Court File No. CV-24-00726584-00CL

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 2675970 ONTARIO INC., 2733181 ONTARIO INC., 2385816 ALBERTA LTD., 2161907 ALBERTA LTD., 2733182 ONTARIO INC., 2737503 ONTARIO INC., 2826475 ONTARIO INC., 14284585 CANADA INC., 2197130 ALBERTA LTD., 2699078 ONTARIO INC., 2708540 ONTARIO CORPORATION, 2734082 ONTARIO INC., TS WELLINGTON INC., 2742591 ONTARIO INC., 2796279 ONTARIO INC., 10006215 MANITOBA LTD., AND 80694 NEWFOUNDLAND & LABRADOR INC.

COMPENDIUM OF THE APPLICANTS
(Re: FARIO Re: Extend Stay)

October 18, 2024

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TO: **THE SERVICE LIST**

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TAB 1

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^o^ 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?

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 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, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

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

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

the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] 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*. Toutefois, 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*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

TAB 2

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 September 16, 2024

Last amended on April 27, 2023

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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

who is obligated under a letter of credit or guarantee in relation to the company.

2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

2005, c. 47, s. 128, 2007, c. 36, s. 64.

11.07 [Repealed, 2012, c. 31, s. 420]

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

(a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2005, c. 47, s. 128.

Stay — Her Majesty

11.09 (1) An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor

personne — autre que la compagnie visée par l'ordonnance — qui a des obligations au titre de lettres de crédit ou de garanties se rapportant à la compagnie.

2005, ch. 47, art. 128.

11.05 [Abrogé, 2007, ch. 29, art. 105]

Membre de l'Association canadienne des paiements

11.06 Aucune ordonnance prévue par la présente loi ne peut avoir pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'Association.

2005, ch. 47, art. 128; 2007, ch. 36, art. 64.

11.07 [Abrogé, 2012, ch. 31, art. 420]

Restrictions : exercice de certaines attributions

11.08 L'ordonnance prévue à l'article 11.02 ne peut avoir d'effet sur :

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

c) l'exercice par le procureur général du Canada des pouvoirs qui lui sont conférés par la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 128.

Suspension des procédures : Sa Majesté

11.09 (1) L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie

under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

When order ceases to be in effect

(2) The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la 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.

Cessation d'effet

(2) Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la 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;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2)

imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection.

Operation of similar legislation

(3) An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation

de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la 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.

Effet

(3) L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si 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

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

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

Critical supplier

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

Obligation to supply

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

Security or charge in favour of critical supplier

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

Priority

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

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court

Restriction

(4) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

Copie de l'ordonnance

(5) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 29, art. 107, ch. 36, art. 65 et 112.

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

Fournisseurs essentiels

11.4 (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 toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

Obligation de fourniture

(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.

Charge ou sûreté en faveur du fournisseur essentiel

(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.

Priorité

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

1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A); 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Révocation des administrateurs

11.5 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur de la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi s'il est

is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

Security or charge relating to director's indemnification

11.51 (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 after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(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.

Negligence, misconduct or fault

(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.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

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

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (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 celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priorité

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

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

(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.

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Priority

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Priorité

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

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

***Bankruptcy and Insolvency Act* matters**

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

Lien avec la *Loi sur la faillite et l'insolvabilité*

11.6 Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

(i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

(ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Nomination du contrôleur

11.7 (1) Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

1997, c. 12, s. 124; 2005, c. 47, s. 129.

No personal liability in respect of matters before appointment

11.8 (1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

Personnes qui ne peuvent agir à titre de contrôleur

(2) Sauf avec l'autorisation du tribunal et aux conditions qu'il peut fixer, ne peut être nommé pour agir à titre de contrôleur le syndic :

a) qui est ou, au cours des deux années précédentes, a été :

(i) administrateur, dirigeant ou employé de la compagnie,

(ii) lié à la compagnie ou à l'un de ses administrateurs ou dirigeants,

(iii) vérificateur, comptable ou conseiller juridique de la compagnie, ou employé ou associé de l'un ou l'autre;

b) qui est :

(i) le fondé de pouvoir aux termes d'un acte constitutif d'hypothèque — au sens du *Code civil du Québec* — émanant de la compagnie ou d'une personne liée à celle-ci ou le fiduciaire aux termes d'un acte de fiducie émanant de la compagnie ou d'une personne liée à celle-ci,

(ii) lié au fondé de pouvoir ou au fiduciaire visé au sous-alinéa (i).

Remplacement du contrôleur

(3) Sur demande d'un créancier de la compagnie, le tribunal peut, s'il l'estime indiqué dans les circonstances, remplacer le contrôleur en nommant un autre syndic, au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité*, pour agir à ce titre à l'égard des affaires financières et autres de la compagnie.

1997, ch. 12, art. 124; 2005, ch. 47, art. 129.

Immunité

11.8 (1) Par dérogation au droit fédéral et provincial, le contrôleur qui, en cette qualité, continue l'exploitation de l'entreprise de la compagnie débitrice ou lui succède comme employeur est dégagé de toute responsabilité personnelle découlant de quelque obligation de la compagnie, notamment à titre d'employeur successeur, si celle-ci, à la fois :

a) l'oblige envers des employés ou anciens employés de la compagnie, ou de l'un de ses prédécesseurs, ou découle d'un régime de pension pour le bénéfice de ces employés;

b) existait avant sa nomination ou est calculée par référence à une période la précédant.

Status of liability

(2) A liability referred to in subsection (1) shall not rank as costs of administration.

Liability of other successor employers

(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

Liability in respect of environmental matters

(3) Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the monitor's appointment; or

(b) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

Reports, etc., still required

(4) Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders

(5) Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (b), the monitor

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a) or within ten days

Obligation exclue des frais

(2) L'obligation visée au paragraphe (1) ne fait pas partie des frais d'administration.

Responsabilité de l'employeur successeur

(2.1) Le paragraphe (1) ne dégage aucun employeur successeur, autre que le contrôleur, de sa responsabilité.

Responsabilité en matière d'environnement

(3) Par dérogation au droit fédéral et provincial, le contrôleur est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu, avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée.

Rapports

(4) Le paragraphe (3) n'a pas pour effet de soustraire le contrôleur à l'obligation de faire rapport ou de communiquer des renseignements prévus par le droit applicable en l'espèce.

Immunité — ordonnances

(5) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (3), le contrôleur est, ès qualité, dégagé de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par des procédures intentées au titre de la présente loi, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout intérêt dans l'immeuble en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the order, or

(ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or

(c) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au contrôleur de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout intérêt dans le bien immeuble en cause ou y avait renoncé, ou s'en était dessaisi.

Stay may be granted

(6) The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

Suspension

(6) En vue de permettre au contrôleur d'évaluer les conséquences économiques du respect de l'ordonnance, le tribunal peut en ordonner la suspension après avis et pour la période qu'il estime indiqués.

Costs for remedying not costs of administration

(7) Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Frais

(7) Si le contrôleur a abandonné tout intérêt dans le bien immeuble en cause ou y a renoncé, les réclamations pour les frais de réparation du fait ou dommage lié à l'environnement et touchant le bien ne font pas partie des frais d'administration.

Priority of claims

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

Priorité des réclamations

(8) Dans le cas où des procédures ont été intentées au titre de la présente loi contre une compagnie débitrice, toute réclamation de Sa Majesté du chef du Canada ou d'une province contre elle pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un de ses biens immeubles est garantie par une sûreté sur le bien immeuble en cause et sur ceux qui sont contigus à celui où le dommage est survenu et qui sont liés à l'activité ayant causé le fait ou le dommage; la sûreté peut être exécutée selon le droit du lieu où est situé le bien comme s'il s'agissait d'une hypothèque ou autre garantie sur celui-ci et, par dérogation aux autres dispositions de la présente loi et à toute règle de droit fédéral et provincial, a priorité sur tout autre droit, charge ou réclamation visant le bien.

Claim for clean-up costs

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental

Précision

(9) La réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un bien

damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

1997, c. 12, s. 124; 2007, c. 36, s. 67.

immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

1997, ch. 12, art. 124; 2007, ch. 36, art. 67.

Disclosure of financial information

11.9 (1) A court may, on any application under this Act in respect of a debtor company, by any person interested in the matter and on notice to any interested person who is likely to be affected by an order made under this section, make an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate.

Factors to be considered

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

(a) whether the monitor approved the proposed disclosure;

(b) whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and

(c) whether any interested person would be materially prejudiced as a result of the disclosure.

Meaning of *economic interest*

(3) In this section, ***economic interest*** includes

(a) a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;

(b) the consideration paid for any right or interest, including those referred to in paragraph (a); or

(c) any other prescribed right or interest.

2019, c. 29, s. 139.

Divulgation de renseignements financiers

11.9 (1) Sur demande de tout intéressé sous le régime de la présente loi à l'égard d'une compagnie débitrice et sur préavis de la demande à tout intéressé qui sera vraisemblablement touché par l'ordonnance rendue au titre du présent article, le tribunal peut ordonner à cet intéressé de divulguer tout intérêt économique qu'il a dans la compagnie débitrice, aux conditions que le tribunal estime indiquées.

Facteurs à prendre en considération

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

a) la question de savoir si le contrôleur acquiesce à la divulgation proposée;

b) la question de savoir si la divulgation proposée favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie débitrice;

c) la question de savoir si la divulgation proposée causera un préjudice sérieux à tout intéressé.

Définition de *intérêt économique*

(3) Au présent article, ***intérêt économique*** s'entend notamment :

a) d'une réclamation, d'un contrat financier admissible, d'une option ou d'une hypothèque, d'un gage, d'une charge, d'un nantissement, d'un privilège ou d'un autre droit qui grève le bien;

b) de la contrepartie payée pour l'obtention, notamment, de tout intérêt ou droit visés à l'alinéa a);

c) de tout autre intérêt ou droit prévus par règlement.

2019, ch. 29, art. 139.

Fixing deadlines

12 The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

R.S., 1985, c. C-36, s. 12; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 2004, c. 25, s. 195; 2005, c. 47, s. 130; 2007, c. 36, s. 68.

Échéances

12 Le tribunal peut fixer des échéances aux fins de votation et aux fins de distribution aux termes d'une transaction ou d'un arrangement.

L.R. (1985), ch. C-36, art. 12; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 2004, ch. 25, art. 195; 2005, ch. 47, art. 130; 2007, ch. 36, art. 68.

Leave to appeal

13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from

Permission d'en appeler

13 Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la

TAB 3

CITATION: McEwan Enterprises Inc., 2021 ONSC 6453
COURT FILE NO.: CV-21-00669445-00CL
DATE: 2021-10-01

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 MCEWAN ENTERPRISES INC.

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick, Caroline Descours, and Trish Barrett* for the Applicant

Sean Zweig and Joshua Foster, for the Monitor

Virginie Gauthier, for The Cadillac Fairview Corporation Limited

HEARD and DETERMINED: September 28, 2021

REASONS RELEASED: October 1, 2021

ENDORSEMENT

1. The initial hearing of this matter took place on September 28, 2021. At the conclusion of the hearing, I granted an Initial Order with reasons to follow. These are the reasons.

A. OVERVIEW

2. McEwan Enterprises Inc. ("MEI") is a full-service restaurant, catering, gourmet grocery and events company (the "Business") based in the Greater Toronto Area (the "GTA"). MEI was founded in 1987 by Mark McEwan, who leads the development, preparation and delivery of the culinary aspects of the Business.

3. Capitalized terms used but not defined herein have the meanings given to such terms in the Affidavit of Dennis Mark McEwan sworn September 27, 2021 (the "McEwan Affidavit").

4. MEI brings this application for an initial order (the "Initial Order") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). Counsel to MEI submits that the principal objectives of these 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 MEI and its Business. As part of its restructuring efforts pursuant to these CCAA proceedings, MEI intends to seek to complete the sale and transfer of the Business pursuant to the proposed Transaction (as defined below).

5. MEI has been experiencing financial challenges for an extended period of time as a result of certain unprofitable McEwan Locations (as defined below), and the McEwan Group has not been profitable since 2017. MEI's financial challenges have been exacerbated by the impacts of the COVID-19 pandemic over the last approximately 18 months.

6. Counsel submits that MEI has made extensive efforts to seek consensual arrangements with its landlords in respect of its leases, but has been unable to achieve a comprehensive out-of-court resolution.

