Batavi's obligations which include paying a purchase price of $750,000.[53]

51. Of this amount, and due to a dispute having arisen between Batavi, VAC Ltd. and Bokenfohr under the SPA, Batavi has only paid a total of $125,000 under the SPA.[54] As a result of that dispute,

[50] van Bruggen Affidavit at para 76 and Exhibit "K".
[51] van Bruggen Affidavit at para 104 and Exhibit "K".
[52] van Bruggen Affidavit at para 107.
[53] van Bruggen Affidavit at para 107.
[54] van Bruggen Affidavit at paras 109 – 110.

Batavi has not made the most recent payment to VAC Ltd. and Bokenfohr under the SPA, which payment was due on January 31, 2023.[55]

52. Section 2.5 of the SPA provides that upon a payment default, VAC Ltd. and Bokenfohr (as "**Vendor**") may give notice to Batavi and the Corporations (as such term is defined in the SPA) of the default, and if such default is not fully rectified within 90 days of notice, "all amounts set out in [the SPA] and in the aforesaid consulting agreement shall be immediately due and payable and the Vendor may proceed to exercise those rights set out in [the Pledge Agreement]."[56]

53. If the SPA Stay is not granted, there is a risk in the midst of these CCAA Proceedings that VAC Ltd. or Bokenfohr could enforce the Pledge Agreement by exercising shareholder rights. In light of the lack of economic value of the shares at this stage, the Applicants respectfully request that this Court consider the needs and interests of all creditors instead of the interests of the shareholders.[57]

54. In light of the limited nature of the Indemnitor Stay and the SPA Stay and for the reasons set out above, the Applicants request that this Court grant the Indemnitor Stay and the SPA Stay.

D The Monitor Should be Appointed

55. The Proposed Monitor is a licensed trustee within the meaning of section 2 of the BIA and has signed a consent to act as the Monitor of the Applicant.[58] The Proposed Monitor is qualified to act as Monitor under section 11.7 of the CCAA.[59]

E Payments to Critical Suppliers for Pre-Filing Amounts Should be Authorized

56. As set out in the van Bruggen Affidavit, the Applicants are requesting permission of this Honourable Court to, with the consent of the Monitor, pay certain amounts owing for goods and services supplied to the Applicants prior to the date of the Initial Order, if in the reasonable opinion of the Applicants such payment is necessary or desirable to either avoid disruption to the operations of the Business of the Applicants or to maximize recoveries during the CCAA proceedings. The payment of such amounts will be in exceptional circumstances only.[60]

57. The Ontario Superior Court of Justice, in *Cinram International*[61]*,* accepted an accurate summary of the law on the court's jurisdiction to permit debtors to make pre-filing payments to critical

[55] van Bruggen Affidavit at paras 109 – 110.
[56] van Bruggen Affidavit at para 111.
[57] van Bruggen Affidavit at para 112.
[58] van Bruggen Affidavit at para 114.
[59] CCAA, s 11.7 [TAB 2].
[60] van Bruggen Affidavit at para 135.
[61] *Cinram*, at paras 66 - 69 [TAB 7]; *Northstar Aerospace, Inc. (Re),* 2012 ONSC 4546 at para 11 [*Northstar Aerospace Inc.*] [TAB 15].

suppliers.[62] The summary stated that there is "ample authority" that the Court may permit payment of pre-filing obligations to critical suppliers. Section 11.4 of the CCAA codified such jurisdiction of the Court to do so.[63]

58. There have been several cases where the Court has authorised such payment of pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. The Court considered several factors in granting such an order, including:

(a) whether the goods and services were integral to the business of the applicants;

(b) the applicants' dependency on the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made without the consent of the proposed Monitor;

(d) the proposed Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

(e) whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

(f) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.[64]

59. In this instance, the proposed pre-filing payments, if made, will be modest in light of the size of the size of the Applicants' unsecured debt, and are subject to Monitor approval. The Applicants respectfully request they should be approved.

F The Priority Charges are Appropriate

60. The Applicants are seeking the approval of certain priority charges in the Initial Order and in the ARIO, which charges are usual and customary for a proceeding of this nature.