7. After extensive review and consideration of its circumstances, and its options and alternatives, and following efforts to reach consensual arrangements with landlords, MEI determined that the best available alternative in the circumstances would be a sale of substantially all of the McEwan Group's assets and the Business (the "Transaction") to the current owners of MEI, and the continuation of the Business with a reduced number of McEwan Locations. The continued involvement of Mr. McEwan as chef and operator of the Business, is premised on a continuation of Mr. McEwan's partnership with Fairfax (as defined below) as co-owners of the McEwan Group.

8. Having regard to its financial circumstances and ongoing challenges, MEI determined that it is necessary to seek protection under the CCAA in order to provide stability for the Business and preserve value, while MEI advances its efforts to restructure and right-size the Business, including pursuing the proposed Transaction.

9. Counsel advises that MEI intends to bring a subsequent motion to seek Court approval of the Transaction.

B. CURRENT CHALLENGES

10. The McEwan Group conducts the Business out of six restaurants (the "McEwan Restaurants"), as well as two food-hall locations and one gourmet grocery location (collectively with the McEwan Restaurants, the "McEwan Locations").

11. MEI is a private company incorporated under the laws of Ontario and is headquartered in Toronto. MEI is owned by Fairfax Financial Holdings Limited ("Fairfax"), through one of its subsidiaries, which holds a 55% equity interest in MEI, and by Mr. McEwan, through McEwan Holdco Inc., which owns a 45% equity interest in MEI.

12. Many of the McEwan Locations have been historically successful and profitable; however, certain locations have been underperforming for a number of years, causing an overall significant strain on MEI's profitability and liquidity. As a result of these financial challenges, in March 2020, MEI's shareholders provided approximately $1.1 million of additional equity financing to support the operations of the Business.

13. In an effort to address the COVID-19 pandemic challenges, MEI implemented extensive cost-saving and cash conservation measures, negotiated various rent concessions, and obtained

various government subsidies and support. Those efforts were insufficient to address MEI's liquidity needs during the COVID-19 pandemic. As a result, MEI needed to obtain additional financing, which it was able to obtain from one of its shareholders, Fairfax, by way of a number of unsecured loans provided in 2020 and 2021.

14. MEI has advised that it will also need further funding to continue operations while the impacts of the COVID-19 pandemic on the Business persist.

15. Counsel submits that after extensive review and consideration of its circumstances and following efforts to reach consensual arrangements with landlords, MEI 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 MEI's many stakeholders, would be the Transaction. On September 27, 2021, MEI entered into a purchase agreement with 2864785 Ontario Corp. (the "Purchaser"), pursuant to which, subject to Court approval, the parties would complete the Transaction (the "Purchase Agreement").

16. MEI believes that the implementation of the Transaction will result in a sustainable Business going forward for the benefit of MEI's many stakeholders, including its 268 employees whose jobs will be preserved, its secured creditors whose obligations will be unaffected and assumed by the Purchaser, and its many suppliers and service providers whose contracts and obligations will also all be assumed. The Transaction also provides for the necessary funding for MEI's operations by way of the Transaction Deposit of up to $2.25 million for the period up to the closing of the Transaction.

17. MEI and its board of directors have determined that it is in the best interests of MEI and its stakeholders for MEI to file for protection under the CCAA in order to preserve the value of the Business and continue as a going concern while seeking to implement a restructuring of the Business, including the proposed Transaction.

18. Counsel submits that the commencement of these CCAA proceedings and the granting of a stay of proceedings (the "Stay of Proceedings") are necessary to provide stability to the Business, to preserve value and to permit MEI to restructure its affairs, and are in the best interests of MEI and its stakeholders.

19. MEI is also requesting that this Court exercise its discretion to extend the Stay of Proceedings in respect of the personal guarantees, indemnities and security granted by Mr. McEwan in his personal capacity in connection with certain of MEI's obligations, as well as in favour of 2860117 Ontario Limited (the "McEwan Subsidiary"), a wholly-owned subsidiary of MEI which holds MEI's 50% interest in the ONE Restaurant Partnership. The McEwan Subsidiary and Mr. McEwan are collectively referred to herein as the "Non-Filing Parties".

20. As set out in the Cash Flow Forecast, with the remaining availability under the Secured Credit Facilities and the funding from the Transaction Deposit (if approved by the Court), MEI is expected to have sufficient funding through the period of the Cash Flow Forecast.

21. Alvarez & Marsal Canada Inc. ("A&M") has consented to act as the monitor of MEI in these proceedings (in such capacity, the "Monitor").

22. In connection with A&M's appointment as the Monitor, it is contemplated that a Court-ordered charge will be granted over MEI's assets, property and undertaking (the "Property") in favour of the Monitor, its counsel, and MEI's counsel in respect of their fees and disbursements incurred prior to and following the commencement of these proceedings at their standard rates and charges (the "Administration Charge").

C. ISSUES

23. The issues to be considered on this application are whether:

(a) MEI is a "debtor company" to which the CCAA applies;

(b) the relief sought in the proposed Initial Order is available under the CCAA;

(c) the stay of proceedings under the Initial Order should be extended to the Non-Filing Parties; and

(d) the Charges (as defined below) should be granted.

D. ANALYSIS and FINDINGS

24. The CCAA applies to a "debtor company" where the total claims against such company exceeds $5 million. The terms "debtor company" is defined in Section 2 of the CCAA. In essence, a debtor company is an insolvent company.

25. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests: (a) is for any reason unable to meet his obligations as they generally become due; (b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of his 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. (See: *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 at paras. 21-22 (Ont. Sup. Ct. J. [Commercial List]), leave to appeal to C.A. refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 336 [*Stelco*];).

26. The test for "insolvent person" under the BIA is disjunctive. A company satisfying any one of the above criteria is considered insolvent for the purposes of the CCAA.

27. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in MEI being unable to pay its debts as they generally become due if a stay or proceedings and ancillary protection are not granted by the court. (see: *Stelco, supra* at para. 40).

28. Having reviewed the McEwan Affidavit and hearing submissions, I am satisfied that MEI meets both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition.

29. As at August 31, 2021, MEI has aggregate liabilities exceeding $10 million. Thus, total claims against MEI exceed the $5 million threshold amount under the CCAA.

30. Accordingly, I am satisfied MEI is a "debtor company" to which the CCAA applies.

31. Subject to the terms of the Initial Order, MEI intends to honour all of its obligations in respect of its employees, suppliers and service providers in the ordinary course, as well in respect of its customer gift cards and the Customer Program. Pursuant to the proposed Transaction, any and all outstanding amounts owing in respect of MEI's employee, trade or customer obligations will be assumed by the Purchaser upon implementation of the Transaction.

32. I am also satisfied that the Court has the jurisdiction to permit payment of pre-filing obligations in a CCAA proceeding, including where such payments are critical to the ongoing operations of a debtor company or the maintenance of its customer, supplier and employee relationships. (See: *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at paras. 41, 43; *Cinram International Inc., Re,* 2012 ONSC 3767 at para. 37 and Sch. C at paras. 66-71; and *Performance Sports Group Ltd., Re,* 2016 ONSC 6800 at para. 24 [*Performance Sports*]).

33. In arriving at this conclusion, I have taken into account a number of factors in authorizing the payment of pay pre-filing obligations, including: (a) whether the goods and services were integral to the business of the applicant; (b) the applicant's need for the uninterrupted supply of the goods and services; (c) whether the applicant had sufficient inventory of the goods on hand to meet its needs; (d) the effect on the applicant's operations and ability to restructure if it could not make pre-filing payments; and (e) the fact that no payments would be made without the consent of the Monitor. (See: *Cinram, supra* at para. 37 and Sch. C at paras. 66-71; *Performance Sports, supra* at para. 25; and *JTI-Macdonald Corp., Re,* 2019 ONSC 1625 at para. 24 [*JTI-Macdonald*]).

34. Pursuant to the proposed Initial Order, it is proposed that the Monitor not be required to comply with the notification requirements of Section 23(1)(a) of the CCAA to: (a) publish a newspaper notice in respect of the CCAA proceedings; (b) send a notice to known creditors; or (c) make publicly available a list showing the names, addresses and estimated claim amounts of those creditors.

35. I am satisfied that pursuant to Section 23(1)(a) of the CCAA, the Court has the jurisdiction to grant an order not requiring compliance with the applicable notice provisions and/or varying

those requirements. The question is whether it is appropriate for the court to exercise its jurisdiction.

36. MEI believes that the issuance of a newspaper notice and the public posting of a list of individual creditors and their claims will not serve to provide any material benefit to the relevant parties, who are intended to not be impacted by these CCAA proceedings, and will add unnecessary costs. MEI believes that a notice issued by MEI to its creditors will be a more efficient and less disruptive means of notifying such parties in these circumstances.

37. I have not been persuaded that it is appropriate or necessary, in these circumstances to deviate from the notice provisions prescribed by the CCAA.

38. CCAA proceedings are public proceedings. The Supreme Court, in the recent decision *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37-38, confirmed that court proceedings are presumptively open to the pubic. It seems to me that, absent extenuating circumstances, any attempt to limit the publication of CCAA proceedings by altering the prescribed notice provisions is not consistent with the open court presumption which must be respected.

39. It is necessary to recognize that it is MEI that is seeking court protection from its creditors and has resorted to the CCAA to achieve its objectives. It does not lie with MEI to alter the notice provisions to suit its purposes.

40. The CCAA sets out notice provisions, which I do not consider to be onerous. Further, the costs associated with a newspaper notice are, in my view, inconsequential when one considers the assets and liabilities of MEI.

41. However, in an effort to eliminate any possible confusion surrounding the publication of individuals whose claims are expected to be unaffected in these proceedings, I have authorized minor adjustments to the notice provisions which are reflected in the signed order.

Extending the Stay of Proceedings to the Non-Filing Parties

42. Courts have the authority under the broad jurisdiction granted under Sections 11 and 11.02 of the CCAA and the Court's inherent jurisdiction to grant a stay of proceedings in favour of third parties that are not themselves applicants in a CCAA proceeding. (See: CCAA, Sections 11 and 11.02(1); *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at para. 21 [*Tamerlane*]; *Laurentian University of Sudbury, Re*, 2021 ONSC 659 at para. 39 [*Laurentian*]; and *Lehndorff, supra* at paras. 5, 16, 21; BOA, Tab 3).

43. The Court has considered the following non-exhaustive list of factors in determining 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. (See: *JTI-Macdonald, supra* at para. 15; *Laurentian, supra* at para. 40; *Cinram, supra* at para. 37 and Sch. C at paras. 63-64; *Lehndorff, supra* at para. 21).

44. MEI submits that it is appropriate to extend the Stay of Proceedings to the Non-Filing Parties given:

(a) Mr. McEwan has granted certain personal guarantees, indemnities and/or security in respect of certain of MEI's obligations, and the McEwan Subsidiary holds MEI's interests in the ONE Restaurant Partnership, an important part of the overall Business of MEI;

(b) if any enforcement proceedings were commenced against any of the Non-Filing Parties, it would cause significant disruption to MEI, would have a detrimental effect on MEI's restructuring efforts, and there could be a significant erosion of value to the Business to the detriment of all stakeholders; and

(c) the obligations which Mr. McEwan has guaranteed, indemnified and/or secured are not anticipated to be impacted by the CCAA proceedings and would be assumed as part of the proposed Transaction, thus MEI believes there would be no prejudice in granting the requested extension of the Stay of Proceedings.

45. I accept that the extension of the Stay of Proceedings in favour of the Non-Filing Parties is appropriate in these circumstances while MEI works to implements a restructuring of the Business, including the proposed Transaction, for the benefit of its many stakeholders.

46. MEI is also seeking approval of the Administration Charge in respect of certain administrative costs of these proceedings and the Directors' Charge in respect of the

indemnification of its directors and officers (the "Charges"). Pursuant to the proposed Initial Order, the Charges would rank in priority to all Encumbrances in favour of any person, except for any secured creditor of MEI. At the Comeback Hearing, MEI intends to seek an Order granting priority of the Charges ahead of all Encumbrances of those secured creditors given notice of the Comeback Hearing, other than the Encumbrances granted by MEI in favour of RBC.

47. The proposed Initial Order provides that the priority of the Charges, as among them, shall be as follows: (a) First – the Administration Charge; and (b) Second – the Directors' Charge.

48. MEI is seeking the granting of the Administration Charge over the Property to secure the fees and disbursements of the Monitor and its counsel, and MEI's counsel, in each case incurred at their standard rates and charges in the amount of $225,000, at this time.

49. Section 11.52 of the CCAA provides the Court with the jurisdiction to grant an administration charge.

50. MEI submits that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Administration Charge given that:

(a) the proposed restructuring of MEI will require the involvement of professional advisors;

(b) the proposed beneficiaries of the Administration Charge have each contributed and will continue to contribute to MEI's restructuring efforts;

(c) there is no unwarranted duplication of roles; and

(d) the amount of the requested Administration Charge reflects the estimated costs of these proceedings to be incurred in the period up to the Comeback Hearing and has been reviewed with the proposed Monitor.

51. MEI is seeking the Directors' Charge over the Property to secure the indemnification of the Directors and Officers pursuant to the Initial Order for any liabilities they may incur during the CCAA proceedings in their capacities as directors and officers in the amount of $600,000, at this time.

52. Section 11.51 of the CCAA provides the Court with the authority to grant a charge relating to directors' and officers' indemnification on a priority basis.

53. MEI submits that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge given that:

(a) it is possible for the Directors and Officers to be held personally liable for certain of MEI's obligations during the course of these CCAA proceedings;

(b) MEI's D&O Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage for the Directors and Officers under such D&O Policy;

(c) the proposed Directors' Charge would apply 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 liabilities that the Directors and Officers may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;

(e) the Directors and Officers have been actively involved in MEI's efforts to address the current circumstances of MEI, including the review and consideration of MEI's financial circumstances, efforts to manage and address MEI's challenging liquidity position, overseeing MEI's negotiations with landlords, the pursuit of restructuring alternatives, and the preparation for and commencement of these CCAA proceedings;

(f) to carry on business during the CCAA proceedings and to complete a successful restructuring for the benefit of MEI and its stakeholders, MEI requires the active and committed involvement of the Directors and Officers; and

(g) the amount of the Directors' Charge has been calculated based on the estimated exposure of the Directors and Officers in the period up to the Comeback Hearing and has been reviewed with the proposed Monitor.

54. MEI believes that that the proposed amounts of each of the Charges are appropriate for the period from and after the granting of the Initial Order (if approved) until the date of the Comeback Hearing. MEI expects to request at the Comeback Hearing that the Administration Charge be increased to $350,000 and that the Directors' Charge be increased to $1.45 million.

55. I accept these submissions and accordingly I am satisfied that the Administration Charge and the Directors' Charge should be included in the Initial Order.

DISPOSITION

56. I am satisfied, for the foregoing reasons, that MEI meets all of the qualifications established for relief under the CCAA. An Order has been signed to reflect the foregoing. The comeback hearing has been scheduled for Thursday, October 7, 2021 at 9:00 a.m.

Chief Justice G.B. Morawetz

Date: October 1, 2021

TAB 4

CITATION: BBB Canada Ltd., 2023 ONSC 1014
COURT FILE NO.: CV-23-00694493-00CL
DATE: 2023-02-13

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 **BBB BED BATH & BEYOND CANADA LTD.**

Applicant

BEFORE: Chief Justice G.B. Morawetz.

COUNSEL: *Marc Wasserman, Shawn Irving, Dave Rosenblat and Emily Paplawski*, for the Applicant

Kevin Zych, Michael Shakra and Joshua Foster, for the Monitor, Alvarez & Marsal Canada Inc.

Evan Cobb, for JPMorgan Chase (ABL Lenders)

Wael Rostom and Jeffrey Levine, for Sixth Street Specialty Lending, Inc. (FILO Agent)

HEARD and DETERMINED: February 10, 2023

REASONS: February 13, 2023

ENDORSEMENT

[1] At the conclusion of the hearing on February 10, 2023, the Initial Order was granted with reasons to follow. These are the reasons.

Introduction

[2] BBB Canada Limited (the "Applicant") brings this application for an Initial Order and related relief under the *Companies' Creditors Arrangement Act* ("CCAA").

[3] While Bed Bath & Beyond Canada LP ("BBB LP" and together with the Applicant, "BBB Canada") is not an applicant, the Applicant seeks to have the stay of proceedings and other benefits of the Initial Order under the CCAA extended to BBB LP.

[4] The Applicant also seeks a temporary stay of any proceeding against its parent company Bed Bath & Beyond Inc., ("BBBI") and together with its various U.S. subsidiaries and BBB Canada, (the "Bed Bath & Beyond Group") arising out of any indemnity, guarantee or surety relating to a lease of real property by BBB LP or the Applicant.

[5] The evidentiary basis for the requested relief is set out in the Affidavit of Holly Etlin, Interim Chief Financial Officer of the Bed Bath & Beyond Group.

[6] The Bed Bath & Beyond Group has been in financial difficulty for a number of years, suffering significant net losses since 2018 and over this period, BBB Canada has had a decline in revenues.

[7] Ms. Etlin states that in an effort to improve the Bed Bath & Beyond Group's financial performance, former management embarked on a series of initiatives designed to transform the business. Unfortunately, the financial situation deteriorated. The Bed Bath & Beyond Group's situation significantly worsened throughout 2022, with declining sales in both the United States and Canada, multiple credit rating downgrades, cash flow constraints, and significant inventory reductions.

[8] Ms. Etlin also states that the financial situation continued to decline in January 2023. The ABL Agent (as defined below) declared events of default and delivered notices of acceleration under both the ABL Facility and BBBI's then US $375 million FILO Facility (of which BBB LP is also a borrower and the Applicant is a guarantor), thereby causing the principal amount of such facilities, together with interest and other fees and obligations, to become immediately due and payable. The ABL Agent also declared cash dominion, which restricted the entire Bed Bath & Beyond Group, including BBB Canada, from spending any cash on hand.

[9] Very recently, BBBI announced a proposed underwritten public offering of shares (the "Offering"), which, if all conditions are met, will provide BBBI with additional time to continue its restructuring efforts for Bed Bath & Beyond Group's business in the United States outside of a bankruptcy filing.

[10] Ms. Etlin states, however, that efforts to identify a going concern solution for Canada have not been successful. The Bed Bath & Beyond Group has concluded that there is not enough capital available to restructure both its business in the United States and properly restructure the Canadian business to achieve profitability.

[11] Ms. Eltin states that BBB Canada is not profitable on a standalone basis and after consideration of all strategic alternatives, the Bed Bath & Beyond Group has determined that it is no longer in a position to provide financial and operational support to BBB Canada. BBB Canada is insolvent and will be unable to satisfy its obligations. BBB Canada has commenced these proceedings in order to effect an orderly liquidation of its remaining inventory with assistance from a third-party professional liquidator and intends to vacate its leased retail stores and premises.

Business Strucgture

[12] The Applicant is a federal corporation incorporated pursuant to the *Canada Business Corporations Act* and has a registered office in Toronto, Ontario. The Applicant is a wholly owned subsidiary of BBBI, a corporation incorporated in the State of New York with a head office in Union, New Jersey. BBBI is the ultimate parent corporation of the entire Bed Bath & Beyond Group.

[13] BBB LP is a limited partnership formed under the laws of Ontario with its principal place of business in Richmond Hill, Ontario. The Applicant is the general partner and 99% unitholder of BBB LP and while BBB LP is not an applicant in this proceeding, the Applicant seeks to have the stay of proceedings and other provisions of the Initial Order extended to BBB LP. BBB LP is the operating entity in Canada which conducts substantially all of Bed Bath & Beyond's retail operations and is party to all commercial real property leases in Canada.

Business of the Bath Bed & Beyond Group

[14] The Bed Bath & Beyond Group is a retailer that sells a wide assortment of merchandise in the home, baby, beauty and wellness markets. Within Canada, BBB Canada operates 54 Bed Bath & Beyond stores and 11 buybuy Baby stores. As of January 31, 2023, BBB LP employed approximately 387 full-time employees and 1038 part-time employees in connection with its retail operations across Canada.

[15] Ms. Etlin further states that each BBB Canada retail store is located in premises leased by BBB LP. The vast majority of retail leases to which BBB LP is party are indemnified by BBBI.

[16] BBB Canada relies on BBB on for certain administrative and business support services (the "Shared Services") that are integral to BBB Canada's operations. In addition, all procurement of merchandise for BBB Canada is completed by Liberty Procurement Co. Inc., a wholly owned subsidiary of BBBI. Ms. Etlin states that BBB Canada cannot operate or function without the provision of the Shared Services from BBBI.

Financial Position of the Applicant

[17] As at November 26, 2022, the Bed Bath & Beyond banner in Canada had total assets of approximately $427.4 million, and total liabilities of approximately $342.8 million. The buybuy Baby banner in Canada has total assets of approximately $52.7 million in total liabilities of approximately $86.9 million.

[18] With respect to the secured debt position, Ms. Etlin states that BBBI, certain of its US and Canadian subsidiaries (including BBB LP), JPMorgan Chase Bank, N.A., as administrative agent and collateral agent (in such capacity, the "ABL Agent"), Sixth Street Specialty Lending, Inc. as the "first in, last out" agent ("Sixth Street"), and certain lenders, are parties to an Amended Credit Agreement.

[19] The Amended Credit Agreement provides for aggregate revolving commitments of US $565 million (the "ABL Facility") and a "first in, last out" term loan facility of US $475 million (the "FILO Facility" and together with the ABL Facility, the "Credit Facilities"). Prior to the Second Amendment to the Amended Credit Agreement, (the "Second Amendment"), the aggregate revolving commitments under the ABL Facility were US $1.13 billion and the FILO Facility was US $375 million.

[20] In Canada, the Credit Facilities are secured against all present and after-acquired personal property of BBB LP and the Applicant.

[21] On or around January 13, 2023, certain events of default were triggered under the Amended Credit Agreements (collectively, the "Events of Default") as a result of BBBI's failure to prepay an over-advance and satisfy a financial covenant, among other things. On January 23, 2023, the ABL Agent informed the Bed Bath & Beyond Group that, as a result of the ongoing events of default, a cash dominion (the "Cash Dominion Period") had occurred and the ABL Agent had delivered the applicable dominion notices. Ms. Etlin states that such significant restrictions on the Bed Bath & Beyond Groups cash use severely hampered its ability to continue operating in both Canada and the United States. On January 25, 2023, the ABL Agent sent a notice of acceleration and default interest (the "Acceleration Notice") to the Bed Bath & Beyond Group (including BBB Canada) as a result of the ongoing Events of Default.

[22] The Bed Bath & Beyond Group undertook a further in-depth review of all strategic alternatives. On February 6, 2023, BBBI announced that an equity offering was proceeding in the United States but no acceptable bids were received for any executable transaction involving the Canadian business.

Need for CCAA Relief

[23] Ms. Etlin advises that BBB Canada is in urgent need of protection under the CCAA. BBB Canada is not profitable on a standalone basis. In 2021, both the Applicant and BBB LP reported net losses. For the nine-month period ending November 26, 2022, both the Bed Bath & Beyond and the buybuy Baby banners in Canada reported significant net losses and negative EBITDA. Ms. Etlin further states that BBB Canada does not have the capacity or ability to independently effect a recapitalization or restructuring of the Canadian operations without the support of BBBI. BBB Canada is insolvent from a balance sheet and cash flow perspective.

Discussion

[24] Having reviewed the record and hearing submissions, I am satisfied that the Applicant is insolvent and there are claims against the Applicant in excess of $5 million. The Applicant is a "debtor company" as defined in the CCAA. In arriving at the conclusion that the Applicant is insolvent, I have taken into account that BBB Canada is not profitable on a standalone basis. For the nine-month period ending November 26, 2022, the Bed Bath & Beyond banner in Canada reported a net loss of $87.6 million and EBITDA was negative $81.8 million. For the same period, the buybuy Baby banner in Canada reported a net loss of $11.9 million and its EBITDA was negative $10.4 million. In addition, I am satisfied that the Applicant does not have the capacity to

effect a recapitalization or restructuring of its operations without the support of BBBI and finally, the Bed Bath & Beyond Group has determined that it is no longer in a position to provide financial and operational support to BBB Canada.

[25] I am also satisfied that this court has jurisdiction over these proceedings. The chief place of business for the Applicant is Ontario. The Applicant's registered office is in Toronto, Ontario and BBB LP is formed pursuant to the laws of Ontario. The corporate office is located in Mississauga, Ontario and a substantial number of retail stores are located in Ontario.