61. The Priority Charges being sought as part of the Initial Order are:

(a) an Administration Charge in an initial amount of $500,000, to secure the professional fees of the Proposed Monitor, the Proposed Monitor's counsel and the Applicants' counsel;

(b) an Interim Lender's Charge, in an initial amount of $450,000, to secure the interim financing necessary for the Applicants to fund their operations in the short term; and

[62] *Northstar Aerospace, Inc.*, at para 11 [TAB 15].
[63] CCAA, s 11.4(1) [TAB 2].
[64] *Cinram*, at para 68 [TAB 7]; *Northstar Aerospace, Inc.*, at para 11 [TAB 15].

(c) a D&O Charge in an initial amount of $50,000, to secure the indemnity provided in the Initial Order to the directors and officers of the Applicants.

(i) Administration Charge

62. The CCAA authorizes this Court to grant a priority charge over the Applicants' assets for professional fees and disbursements on notice to affected secured creditors.[65] The factors to consider in determining whether to approve an administration charge 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.[66]

63. The Administration Charge is necessary due to the size and complexity of the Applicants' business and the professional expertise and knowledge required by the Applicants in order to successfully navigate these CCAA Proceedings

64. The proposed quantum of the Administration Charge being sought in the Initial Order is $500,000. The Proposed Monitor was consulted on the quantum of the Administration Charge and is of the view that the Administration Charge is appropriate in light of the Applicants' operations, the Monitor's proposed duties and the duties of counsel to the Monitor and Applicants.

65. The Administration Charge is necessary to encourage the participation of the insolvency professionals associated with this matter, who are integral to the success of the proceeding.

(ii) Interim Financing and Interim Lenders Charge

66. Interim financing refers "primarily to the working capital that the debtor corporation requires in order to continue operating during restructuring proceedings, as well as to finance the costs of the CCAA process."[67] Pursuant to section 11.2(1) of the CCAA, a debtor corporation may apply to the court "at any stage of the proceedings for interim financing."[68] The underlying premise of interim

[65] CCAA, s 11.52 [TAB 2].
[66] *Canwest Publishing Inc.*, 2010 ONSC 222, 63 CBR (5th) 115 at para 54 [TAB 5].
[67] *Industrial Properties Regina Limited v Cooper Sands Lands Corp*, 2018 SKCA 36, para 37 [*Industrial Properties Regina Limited*] [TAB 11].
[68] *Industrial Properties Regina Limited,* at para 37 [TAB 11].

financing is to allow "the debtor to protect going-concern value while it attempts to devise a plan of compromise or arrangement acceptable to creditors."[69]

67. An application under section 11.2(1) requires notice be given to secured creditors likely to be affected by interim financing. Section 11.2(4) sets out a non-exhaustive set of considerations for the court when granting DIP financing, including whether a creditor will be materially prejudiced as a result of the higher-ranking charge. The function of the court is to determine, in light of the criteria outlined in s. 11.2(4), if the approval of the financing is reasonable in the circumstances.[70] In addition, the Court must be satisfied that the terms of the loan are limited to what is "reasonably necessary".[71]

68. In *Priszm Income Fund (Re)*, the court considered the factors set out in s. 11.2(4) and held that several reasons supported granting the lenders' charge:

(a) the insolvent company was expected to continue daily operations during the proceedings;

(b) management would be overseen by the monitor who would in turn oversee spending under the DIP financing;

(c) the ability to borrow funds from a court-approved DIP facility would be crucial to retain the confidence of stakeholders;

(d) secured creditors had either been given notice of the DIP lenders' charge or were not affected by it;

(e) the DIP lenders' charge did not secure an obligation that existed before the granting of the initial order;

(f) the proposed monitor was supportive of the DIP facility and the DIP lenders' charge.[72]

69. In order to provide the required liquidity needed to fund the operations of the Applicants during the CCAA Proceedings, the Applicants are seeking the approval of interim financing in the form of a non-revolving interim financing facility (the "**Interim Facility**"). The proposed Initial Order provides for the creation of an initial court-ordered priority charge to secure advances made under the Interim Facility (the "**Interim Lender's Charge**") to match the initial maximum allowable borrowing under the Interim Facility plus interest and recoverable costs incurred of $450,000, as proposed in the Initial Order and ARIO.