[26] The Applicant wishes to conduct a controlled and orderly winddown of operations in Canada for the benefit of all stakeholders. The CCAA can be used for the purpose of winding down a business. Examples include *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 31; *Express Fashion Apparel Canada Inc.* and *Express Canada GC GP, Inc. (Re)*, (May 4, 2017) Ontario SCJ (Commercial List), Court File No. CV–17–11785–00CL (Initial Order) at para. 10 and *Forever XXI ULC (Re)*, September 29, 2019, Ontario SCJ, (Commercial List), Court File No. CV–19–00628233–00CL (Endorsement).

[27] With respect to the request for a stay of proceedings and related relief during the Initial Stay Period, section 11.02(1) of the CCAA permits the court to grant an initial stay of up to 10 days, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. At an initial hearing the relief must be limited to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period.

[28] The CCAA expressly applies to debtor companies, but not partnerships. However, where the operations of partnerships are integral and closely related to the operations of the Applicant, the CCAA Court has jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. Such relief has been granted in *Target, supra* above at paras. 42 – 43 and in *4519922 Canada Inc. (Re)*, 2015 ONSC 124, para. 37.

[29] In this case, the Applicant seeks to have the stay of proceedings and other provisions of the Initial Order extended to BBB LP, as it is related to the Applicant, carries on operations that are integral to the business of the Applicant, is party to all Canadian retail leases, and is a guarantor under the Credit Facilities.

[30] I am satisfied that it is appropriate to grant the Stay of Proceedings and to extend such stay to cover BBB LP.

[31] The Applicant also requests a stay of certain derivative claims against BBBI. Most of the retail leases to which BBB LP is a party are subject to an indemnity provided by BBBI in favour of the landlord. Although BBBI is not an applicant, the Proposed Initial Order includes the temporary stay of any proceeding against or in respect of BBBI arising out of or in connection with any indemnity, guarantee or surety relating to a lease of real property by BBB LP or the Applicant. The proposed Initial Order also provides that any landlord claim pursuant to a guarantee in relation to either BBB LP or the Applicant shall be unaffected and shall not be released or

affected in any way in any Plan filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* ("BIA").

[32] The Applicant submits that the CCAA Court has jurisdiction under section 11 to grant a third party stay and references *Target, supra* at para. 50, *McEwan Enterprises Inc.*, 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury* 2021 ONSC 659 at paras. 30 – 33 and *Lydian International Limited*, 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen's Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

[33] This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

[34] There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicant and the various Landlords, I am prepared to grant this requested stay of proceedings in respect of BBBI for the initial 10 day period prior to the comeback hearing. To be clear, this stay of proceedings will expire on February 21, 2023, unless further extended at the comeback hearing.

[35] I am also satisfied that it is appropriate to permit the Applicant to make prefiling payments, with the consent of the Monitor, to critical suppliers up to a maximum aggregate amount of $500,000, on terms set out in the Initial Order.

[36] In addition, the Applicant proposes that the Monitor, its counsel, counsel to BBB Canada be granted a Court-ordered charge as security for their respective fees and disbursements relating to services rendered in respect of BBB Canada (the "Administration Charge"). With the concurrence of the proposed Monitor, the Applicant proposes that the Administration Charge for the first 10 days be limited to $0.55 million and will be seeking to increase the Charge at the comeback hearing. The court has jurisdiction to grant such relief pursuant to section 11.52 of the CCAA and in the circumstances, I am satisfied that it is appropriate to grant the requested relief.

[37] I am also satisfied that it is appropriate to grant a Charge in favour of the Directors and Officers of BBB Canada (the "D&O Charge"), in the requested amount of $7.5 million for the first 10-day period.

[38] In summary, an Initial Order is granted with Alvarez & Marsal Canada Inc. being appointed as Monitor. The comeback hearing has been scheduled for Tuesday, February 21, 2023, at 9:00 a.m.

Chief Justice G.B. Morawetz

Date: February 13, 2023

TAB 5

CITATION: Nordstrom Canada Retail, Inc., 2023 ONSC 1422
COURT FILE NO.: CV-23-00695619-00CL
DATE: 2023-03-03

SUPERIOR COURT OF JUSTICE – ONTARIO2023-03-01

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 NORDSTROM CANADA RETAIL INC., NORDSTROM CANADA HOLDINGS INC., LLC AND NORDSTROM CANADA HOLDINGS II, LLC

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Jeremy Dacks, Tracy Sandler, Martino Calvaruso and Marleigh Dick*, for the Applicants

Susan Ursel, Karen Ensslen, for the Proposed Employee Representative Counsel

Brendan O'Neill and Brad Wiffen, for the Proposed Monitor

George Benchetrit, for the Directors and Officers of the Nordstrom Canada Entities

Aubrey Kauffman, for Nordstrom, Inc. (U.S.)

HEARD and DETERMINED: March 2, 2023

REASONS: March 3, 2023

ENDORSEMENT

Background

[1] At the conclusion of the hearing on March 2, 2023, I granted the requested relief, with reasons to follows. These are the reasons.

[2] Nordstrom Canada Retail, Inc. ("Nordstrom Canada"), together with the other applicants listed above (collectively, the "Applicants"), seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Applicants seek a stay of proceedings (the "Stay") for the initial ten-day period (the "Initial Stay Period") under section 11.02(2) of the CCAA, together with related relief necessary to preserve the Applicants' business and stakeholder value during the Initial Stay Period. The Applicants also seek to extend the stay of proceedings to Nordstrom Canada Leasing LP ("Canada Leasing LP") and, for limited purposes, to Nordstrom,

Inc. ("Nordstrom US"). The Applicants and Canada Leasing LP are referred to collectively below as the "Nordstrom Canada Entities."

[3] Nordstrom Canada is a retailer which acts as the Canadian operating subsidiary of Nordstrom US. Nordstrom Canada entered the Canadian marketplace in September 2014 and currently operates 13 retail stores in Ontario, Alberta and British Columbia. Nordstrom Canada has experienced losses each year. Nordstrom Canada has only been able to sustain operations due to the financial support of Nordstrom US, which has provided Nordstrom Canada with approximately USD$775 million in net funding through various means since inception. Nordstrom US also provides various other ongoing strategic support, and administrative services.

[4] Given Nordstrom Canada's financial performance and after considering available options, Nordstrom US has determined that it is in the best interest of its stakeholders to discontinue further financial and operational support for Nordstrom Canada in order to focus on its core business in the US. Nordstrom US has terminated its support and IP licensing arrangements with the Nordstrom Canadian Entities and replaced them with a Wind-Down Agreement (described further below).

[5] The Applicants contend that without support from Nordstrom US, the Nordstrom Canada Entities are insolvent and require the flexibility of the CCAA in order to effect an orderly, responsible and controlled wind-down of operations.

[6] The Applicants further contend that the requested relief is urgent, as the Nordstrom Canada Entities cannot operate without Nordstrom US's support, and continued support during the wind-down process is conditional on obtaining protection under the CCAA.

[7] The requested relief includes the approval of the Employee Trust, the appointment of Employee Representative Counsel, Court-ordered Administration and D&O charges in an amount required for the Initial Stay Period, as well as a Co-tenancy Stay of proceedings (the "Co-tenancy Stay") and a stay in favour of Nordstrom US.

[8] At the Comeback Hearing, the Applicants anticipate seeking certain additional relief, including the approval of an Employee Retention Plan. Additionally, the Applicants, in consultation with Alvarez & Marsal Canada Inc. (the "Proposed Monitor"), also plan to solicit bids from a number of professional third-party liquidators and to seek court approval in the near term to engage the successful liquidator bidder and to conduct an orderly realization process.

[9] The facts have been set out in an affidavit of Misti Heckel, President of Nordstrom Canada Retail, Inc., and President and Treasurer of Nordstrom Canada Holdings, LLC and Nordstrom Canada Holdings II LLC. In addition, the Proposed Monitor has filed a pre-filing report.

[10] The Proposed Monitor supports the position of the Applicants.

The Nordstrom Canada Entities

[11] Nordstrom Canada is incorporated pursuant to the laws of British Columbia. It is a wholly-owned subsidiary of Nordstrom International Limited ("NIL"). NIL is a wholly-owned subsidiary of Nordstrom US, a publicly traded company on the New York Stock Exchange. Nordstrom Canada serves as the Canadian retail sales operating entity.

[12] As of January 28, 2023, Nordstrom Canada employed approximately 1925 full-time and 575 part-time employees. Of these, 2,047 are full-line store and 310 are Rack store employees.

[13] Nordstrom Canada Holdings, LLC ("NCH") is a US single member limited liability company wholly-owned by NIL. NCH, as general partner, owns 99.9% of Canada Leasing LP, the Canadian leasing entity. Nordstrom Canada Holdings II, LLC ("NCHII") is a US holding company that owns 0.1% of Canada Leasing LP, as its limited partner.

[14] Canada Leasing LP is an Alberta limited partnership responsible for the Canadian real estate activities, such as leasing retail space from the Landlords, and subleasing the retail space to Nordstrom Canada.

Business of the Applicants

[15] Nordstrom Canada currently operates six Nordstrom-branded full-line stores and seven off-price Nordstrom Rack stores in Ontario, Alberta and British Columbia. These retail operations are conducted in facilities which are leased to Canada Leasing LP, as lessee, by third-party landlords (the "Landlords") pursuant to leases (the "Leases") and sublet by Canada Leasing LP to Nordstrom Canada pursuant to subleases (the "Subleases").

[16] Ms. Heckel contends that Nordstrom Canada Entities' business is dependent on Nordstrom US for administrative and business support services, including legal, finance, accounting, bill processing, payroll, human resources, merchandising, strategy, and information technology project support (the "Shared Services"). Nordstrom US formerly provided these Shared Services under an inter-affiliate licence and services agreement, effective as of February 3, 2019, between Nordstrom US and Nordstrom Canada (the "Licence and Services Agreement").

[17] On March 1, 2023, Nordstrom US notified Nordstrom Canada that it would be terminating the Licence and Services Agreement in accordance with its terms, as well as the other agreements referenced above to which it is a party. Subsequently, the Nordstrom Canada Entities agreed to have the termination become effective immediately. Nordstrom US and the Nordstrom Canada Entities have entered into a new administrative services agreement effective March 1, 2023 (the "Wind-Down Agreement") for Nordstrom US to continue providing Shared Services, as well as a license to use the essential IP, for the sole purpose of an orderly wind down under the CCAA.

Financial Position of the Nordstrom Canada Entities

[18] As of January 28, 2023, the Nordstrom Canada Entities had combined total assets with a book value of approximately $500,784,000 and total liabilities of approximately $561,024,000.

[19] Since 2014, Nordstrom Canada has experienced yearly losses across the majority of its 13 Canadian locations. For the year ended January 28, 2023, Nordstrom Canada generated revenue of $515,046,000. As a result of its high occupancy and other operating costs, its EBITDA for the year ending January 28, 2023, was negative $34,563,000, prior to taking into account intercompany payments.

[20] Most of the Nordstrom Canada Entities' losses have been absorbed by Nordstrom US through intercompany payments. However, Nordstrom US has resolved to discontinue this support, without which Nordstrom Canada cannot continue operating.

[21] The Nordstrom Canada Entities do not owe any secured indebtedness. Prior to the commencement of this proceeding, by virtue of amendments agreed upon by parties to a revolving Credit Agreement among Nordstrom US (as Borrower), Wells Fargo Bank, National Association, and certain other lenders, Nordstrom Canada was released from its guarantee obligations in relation to this indebtedness. The corresponding security interest granted by Nordstrom Canada was also released. Nordstrom Canada does not have any commitments under and has not granted any security in relation to the remaining debt agreements of Nordstrom US.

[22] Ms. Heckel states that since 2014, Nordstrom US has provided the Nordstrom Canada Entities with approximately USD $950 million. Taking into account the distributions of USD $175.6 million made by Nordstrom Canada to Nordstrom US, Nordstrom US has provided net funding to Nordstrom Canada of USD $775 million.

[23] Nordstrom US, with the support of its advisors, has decided in its business judgment that it is in the best interests of Nordstrom US to discontinue its support of the Canadian operations. The Applicants contend that due to its operational and financial dependence on Nordstrom US, Nordstrom Canada cannot continue operations without the full support of Nordstrom US, including a licence to use Nordstrom US's IP.

[24] The Nordstrom Canada Entities believe that these CCAA proceedings are the only practical means of ensuring a fair and orderly wind-down. Additionally, Nordstrom US has indicated that it is only willing to continue providing the Shared Services and to permit use of the IP if the wind-down is supervised by this Court under the CCAA.

Requested Relief

[25] Having reviewed the record and hearing submissions, I am satisfied that the Applicants are all affiliated debtor companies with total claims against them in excess of $5 million. I am also satisfied that Nordstrom Canada and the other Applicants are each a "company" for the purposes of s. 2 of the CCAA because they do business in or have assets in Canada.

[26] I accept that without the ongoing support of Nordstrom US, the realizable value of the Nordstrom Canada Entities' assets will be insufficient to satisfy all of their obligations to their creditors. I am satisfied that the Applicants in these proceedings are either currently insolvent under the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.

B-3 ("BIA") or the expanded concept of insolvency adopted by this Court in *Stelco Inc., Re*, 2004 CanLII 24933 (Ont. Sup. Ct.).

[27] I am also satisfied that this Court has jurisdiction over the proceedings. The chief place of business of the Nordstrom Canada Entities is Ontario: 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 .

[28] There are a number of examples of CCAA proceedings that have been commenced for the purpose of winding down a business. Recent examples include *Target Canada Co. (Re)*, 2015 ONSC 303, *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014, and *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1230.

[29] Section 11.02(1) of the CCAA permits the Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. Under section 11.001, other relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period." In my view, the relief requested in this first-day application meets these criteria.

[30] Where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. (See: *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 42 and 43; *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37; *Just Energy Corp. (Re)*, 2021 ONSC 1793 at para. 116; *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014, at para. 28).

[31] The Applicants submit that it is appropriate to extend the Stay to Canada Leasing LP. As the lessor of Nordstrom Canada's retail premises, its business and operations are fully intertwined with those of the Nordstrom Canadian Entities, and any proceedings commenced against Canada Leasing LP would necessarily involve key personnel of the Applicants, who collectively hold a 100% interest in Canada Leasing LP. As counterparty to the store Leases, Canada Leasing LP is also insolvent and needs the breathing space provided by the stay to prevent the exercise of Landlord remedies during the pendency of the proposed liquidation sale.

[32] I accept this submission. In my view, the proposed extension of the Stay is appropriate in the circumstances.

[33] Many retail leases provide that other tenants within the same shopping centre have certain rights against the Landlords upon an anchor tenant's (such as Nordstrom Canada's) insolvency or cessation of operations. In order to alleviate potential prejudice, the Applicants request that the Court extend the Stay to all rights of third-party tenants against the Landlords, owners, operators or managers of the commercial properties where the Nordstrom Canada's stores, offices or

warehouses are located that arise as a result of the Applicants' insolvency, or as a result of any steps taken by the Applicants pursuant to the proposed Initial Order.

[34] The Court's authority to grant the Co-tenancy Stay flows from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that may impose." The Applicants submit that a Co-tenancy Stay is justified on the basis that, if tenants were permitted to exercise these "co-tenancy" rights during the Initial Stay Period (and beyond), the claims of the landlords against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company and that such claims would result in a multiplicity of proceedings which would be detrimental to an efficient and orderly wind-down.

[35] I have been persuaded that the Co-tenancy Stay should be granted in the circumstances.

[36] The Applicants also request that the Stay be extended (subject to certain exceptions related to the Cash Management System) to Nordstrom US in relation to claims that are derivative of the primary liability of or related to the Nordstrom Canada Entities (the "Parent Stay"). The Applicants submit that, among others, the Parent Stay would affect contractual counterparties with contracts or purchase orders involving Nordstrom Canada merchandise and concession operations entered into or issued by Nordstrom US on behalf of, or jointly with, Nordstrom Canada. The Parent Stay would also affect claims that arise out of or in connection with any indemnity, guarantee or surety relating the Leases. The proposed Initial Order further provides that any Landlord claim pursuant to an indemnity or guarantee in relation to either Canada Leasing LP or the Applicants shall not be released or affected in any way in any Plan filed by the Applicants under the CCAA, or any proposal under the BIA.

[37] The Parent Stay is being requested as a temporary measure designed to preserve the *status quo* and create breathing space during the Initial Stay Period, in particular to engage in good faith discussions with the Landlords. It is intended to prevent a multitude of proceedings being commenced in several different jurisdictions against Nordstrom US during this initial period with possibly inconsistent outcomes.

[38] The Court recently granted similar relief during the initial stay period in *Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014. I note that it is the Applicants' intention to request a continuation of the Parent Stay for a reasonable period beyond the Initial Stay Period at the Comeback Hearing.

[39] I note that the Applicants submit that section 11.04 of the CCAA does not prohibit this relief. Firstly, the Indemnities are not "guarantees." Secondly, even if the Indemnities could be characterized as "guarantees", the opening words of section. 11.04 do not oust the Court's jurisdiction under section 11 to grant a third party stay in favour of a guarantor in appropriate circumstances.

[40] The Applicant submits that the Court has jurisdiction under section 11 to grant a third party stay and references *Target Canada* at para. 50, *McEwan Enterprises Inc.,* 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury* 2021 ONSC 659 at paras. 30–33 and *Lydian*

International Limited, 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the Court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen's Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

[41] This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

[42] There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicants and the various landlords, I am prepared to grant the Parent Stay for the initial 10-day period prior to the comeback hearing.

[43] Ms. Heckel states that it is expected that the vast majority of Nordstrom Canada's employees will be provided with working notice of termination on, or shortly after, the commencement of these CCAA proceedings.

[44] Nordstrom Canada is seeking this Court's approval of the Employee Trust, which is to be funded by Nordstrom US. The Employee Trust is intended to provide Nordstrom Canada employees with a measure of financial security during the wind-down process.

[45] The Applicants submit that the Court in *Target Canada* exercised its CCAA jurisdiction to sanction the establishment of an employee trust established by the debtor company's parent for similar purposes.

[46] The Applicants submit that the Employee Trust is intended to ensure that these employees receive the full amount of termination and severance pay owing to them pursuant to employment standards legislation in a timely manner. Nordstrom US has a right of subrogation against Nordstrom Canada in respect of amounts paid pursuant to the Employee Trust.

[47] I am satisfied that the creation of an Employee Trust is fair and appropriate in the circumstances. The Employee Trust is approved.

[48] The Applicants seek the appointment of Ursel Phillips Fellows Hopkinson LLP as Employee Representative Counsel, to represent Nordstrom Canada's store-level employees and all non-KERP eligible non-store employees. Among other things, Employee Representative Counsel will assist with questions regarding Eligible Employee Claims and other issues with respect to the Employee Trust.

[49] I am satisfied that the appointment of Employee Representative Counsel is appropriate in these circumstances. Employees who do not wish to be represented by Ursel Phillips will have the right to opt out.

[50] The Applicants also seek authorization, with the consent of the Monitor, to make payments of pre-filing amounts owing to certain suppliers, including: (i) logistics or supply chain providers; (ii) providers of information, internet, telecommunications and other technology; and (iii) providers of payment, credit, debit and gift card processing related services. The Applicants believe that categories of suppliers are fundamental to continuing operations and the proposed liquidation sale and any disruptions of their services could jeopardize the orderly wind down, given the expedited timelines for the proposed Realization Process.

[51] For third-party suppliers or service providers other than those listed above, the Initial Order proposes permitting payments in respect of pre-filing amounts up to a maximum aggregate amount of $1,000,000 with the consent of the Monitor, if, in the opinion of the Nordstrom Canada Entities, the supplier is critical to the orderly wind down of Nordstrom Canada's business.

[52] The Applicants submit that the Court has exercised its jurisdiction on multiple occasions to grant similar relief (See: *Target Canada* at paras. 62-65; *Just Energy*, at para. 99; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753, at paras. 72-74; *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802, at paras. 20-22). The Court in *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 at para. 31 outlined the factors that courts have considered in determining whether to grant such authorization, including (a) whether the goods and services are 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 will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments.

[53] In my view, a consideration of these factors leads to the conclusion that this requested relief should be granted.

[54] Pursuant to section 11.52 of the CCAA, the Applicants are requesting an Administration Charge in favour of the Proposed Monitor, along with its counsel, counsel to the Nordstrom Canada Entities, counsel to the directors and officers of the Nordstrom Canada Entities, and Employee Representative Counsel, as security for their respective fees and disbursements up to a maximum of $750,000 (the "Administration Charge"), which amount covers the time period until the comeback hearing. The Applicants anticipate requesting an increase to $1.5 million at the Comeback Hearing. The Administration Charge was sized in consultation with the Proposed Monitor and is proposed to have first priority over all other charges and security interests.

[55] In my view, the requested Charge satisfies the well-accepted factors originally established by Pepall J. (as she then was) in *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 222, at para. 39. Among other factors, the requested amount is fair and reasonable, and appropriate to the size and complexity of the businesses being restructured. In addition, the initial amount requested is tailored only to the needs within the Initial Stay Period. This relief is granted.

[56] In accordance with section 11.51 of the CCAA, the Applicants also seek a directors and officers charge (the "Directors' Charge") in the amount of $10.75 million until the Comeback Hearing. The Applicants anticipate requesting an increase to $13.25 million at the Comeback

Hearing. The Applicants submit that the quantum of the Director's Charge was arrived at in consultation with the Proposed Monitor and is proposed to be secured by the property of the Nordstrom Canada Entities and to rank behind the Administration Charge. The Directors' Charge would act as security for the Nordstrom Canada Entities' indemnification obligations for director and officer liabilities that may be incurred after the commencement of the CCAA proceeding. This charge would only be relied upon to the extent liabilities are not covered by existing insurance.

[57] In light of the potential liabilities, the continued service and involvement of the director and officers in this proceeding is conditional upon the granting of an Order which includes the Directors' Charge. I am satisfied that the Directors' Charge is necessary in the circumstances.

Disposition

[58] In summary, the Applicants' request for the relief set out in the proposed Order is granted and Alvarez & Marsal Canada Inc. is appointed as Monitor. The Comeback Hearing is scheduled for March 10, 2023.

Chief Justice G.B. Morawetz

Date: March 3, 2023

TAB 6

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-24-00713254-00CL **DATE:** **23 January 2024**

NO. ON LIST: **5 (12:00pm)**

TITLE OF PROCEEDING: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BALBOA INC., DSPLN INC., HAPPY GILMORE INC., INTERLUDE INC., MULTIVILLE INC., THE PINK FLAMINGO INC., HOMETOWN HOUSING INC., THE MULLIGAN INC., HORSES IN THE BACK INC., NEAT NESTS INC., AND JOINT CAPTAIN REAL ESTATE INC.**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT OF JUSTICE KIMMEL:

The Applicants' Business, Indebtedness and Liquidity Crisis

1. Balboa Inc., DSPLN Inc., Happy Gilmore Inc., Interlude Inc., Multiville Inc., The Pink Flamingo Inc., Hometown Housing Inc., The Mulligan Inc., Horses In The Back Inc., Neat Nests Inc., and Joint Captain Real Estate Inc. (collectively, the "Applicants"), all Canadian privately held companies, seek relief pursuant to an order (the "Initial Order") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").
2. The Applicants are all subsidiaries of (i) One Happy Island Inc. ("Happy Island"), (ii) Keely Korp Inc. ("Keely Korp"), (iii) 2657677 Ontario Inc. ("265 Inc."), or (iv) Sail Away Real Estate Inc. ("Sail Away", and collectively, the "Non-Applicant Parent Cos."), or some combination thereof. These companies are each, in turn, directly or indirectly controlled and managed by one or more of three individuals, Aruba Butt, Dylan Suitor, and Ryan Molony who are variously the indirect shareholders, directors and officers (the "Affiliated Individuals" also later referred to as the "Additional Stay Parties").
3. The Applicants currently only have one employee who is employed full-time by The Mulligan Inc. The Mulligan Inc. has approximately $55,000 in unpaid source deductions.
4. The Applicants specialize in the acquisition, renovation and leasing of distressed residential real estate in what they considered to be undervalued markets throughout Ontario (the "Business"). The Applicants currently own 405 residential properties (collectively, the "Properties" and each, a "Property"), containing 631 rental units, including 424 currently-tenanted rental units, and a single non-operating golf course.
5. The purchase, renovation and related costs of the Properties were financed through (i) first and second mortgage loans, and (ii) unsecured promissory notes. This debt is predominantly held by hundreds of individual real estate investors (the "Lenders"). The Applicants also have an estimated 1,000 tenants in their Properties. The applicants and their affiliates (collectively, the "Companies") are one of the largest holders of residential real estate in Ontario.
6. As of December 31, 2023, there is approximately $81,455,930 in principal outstanding under 390 First Mortgage Loans. As of December 31, 2023, there is approximately $8,642,697 in principal outstanding under the Second Mortgage Loans. The majority of these First and Second Mortgage Loans are in default. Substantially all of the First and Second Mortgage Loans were executed by the Affiliated Individuals, purportedly in their capacity as guarantor[1].
7. The Applicants have collectively issued approximately 802 unsecured promissory notes (as amended from time to time, the "Promissory Notes"). Approximately 602 of the Promissory Notes were issued to

[1] The Applicants have indicated that there may be challenges to the validity and scope of guarantees provided by the Affiliated Individuals in respect of the First and Second Mortgage Loans and the Promissory Notes.