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[69] *Industrial Properties Regina Limited,* at para 37 [TAB 11].
[70] *iMarketing Solutions Group Inc., Re,* 2013 ONSC 2223, para 18 [TAB 10].
[71] CCAA, s 11.2(5) [TAB 10].
[72] *Priszm Income Fund, Re,* 2011 ONSC 2061, para 38 [TAB 17].

70. The cash flow statement for the Applicants for the 13-week period commencing December 20, 2023 and ending March 15, 2024 (the "**Cash Flow Statement**") reflects that, subject to obtaining the relief sought as part of the Originating Application for the Initial Order and the ARIO, the Applicants will require interim financing to fund their ongoing operations until at least March of 2024.

71. The Proposed Monitor has reviewed the terms and values within the Term Sheet and is of the view that it is commercially reasonable in the circumstances, including the annual interest rate and the Interims Lender's Charge.

72. The Proposed Monitor is further of the view that the Interim Facility is warranted, as without it, it would be difficult for the Applicants to continue in the CCAA Proceedings. Further, in any probable realization strategy, a receiver, trustee or other administrator or manager would likely recommend to expend a similar amount of funds in order to preserve and market the Applicants and/or their assets.

73. In light of the foregoing, the Applicants respectfully request that the Interim Financing should be approved. The Interim Financing is necessary to facilitate the orderly wind down of the Applicants' business.

(iii) D&O Charge

74. The CCAA also authorizes this Court to grant a priority charge to indemnify a debtor company's directors and officers on notice to its secured creditors ("**D&O Charge**").[73] Directors' charges encourage directors and officers to remain in place, providing a potential stabilizing force for the company.[74]

75. In deciding whether to grant a director's charge, Courts must be satisfied that: (i) notice has been given to the likely affected secured creditors; (ii) the amount of the charge is appropriate; (iii) the Applicants could not obtain adequate indemnification insurance for the directors and officers at a reasonable cost; and (iv) the charge does not apply to obligations incurred by a director or officer as a result of their gross negligence or wilful misconduct.[75]

76. In *PT Holdco, Inc., Re*, the debtor required the continued involvement of its directors and officers in order to finalize the sales process that was already in progress. The court granted a charge that would indemnify the directors and officers and would allow the debtor to continue to benefit from the knowledge and expertise of its directors and officers. The court held that the quantum of the

[73] CCAA, s 11.51 [TAB 2].
[74] *Canwest Global,* at para 48 [TAB 4].
[75] *Jaguar Mining*, at para 45 [TAB 12].

charge was fair and reasonable given the complexities of the debtor's business and the potential exposure of the directors and officers to personal liability.[76]

77. In *Cline Mining Corp., Re,* the applicant's proposed Initial Order requested the court to grant a D&O charge on a priority basis. The D&O charge was calculated on the "estimated exposure of the directors and officers….and [would] only apply to the extent that the directors and officers do not have coverage under the D&O insurance policy with [current insurance provider]."[77]

78. In the present case, the Applicants are current on all source deductions, GST, employee wages and vacation pay, but have no directors and officers insurance. The Applicants are not aware of any deemed trust claims or other priority claims that will be subordinated or prejudiced by the Proposed Priority Charges.[78]

79. Accordingly, the Applicants seek approval of the D&O Charge against the Applicants' property in favour of the Directors and Officers in the amount of $50,000 to protect such Directors and Officers from the risk of significant personal exposure.

80. The Applicants submit that the proposed D&O Charge should be authorized and approved for the following reasons:

(a) the D&O Charge will allow the Applicants to benefit from the knowledge, expertise, and stability offered by their current Directors;

(b) the D&O Charge should be granted because the current directors and officers do not have sufficient indemnity/insurance coverage, and the Applicants do not have sufficient funds to satisfy any given indemnity; and

(c) the D&O Charge does not secure obligations incurred by a director or officer as a result of gross negligence or wilful misconduct.

81. The Applicants have worked with the Proposed Monitor to calculate the quantum of the D&O Charge. The Proposed Monitor supports the D&O Charge.