The Lion's Share Group Inc., an affiliate of the Hamilton-based mortgage brokerage, The Windrose Group Inc. ("Windrose"), which was the broker that sourced and placed the First Mortgage Loans. The remaining Promissory Notes were issued to First Mortgage Lenders directly. The majority of these Promissory Notes are currently in default. They were also signed by the Individual Affiliates purportedly as guarantors. As of December 31, 2023, the Applicants currently owe the principal amount of $54,236,109.51 pursuant to the Promissory Notes.

8. Commencing in 2022, the Applicants undertook various refinancing and sale initiatives, with some modest success. However, they were unable to find a comprehensive solution to their mounting debt and lower than anticipated revenues and they have suffered substantial losses in the past eighteen months. They have been trying since August 2023, with the assistance of a professional financial advisor, Howards Capital Corp. ("HCC"), to obtain a comprehensive refinancing solution for their funded indebtedness.
9. They now face a severe liquidity crisis and are generally unable to meet their obligations as they become due under their funded debt (some of which is secured and some of which is not) and they also have significant tax and other unsecured obligations to trade creditors, affiliates, and utilities. The ability of the Applicants to earn revenue or profits from their Business has been negatively impacted by their lack of capital to fund renovations.
10. As of December 31, 2023, the funded indebtedness of the Applicants totaled approximately $144,350,000. The estimated total book value of their collective assets, based on available financial statements for years ended 2021 and 2022 (as the case may be) was approximately $127,858,943.
11. Between them, the Applicants currently have less than $100,000 cash on hand.
12. In recent months, the Applicants have received over 50 demand letters, notices of default, notices of intention to enforce security and notices of sale under mortgage, among other demands and notices, and are named in approximately 32 statements of claim that have been filed in the Ontario Superior Court of Justice. In 27 of these instances, an Affiliated Individuals is also named as a defendant. These actions remain unresolved and the Applicants and the Affiliated Individuals have not responded to or taken any material steps in connection therewith.
13. In light of their current liquidity crisis, limited cash on hand, and numerous defaults and related enforcement proceedings, the Applicants have concluded that they can no longer continue to operate the Business absent the relief sought under the Initial Order. The Proposed Monitor, KSV Restructuring Inc. ("KSV"), believes that the relief sought is reasonable and necessary in the circumstances and supports the Applicants' requested Initial Order.

<u>The CCAA Application</u>

14. The Applicants believe these CCAA proceedings present the only viable means to preserve and maximize the value of the Business for the benefit of the Applicants' stakeholders. The relief sought in the Initial Order will allow the Applicants the breathing space needed to pursue a comprehensive refinancing or restructuring and implement a consensual plan of arrangement, if one can be achieved.
15. The issues raised by the relief sought are whether:
    a. The Applicants meet the criteria for CCAA protection, including the Initial Stay, and have proposed a qualified Monitor;
    b. The proceedings should be stayed against the Affiliated Individuals (a.k.a., the Additional Stay Parties);
    c. The Lender Representative Counsel should be appointed; and
    d. The Administration Charge (as defined below) should be granted.

Analysis

a) The CCAA Applies and the Initial Stay and Proposed Monitor are Appropriate

16. Section 9(1) of the CCAA provides that an application under the CCAA may be made to the court that has jurisdiction in the province where the debtor company has its "head office or chief place of business." The CCAA applies to a "debtor company" or "affiliated debtor companies" that is, among other things, "insolvent", which has been interpreted to include companies that are reasonably expected to run out of liquidity in the time it may take to implement a restructuring. See *Re Just Energy Corp.*, 2021 ONSC 1793, at para. 49.
17. These criterion have been satisfied.
18. The Applicants were all incorporated pursuant to the OBCA, and their business and assets are exclusively in Ontario. As such, each of the Applicants are a "company" within the ambit of the CCAA. Given that each of the Applicants' registered offices is located in Ontario, and the Business is carried out exclusively in Ontario, Ontario is the appropriate venue for these proceedings and this Court has jurisdiction to hear this application.
19. Pursuant to subsection 3(2) of the CCAA, "companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person". The Applicants operate as an integrated Company, and various of the Applicants are "affiliated companies" through their shared ownership by the Non-Applicant Parent Cos. Their indebtedness far exceeds $5 million.
20. In order for the CCAA to apply, the debtor company must also be insolvent under the definition of "insolvent person" set out in the *Bankruptcy and Insolvency Act*, R.S.C. c. B-3, as amended (the "BIA").
21. Courts have also recognized the expanded definition of insolvency provided in *Re Stelco*, 2004 CanLII 24933 at paras 25-26, which provides that a company is also insolvent for purposes of the CCAA if there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured. Applied here, the Applicants are individually and as a whole insolvent. The Applicants are facing a significant liquidity crisis and cannot satisfy their liabilities as they come due.
22. Section 11.02(1) of the CCAA permits this court to grant an initial stay of up to 10 days on an application for an initial order, provided the applicant establishes that such a stay is appropriate and that the applicant has acted with due diligence and in good faith (s. 11.02(3)(a-b)). The primary purpose of the CCAA stay is to maintain the *status quo* for a period while the debtor company consults with its stakeholders with a view to continuing its operations for the benefit of its creditors.
23. A stay of proceedings will be appropriate where it maintains the status quo and provides applicants with breathing room while they seek to restore solvency and emerge from the CCAA on a going-concern basis. See *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60, at para. 14.
24. The Stay of Proceedings will preserve the status quo and afford the Applicants the breathing space and stability required to advance their restructuring efforts, including their intention to negotiate and seek approval of a debtor-in-possession facility, to seek approval to appoint HCC as financial advisor, and to develop a plan of compromise or arrangement and/or explore other restructuring transaction alternatives. Additionally, it will permit the Applicants to continue to operate the Business as a going concern with minimal disruption. The continued and uninterrupted operation of the Business and the avoidance of uncoordinated and distressed sales or forced liquidations of the Properties will preserve value for the Applicants' stakeholders and is in the best interests of all stakeholders, including the Lenders and the Applicants' tenants.
25. In the circumstances of this case, that the Stay of Proceedings is in the Applicants' best interests and the best interests of their stakeholders, consistent with the purposes of the CCAA, and appropriate in the circumstances.

26. KVS is a "trustee" within the meaning of subsection 2(1) of the BIA, it is established and qualified and has consented to act as monitor. KVS's involvement as the court-appointed monitor will lend stability and assurance to the Company's stakeholders. KVS is not subject to any of the restrictions set out in s. 11.7(2) of the *CCAA*.
27. In December, 2023, KSV Advisory Inc. (an affiliate of KSV) was engaged by the Applicants and has been working with the Applicants' management team, financial advisor and legal counsel since that time to assist them to prepare for this filing. During its engagement, KSV has obtained an understanding of the Applicants' Business. This knowledge will assist KSV to fulfil its duties as Monitor.

b) Extending the Stay to the Additional Stay Parties

28. The Additional Stay Parties purportedly provided guarantees in respect of substantially all of the First Mortgage Loans, Second Mortgage Loans, and Promissory Notes. The Applicants' defaults have already resulted in at least 27 claims being filed against the Additional Stay Parties. If the Non-Applicant Stay is not granted, it is conceivable that hundreds of claims could be filed against the Additional Stay Parties in connection with the Applicants' Business. The Applicants are concerned that this will occur within the initial 10 day period before the come-back hearing.
29. Section 11.04 of the CCAA provides that a stay pursuant to section 11.02 will not affect claims against third party guarantors of an applicant company, and section 11.03(2) provides that a stay pursuant to section 11.02 does not affect 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. So it is clear that, absent some specific order, the CCAA stay in favour of the Applicants under s. 11.02 would not protect the Additional Stay Parties who have provided guarantees.
30. Such a stay was denied in favour of a non-applicant director, ostensibly at least in part on jurisdictional grounds, in *Cannapiece Group Inc. v. Marzili, 2022 ONSC 6379*, but such stays have been granted in favour of non-applicants, including director guarantors, in other cases. See for example *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422, at paras 40-42; *BBB Canada Ltd.*, 2023 ONSC 1014 at paras 32-34 and *McEwan Enterprises Inc.*, 2021 ONSC 6453 at para 45, the latter being the most analogous case involving a stay in favour of a non-applicant director/guarantor.
31. In *Cannapiece*, the court was concerned about the breadth of the wording of the proposed non-applicant stay in favour of the director but was also able to make a procedural order that accomplished the same result in the one already existing proceeding against that director guarantor against whom there was an already crystalized claim.
32. I agree with the applicant that this case is more akin to the circumstances in *BBB* and *Nordstrom* and particularly *McEwan* where the third party stays were granted in complex situations in which non-parties could be facing significant distractions from their important restructuring work if they were having to respond to and fend off guarantee claims against them personally that overlap with the claims against the Applicants themselves. The Additional Party Stay here is limited to claims that relate to the Applicants or obligations of the Applicants. It only applies to Related Claims, being claims with respect to any guarantee, contribution or indemnity obligation, liability or claim in respect of or that relates to any agreement involving any of the Applicants or the obligations, liabilities and claims of and against any of the Applicants.
33. While "the issue [of non-party stay orders] is not free from doubt", as Chief Justice Morawetz noted in both the *BBB* and *Nordstrom* decisions, he ultimately granted a stay in favour of certain non-applicant guarantors on an initial CCAA application, notwithstanding the language of section 11.04.
34. It is not in the best interests of the Applicants' stakeholders or the administration of justice for the Additional Stay Parties to be forced to respond to uncoordinated actions in respect of their purported guarantees of the very indebtedness that the Applicants are attempting to restructure under the CCAA. The Non-Applicant Stay is consistent with the "single-proceeding model" that favours the resolution of

claims within a CCAA process and avoids the "inefficiencies and chaos" that could otherwise result from uncoordinated attempts at recovery. See *Century Services*, at para 59.

35. This is an order that is within the discretion of the court to make when it is considered just and convenient to do so, and I find it to be so in this case. This jurisdiction is derived from s. 11 of the CCAA and further embodied in section 106 of the *Court of Justice Act*, R.S.O. 1990, c. C.43
36. The plaintiffs and potential plaintiffs should only be minimally prejudiced by this temporary stay, which does not settle their actions or provide any release of claims against the Additional Stay Parties. If, however, there are objections to this continuing after the Initial Stay Period, those can be addressed at the come-back hearing.

c) The Appointment of Lender Representative Counsel

37. There are over 300 individual Lenders to the Applicants under approximately 390 First Mortgage Loans, 121 Second Mortgage Loans and 802 Promissory Notes. The Lenders are predominantly individual real estate investors. The Applicants seek the appointment of Chaitons LLP as Lender Representative Counsel. If appointed, Lender Representative Counsel may identify up to six Lenders to be nominated as Court-appointed representatives (the "Lender Representatives") to advise and, where appropriate, instruct Lender Representative Counsel. Lenders who do not opt-out of Lender Representative Counsel's representation pursuant to the Initial Order would be bound by the actions of the Lender Representative Counsel and the Lender Representatives, if any.
38. These Lenders are vulnerable stakeholders and creditors of the Applicants because there are so many of them and their individual claims may not each be material in the context of this CCAA, but are no doubt important to them given that they are mostly individuals (or private holding companies). The cost to them individually to retain counsel and obtain legal advice about these CCAA proceedings could be cost-prohibitive and the Applicants, the Monitor and the court will all be greatly assisted by the streamlining of positions that will be accomplished through the involvement of representative counsel.
39. Chaitons LLP, the proposed Lender Representative Counsel, is very experienced in this area and I have every confidence in their qualifications. These are among the relevant factors that I have considered in reaching the conclusion that the court should exercise its broad discretion under Section 11 of the CCAA and the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to appoint representative counsel for the Lenders in this case. See for example, *Canwest Publishing Inc.*, 2010 ONSC 1328 at para 21.
40. The only hesitation that I had was about whether the appointment of Lender Representative Counsel is needed and warranted at this Initial Order stage and whether it was fair to appoint the Representative Counsel that had been proposed by the Applicants without affording the Lenders to choose their own counsel. However, having heard and further considered the submissions of counsel for the Applicants, the proposed Lender Representative Counsel and the proposed Monitor, I am satisfied that an appointment is appropriate at this early stage, specifically to assist in the transmission of information and preliminary advice to the Lenders in advance of the come-back hearing which the proposed Lenders Representative Counsel will take on the responsibility for doing, including at a virtual town hall meeting (without the Applicants) that they plan to hold early next week.
41. The proposed Monitor is of the view that appointing representative counsel for the Lenders at the outset of these proceedings will also enable the Monitor to immediately put in place an efficient and effective communication plan, provide a single means through which the inquiries and concerns of hundreds of Lenders can be addressed and facilitate the efficient administration of these proceedings. In the proposed Monitor's view, it is important that representative counsel for the Lenders be appointed at the outset of these proceedings rather than at the Comeback Motion due to the volume of inquiries expected to be received in the coming days should the Court grant the Initial Order.
42. Counsel have helpfully referred me to some other cases in which representative counsel were appointed at the time of the Initial Order in CCAA restructurings, for example: *Law Society of Ontario v Derek*

Sorrenti and Sorrenti Law Professional Corporation, Nordstrom Canada Retail, Inc., 2023 ONSC 1422 and Target Canada Co. (Re), 2015 ONSC 303.

43. I take further comfort in the fact that any Lenders that do not wish to be represented may opt-out in accordance with the Initial Order. They also have full come-back rights in respect of this appointment so it is not set in stone.
44. I am satisfied that this relief is necessary and appropriate in the circumstances.
45. Counsel have advised that the specific paragraphs of the Initial Order dealing with this are taken from precedents in other cases in which representative counsel have been granted, tailored to the circumstances of this case.

d) The Administration Charge

46. The Applicants are seeking a Court-ordered charge over the Applicants' Property in the amount of $750,000 to secure the professional fees and disbursements of the Proposed Monitor, along with counsel to the Proposed Monitor and the Applicants, and the Lender Representative Counsel at their standard rates and charges, incurred prior and subsequent to the granting of the Initial Order (the "Administration Charge").
47. Section 11.52 of the CCAA vests this Court with jurisdiction to grant an administration charge on notice to the secured creditors likely to be affected thereby in favour of, among others, a Court-appointed monitor, its legal advisors and any legal experts engaged by the debtor company. This Court has recognized that it is essential to the success of any CCAA restructuring "to order a super-priority in respect of charges securing professional fees and disbursements". See *US Steel Canada Inc (Re)*, 2014 ONSC 6145, at paras. 20 and 22. See also *Laurentian University of Sudbury*, 2021 ONSC 659, at paras. 49-50 and *Re Lydian International Limited*, 2019 ONSC 7473, at para. 28.
48. The Administration Charge reflects an estimate of fees for professionals whose services will be essential to the Applicants' restructuring efforts. Some of the beneficiaries of the Administration Charge have already engaged in a significant amount of work in connection with this CCAA application, and are expected to continue to provide restructuring and insolvency advice, developing a restructuring plan, preparing the Cash Flow Statement, and negotiating the DIP Term Sheet. The professionals will continue to play a key role in advancing the CCAA proceedings. Certain beneficiaries of the Administration Charge have modest retainers and significant arrears and the Applicants have no other means of retaining the beneficiaries of the Administration Charge, and each beneficiary is performing distinct functions in these CCAA proceedings to assist the Applicants with continuing and operating the Business in the ordinary course.
49. At this time there is no DIP financing and the Applicants have no cash flow with which to pay these professionals, so they require the Administration Charge as security for future payment of their fees and disbursements that will continue to accrue over the next ten days during the Initial Stay Period.
50. The Proposed Monitor has reviewed the past and projected fees of these professionals over the Initial Stay Period and considers the Administration Charge of $750,000 to be reasonable and proportionate. It is approved.

Order

51. For the foregoing reasons, I have signed the form of Initial Order submitted to the court today. Aside from the specific points discussed above, the draft order is for the most part consistent with the form of Commercial List model order, with some changes that have becomes standard and accepted in these types of orders and some changes made to reflect the specific nature of the Business and the Applicants (for example, the Initial Order does require the co-operation of the loan originators to ensure that the Lenders all receive the CCAA materials and that the Lender Representative Counsel can communicate with them).
52. The comeback hearing has been scheduled before me on January 31, 2024 at 9:30 a.m.

KIMMEL J.

TAB 7

CITATION: Pride Holdings Group Inc., 2024 ONSC 1830
COURT FILE NO.: CV-24-00717340-00CL
DATE: 2024-03-28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-3, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **PRIDE GROUP HOLDINGS INC.** and those entities listed in **Schedule "A"** hereto

APPLICANTS

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Leanne Williams, Rachel Nicholson and Puya Fesharaki,*, for the Applicants

Pamela Huff, Chris Burr and Daniel Loberto, for the Proposed Monitor, Ernst & Young Inc.

Stuart Brotman and Daniel Richer, for the Syndicate Leaders

Marc Wasserman and Harvey Chaiton, for Mitsubishi

Raj Sahni, for the Directors and Officers

Lee Nicholson, for Move Trust

John Salmas, for the Bank of Montreal

HEARD and DETERMINED: March 27, 2024

REASONS: March 28, 2024

ENDORSEMENT

INTRODUCTION

[1] At the conclusion of this hearing, an order was granted with reasons to follow. These are the reasons.

[2] This application is brought by Pride Group Holdings Inc. and the other applicant companies (together, the "Applicants"), certain limited partnerships (the "LPs") and other related non-Applicant entities (the "Additional Stay Parties") set out in Schedule "A" hereto (collectively, the

"Pride Group") for an initial order (the "Initial Order") and related relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

[3] The Proposed Initial Order provides for, among other things:

(i) a stay of proceedings until April 6, 2024 in respect of the Pride Group, together with Sulakhan, Jasvir and Amrinder Johal (collectively, the "Personal Guarantors");

(ii) the appointment of Ernst & Young Inc. ("EYI") as the Court-appointed Monitor (in such capacity, the "Proposed Monitor");

(iii) the appointment of RC Benson Consulting Inc. ("RCB") as the Chief Restructuring Officer (the "CRO");

(iv) the approval of an Administration Charge and Directors' Charge (as each term is defined below);

(v) subject to the Governance Protocol (as defined below) which the Pride Group is required to comply with, the authority to (a) continue selling used or new trucks and trailers, and (b) remit proceeds of vehicle sales and lease collections from customers to the Pride Group's secured lenders in repayment of pre-filing indebtedness, each in the ordinary course of business;

(vi) the authority for Sulakhan Johal and the CRO to act as foreign representative in an application to recognize these proceedings under Chapter 15 of Title 11 of the United States Code (the "Bankruptcy Code"); and

(vii) an order sealing the unredacted copy of the CRO Engagement Letter, as defined and attached as a confidential appendix to the Proposed Monitor's Pre-Filing Report.

[4] The Pride Group is a privately held cross-border trucking and logistics conglomerate operating from more than fifty leased and owned facilities across Canada and the U.S. The Pride Group is responsible in some manner for the management of, or logistics in respect of, over 20,000 trucks across North America and has 558 employees, the majority of which are based in Ontario.

[5] The Applicants submit that the North American trucking and logistics industry is facing a prolonged downturn which can be traced to the COVID-19 pandemic and major geopolitical events.

[6] While the Pride Group has made significant efforts to manage its limited liquidity and sustain ordinary course operations, it has been forced to implement restructuring measures and to cease paying certain obligations to its lenders.

[7] Due to such non-payment, a majority of the Pride Group's lenders have begun to take enforcement measures and exercise self-help remedies. The Pride Group has been unable to negotiate an acceptable standstill arrangement with its principal lenders.

[8] The Applicants state that without the relief requested, the Pride Group will be forced to cease operations.

FACTS

[9] The facts are set out in the Affidavit of Sulakhan Johal sworn March 26, 2024 (the "Johal Affidavit").

[10] The Pride Group was founded by two brothers, Sulakhan and Jasvir Johal, as a used-truck dealer in 2010 operating from the back of a tractor-trailer in Mississauga, Ontario. The brothers remain involved with the Pride Group as directors and officers, shareholders and personal guarantors.

[11] Since its founding, the Pride Group has grown into a multi-national conglomerate with many different business lines, including:

(i) logistics and brokering services;

(ii) selling and leasing new and used trucks, principally to entrepreneurial owner-operators (the "Owner-Operators");

(iii) providing trucking parts, servicing and fuel sales services to the Owner-Operators and others; and

(iv) owning and operating more than forty real estate properties, which include dealerships, truck stops and other services and solutions.

[12] The Applicants consist of the operating companies, real estate holding companies and certain other holding companies that are either insolvent in their own right or have been rendered insolvent as a result of the Pride Group's inability to continue to provide financial support to them. Many of the Applicants are borrowers and/or guarantors under the Pride Group's various credit facilities with its lenders and are integral to its operations.

[13] The LPs and the Additional Stay Parties are entities that do not qualify as applicants under the CCAA by virtue of being limited partnerships or not being insolvent, but which are intertwined with the Applicants and the Pride Group's operations. The Applicants submit that the LPs and the Additional Stay Parties require some of the same protections, including the stay of proceedings, in order for the Pride Group to continue to operate as a going concern.

[14] The Pride Group has numerous credit facilities, including the following:

(a) *Operating Facilities* - these facilities provide working capital to the Pride Group;

(b) *Floorplan Facilities* – these facilities permit the acquisition of trucks that are subsequently made available for sale by the Pride Group;

(c) *Wholesale Leaseline and Lease Facilities* – these facilities permit the leasing of trucks to end customers and include the financing arms of major truck manufacturers among others;

(d) *Securitization Facilities* – several Pride Group entities are parties to securitization arrangements, whereby certain of the Pride Group entities sell "packages of leases" to securitization lenders, while continuing to service the transferred lease assets for the benefit of the Securitization Lenders who purchased the lease receivables; and

(e) *Real Estate and Mortgage Facilities* – several lenders provide real property mortgages to certain of the Applicants.

[15] Each of these types of financing are used regularly in the business of the Pride Group and are necessarily intertwined to permit it to operate its various lines of business.

[16] The Applicant's financial position has materially deteriorated as a result of the industry-wide downturn. The Pride Group has made significant efforts to improve its bottom-line, including winding-down unprofitable business lines, re-financing available equity, and selling excess assets.

[17] The Applicants state that higher delinquency rates, combined with additional strains on the Pride Group's human resources and its financing flow-through structure, may have contributed to certain trucks having been pledged more than once and more than one lender now claiming an interest in the same collateral, a significant concern for all stakeholders.

[18] The Pride Group has not been able to mitigate the post-pandemic industry downturn. As a result, the Pride Group stopped paying its lenders in the ordinary course which caused those parties to begin to exercise their rights and remedies against the Pride Group and the Personal Guarantors.

[19] The Pride Group engaged EYI as its financial advisor and RCB as its CRO to assist it in addressing its financial and operational challenges and the multiple-pledging of truck assets. Among other things, EYI and RCB have assisted the Pride Group in developing a more robust governance structure and creating controls (the "Governance Protocol") to ensure that the Pride Group's various creditors' security interests are protected.

[20] The Pride Group states that the protection of the CCAA is required in order to give it the breathing room it needs in order to:

(i) stabilize and continue its business operations;

(ii) preserve jobs and serve its customers;

(iii) collect outstanding receivables, maximize realizations on its inventory of trucks, excess real estate and other assets; and

(iv) develop a restructuring plan with the goal of maximizing the ongoing value of the business for the benefit of its creditors, employees, customers, suppliers and other stakeholders and the communities affected by the Pride Group's business activities.