G Concurrent Grating of the Initial Order and ARIO

82. Prior to recent amendments to the CCAA, a stay of proceedings granted pursuant to an Initial Order could not be granted for a period of more than 30 days, which meant that a comeback hearing on proper notice to all parties tended to occur within approximately a month. The reduction in that period of time to 10 days through amendments to the CCAA obviously evidences an intention on

[76] *PT Holdco, Inc., (Re),* 2016 ONSC 495 [TAB 18].
[77] *Cline Mining Corporation, Re* 2014 ONSC 6998 at para 27 [TAB 8].
[78] van Bruggen Affidavit at para 81.

the part of Parliament to ensure that a comeback hearing, with improved notice to stakeholders, occurs more quickly.

83. Unfortunately, the timing of this application coupled with the Court's schedule do not permit this objective to be easily satisfied. The maximum 10 day stay expires on December 30, 2023, and there are no commercial sittings of the Alberta Court of King's Bench between December 23, 2023 and January 8, 2024. Further, even if the Court agreed to hear a comeback application on an emergency basis during that time, parties would not be on materially improved notice of that hearing due to the holiday season.

84. To ameliorate this issue, the Applicants propose that both the Initial Order and ARIO be granted at the same time. This would result in a hearing the week of January 8, 2024, which is still improved timing compared to the prior 30 day stay period. The Applicants are prepared to treat that hearing as of it were a "true" comeback hearing in light of these notice issues. This is consistent with the policy associated with the CCAA amendments, and would benefit stakeholders.

85. Alberta Courts have, although in different circumstances, approved an Initial Order and an ARIO on the same day.[79]

86. While an Ontario court previously declined to grant a CCAA initial order concurrently with an amended and restated initial order in *Lydian International Limited, Re,* 2019 ONSC 7473, that case is distinguishable, as the stay of proceedings was set to expire on a day the courts were open.[80]

VI. CONCLUSION

87. Based on the foregoing, the Applicants request that this Honourable Court grant the Orders and provide the Applicants protection under the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of December, 2023.

Cassels Brock & Blackwell LLP

Per: Jeffrey Oliver

Jeffrey Oliver / Natalie Thompson
Counsel for the Applicants

[79] See e.g. *Century Services* [TAB 6]; *Re Wayland group Corp. et al.* (2 December 2019), Toronto CV–19–00632079-00CL [TAB 21]; *Free Rein Enterprises Ltd. (Re)* (8 December 2023), Calgary-2301-16260 [TAB 9].
[80] *Lydian International Limited, Re,* 2019 ONSC 7473 [TAB 14].

VII. LIST OF AUTHORITIES

STATUTES

Tab	Authority
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36

JURISPRUDENCE

Tab	Authority
3.	*9354-9186 Québec Inc. v Callidus Capital Corp.*, 2020 SCC 10
4.	*Canwest Global Communications Corp., Re*, [2009] OJ No 4286
5.	*Canwest Publishing Inc.*, 2010 ONSC 222
6.	*Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
7.	*Cinram International Inc. (Re)*, 2012 ONSC 3767
8.	*Cline Mining Corporation, Re* 2014 ONSC 6998
9.	*Free Rein Enterprises Ltd. (Re)* (8 December 2023), Calgary-2301-16260
10.	*iMarketing Solutions Group Inc., Re*, 2013 ONSC 2223
11.	*Industrial Properties Regina Limited v Cooper Sands Lands Corp*, 2018 SKCA 36
12.	*Jaguar Mining Inc., Re*, 2014 ONSC 494
13.	*Laurentian University of Sudbury*, 2021 ONSC 659
14.	*Lydian International Limited, Re*, 2019 ONSC 7473
15.	*Northstar Aerospace, Inc. (Re)*, 2012 ONSC 4546
16.	*Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*, 2021 BCCA 382
17.	*Priszm Income Fund, Re*, 2011 ONSC 2061
18.	*PT Holdco, Inc., (Re)*, 2016 ONSC 495
19.	*Re Canada North Group Inc.*, 2017 ABQB 508
20.	*Re Stelco Inc.*, 48 CBR (4th) 299
21.	*Re Wayland group Corp. et al*. (2 December 2019), Toronto CV–19–00632079-00CL
22.	*SkyLink Aviation Inc., Re*, 2013 ONSC 1500

23. *Victorian Order of Nurses for Canada (Re)* 2015 ONSC 7371