ISSUES

[21] The principal issues on this Application are whether:

(a) the Applicants meet the criteria to obtain relief under the CCAA;

(b) the stay of proceedings should be granted to the Applicants and extended to the LPs, Additional Stay Parties and Personal Guarantors;

(c) the Applicants should be authorized to make certain pre-filing and post-filing payments;

(d) the appointment of the Monitor, the CRO and the Foreign Representatives should be approved;

(e) the Administration Charge and Directors' Charge should be granted; and

(f) the sealing order should be granted.

[22] The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars.

[23] I am satisfied that the Applicants are insolvent. They are facing a significant liquidity crisis and cannot satisfy their liabilities as they come due. Each of the Applicants is an "insolvent person" and a "debtor company" to which the CCAA applies.

[24] Subsection 9(1) of the CCAA provides that an application for a stay of proceedings 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.

[25] While certain of the Applicants include U.S. affiliates of the Pride Group, the Applicants' chief place of business is Ontario, and its head offices are in Mississauga, Ontario. All of the U.S. members of the Pride Group report to the Canadian head office and the Canadian entities, and the Canadian employees provide operational and administrative functions for the Pride Group as a whole.

[26] If the proposed Initial Order and related relief is granted, the Pride Group has advised that it intends to commence recognition proceedings under Chapter 15 of the U.S. Bankruptcy Code in Delaware (the "Chapter 15 Proceedings").

[27] Section 11.02(1) of the CCAA permits this Court to grant an initial stay of up to 10 days on an application for an initial order.

[28] The Applicants submit that they require the stay of proceedings and the other relief set out in the Initial Order to preserve the *status quo* and provide them with the breathing room necessary to advance their restructuring efforts. I am satisfied that this relief should be granted.

[29] The Applicants request that the benefit of the stay be extended to the LPs, Additional Stay Parties and Personal Guarantors.

[30] This Court has found it just and reasonable to extend the protection of the stay of proceedings to non-applicant limited partnerships and non-applicant affiliates where such parties are integrally and closely interrelated to the debtor companies' business in order to ensure that the purposes of the CCAA can be achieved. (See: *Re Canwest Publishing Inc.*, 2010 ONSC 222 at paras. 33-34 [*Canwest Publishing*]; (*Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 42-43 [*Target Canada*]; *Re Just Energy Corp.*, 2021 ONSC 1783 ("*Just Energy*")at para. 116; *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014 at para. 28 [*BBB Canada*]; *4519922 Canada., Re*, 2015 ONSC 124 at para 37).

[31] The Applicants submit that it is just and reasonable in the circumstances to extend the stay of proceedings to the LPs and Additional Stay Parties. The business and operations of the Applicants, the LPs and the Additional Stay Parties are heavily intertwined, and the stay of proceedings needs to be extended to the LPs and the Additional Stay Parties to maintain the overall stability of the Pride Group and preserve value for its stakeholders. I am satisfied that this relief is appropriate.

[32] The Applicants further submit that it is just and reasonable for this Court to exercise its discretion to extend the stay of proceedings in respect of the Personal Guarantors, who granted personal guarantees in respect of the indebtedness of the Pride Group to certain of its lenders, and against whom certain lenders have threatened personal proceedings.

[33] Section 11.04 of the CCAA provides that a stay pursuant to section 11.02 of the CCAA will not affect claims against third party guarantors of an applicant company, and section 11.03(2) provides that a stay pursuant to section 11.02 does not affect 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.

[34] Notwithstanding sections 11.04 and 11.03(2) of the CCAA, this Court has found that it has broad inherent jurisdiction under section 11 to grant stays in favour of third-party guarantors, including director guarantors, to ensure that the intent and purpose of the CCAA proceedings are not frustrated. (See: *Balboa Inc. et al. (Re)*, (January 23, 2024), Toronto, CV-24-00713254-00CL at para. 32; *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422, at paras. 40-42).

[35] This Court has granted stays in favour of non-applicant director guarantors where their involvement in defending potential claims would unduly strain the Applicants' resources and be a significant distraction from the restructuring efforts to the detriment of all stakeholders.

[36] In the circumstances of this case, I am satisfied that this relief is appropriate to include in the Initial Order.

[37] The Applicants seek the Court's authorization to make payments of certain (i) pre-filing amounts owing to independent contractors and subcontractors (including those providing office support as well as truck drivers) that provide services to the Pride Group incurred in the ordinary course of business and consistent with existing payment arrangements; and (ii) pre-filing amounts owing to fuel suppliers that are integral to the Pride Group's ability to operate during the restructuring period.

[38] The Applicants submit that case law demonstrates that a supplier is considered critical when the uninterrupted supply of goods and/or services is sufficiently integral to the debtor's business that it would be prejudicial to the debtor's restructuring efforts for supply to be interrupted. (See: *Target* at paras. 62-65)

[39] The Applicants also submit that, given the nature of the Pride Group's business, the fuel suppliers and independent contractors' continued services are critical to the Pride Group's ability to operate its business in the ordinary course during the CCAA proceedings. The Pride Group's independent contractors should be afforded the same rights to payment for their services as its employees.

[40] I am satisfied that it is appropriate to provide this relief.

[41] The Applicants seek authorization to remit the proceeds from the sale of vehicles and the receipts of lease receivables from its customers in the ordinary course of business to the applicable lenders in reduction of such lenders' pre-filing indebtedness, in accordance with the Governance Protocol. I am satisfied that this relief is appropriate.

[42] I am satisfied that EYI is qualified to act as Monitor.

[43] I am also satisfied that the approval of the Governance Protocol is appropriate in the circumstances, and in the best interests of all stakeholders. The Proposed Monitor helped design the Governance Protocol and is agreeable to performing the proposed duties thereunder.

[44] Prior to the filing of this application, the Pride Group, at the request of certain of its lenders, engaged RCB to provide the services of Randall Benson to act as CRO. The Applicants seek an order approving the engagement of the CRO pursuant to the terms set out in the CRO Engagement Letter they entered into with RCB. The Applicants state that they require the CRO's expertise in order to successfully develop and implement a successful restructuring.

[45] The CRO has consented to act in these proceedings, and the Proposed Monitor has reviewed the CRO Engagement Letter and supports the appointment of the CRO. I am satisfied that it is appropriate to approve of the engagement of the CRO.

[46] As noted above, the Applicants intend to seek recognition of these proceedings in the U.S. Section 56 of the CCAA grants the Court unfettered authority to appoint "any person or body" to act as a representative for the purpose of having CCAA proceedings recognized in any jurisdiction outside of Canada, including the U.S.

[47] The Pride Group submits that it is appropriate for this Court to exercise its jurisdiction to authorize Mr. Johal and the CRO to act as the foreign representatives of the Pride Group. In my

view, the appointment of two individuals as foreign representatives could give rise to an undesirable ambiguity and should be avoided. It seems to me that, given the role of the CRO, the CRO should be the foreign representative.

[48] The Applicants propose that the Proposed Monitor, its counsel, Canadian and U.S. counsel to the Applicants, the CRO and Canadian counsel to the Pride Group's board of directors be granted a Court-ordered charge on the Applicants and LP's Property as security for their respective fees and disbursements relating to services rendered in respect of the Pride Group (the "Administration Charge"). With the concurrence of the Proposed Monitor, the Applicants are proposing that the Administration Charge for the first ten days be limited to $2.0 million and will be seeking to increase the charge at the comeback hearing.

[49] I am satisfied that the Administration Charge is reasonable in the circumstances.

[50] The Application was brought on an *ex parte* basis and accordingly, the Administration Charge does not have any super priority.

[51] In light of the potential liabilities and insufficiency of available insurance, the directors and officers have indicated to the Applicants that their continued service to the Pride Group and involvement in this proceeding is conditional upon the granting of a charge in the amount of $4.1 million on the Applicants and LPs' Property (the "Directors' Charge").

[52] I am satisfied that a Directors' Charge should be created. However, due to the *ex parte* nature of this application, such charge does not have any super priority.

[53] The proposed Initial Order provides that the Confidential Appendix "A" to the Monitor's Pre-Filing Report, consisting of an unredacted copy of the CRO Engagement Letter, be sealed and not form part of the public record until further Order of the Court.

[54] Pursuant to section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Court has the jurisdiction and the discretion to order that any document filed in a civil proceeding be treated as "confidential, sealed and not form part of the public record".

[55] The Supreme Court of Canada set out the applicable test for a sealing order *in Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41, at para. 53, as subsequently refined in *Sherman Estate v. Donovan* 2021 SCC 25 at paras. 37-38, wherein the Supreme Court held that held that a person asking a court to exercise its discretion in a way that limits the open court presumption must establish that: (i) court openness poses a serious risk to an important public interest; (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[56] The unredacted CRO Engagement Letter includes a breakdown of the CRO's monthly fees and expenses and success fee, which the Applicants seek to keep confidential and not part of the public record. The Applicants submit that the CRO in this case is an individual, and individuals have the reasonable expectation that their personal and financial information will be kept confidential and not form part of the public record.

[57] In the CCAA proceedings of *MJardin Group, Inc. et al.* (June 2, 2022, Toronto, CV-22-00682101), I granted a sealing order in order to keep confidential the fees and expenses attributable to the individuals working for a chief restructuring company.

[58] The Applicants submit that there are no satisfactory alternatives to the sealing order in the circumstances. Further, no stakeholders will be materially prejudiced by sealing the unredacted CRO Engagement Letter, and the salutary effects of granting the sealing order outweigh any deleterious effects.

[59] In my view, the request for a sealing order is appropriate with one caveat. The monthly fees should not be redacted. The success fee details are to be sealed on the basis that it could impair realization efforts which affect all stakeholders.

DISPOSITION

[60] The CCAA protection is granted. The Order has been signed. Due to the *ex parte* nature of this application, a "true" comeback hearing will be scheduled.

Chief Justice G.B. Morawetz

Date: March 28, 2024

TAB 8

Staying Guarantees By Non-Debtors and Section 11.04 of the *CCAA*

*James D Gage and Trevor Courtis**

It seems that no one has ever known quite what to make of section 11.04 of the *Companies' Creditors Arrangement Act*[1] as it relates to guarantees. Section 11.04 provides:

> **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, who is obligated under a letter of credit or guarantee in relation to the company.[2]

On first reading, the provision appears to prohibit stays of proceedings from being extended to non-debtors that have issued letters of credit or guarantees with respect to a *CCAA* debtor company. However, if courts are unable to extend a *CCAA* stay to third-party guarantors in appropriate circumstances, this section would have the potential to complicate certain restructurings. For example, in large corporate groups with obligations that have been guaranteed and cross-collateralized across some or all of the entire enterprise, all of those entities would have to file for protection as *CCAA* debtors, even if some of the guarantors are not central to the restructuring effort. Some guarantors may not even be eligible to file for protection as *CCAA* debtors.

Despite the potential for a broad reading and application of section 11.04, stays of proceedings have been extended to related companies and others that have guaranteed the indebtedness of the debtor company on numerous occasions. It does not appear that section 11.04 is expressly addressed by the parties or considered by the court in most cases. In the rare cases when section 11.04 has

* James D Gage is a partner and Trevor Courtis is an associate at McCarthy Tétrault LLP (Toronto).

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

[2] *Ibid*, s 11.04.

> ii) Letters of Credit: provide that the court may not stay demands on letters of credit or upon guarantors.[41]

Amendments to both the *BIA* and *CCAA* were developed by the federal government based on the BIAC's recommendations and were introduced in Parliament as Bill C-22 on 4 March 1996.[42] The addition of the restriction on stays against letters of credit and guarantees does not appear to have been the subject of any material discussion during any of the parliamentary debates or the proceedings before the House of Commons and Senate committees that reviewed Bill C-22. The provision does not appear to have been amended during the legislative process. The amendments were enacted into law and came into force on 25 April 1997.[43]

2. The Restriction in Section 11.2 of the *CCAA*

The restriction on stays against issuers of letters of credit and guarantees was introduced into the *CCAA* as section 11.2. It read:

> **No stay, etc. in certain cases**
>
> **11.2** No order may be made under section 11 staying or restraining any action, suit or proceeding against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company.[44]

Section 11.2 specifically provided that the restriction applied to stays made under section 11 of the *CCAA*. Section 11 of the *CCAA* was also amended in the 1997

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[41] George F Redling, "Summary of Recommendations made by the Bankruptcy and Insolvency Advisory Committee: December 28, 1994" (Paper delivered at the Insolvency Institute of Canada's Sixth Annual General Meeting and Conference, White Point, Nova Scotia, 21–23 October 1995), at 10-5 [BIAC Recommendations].
[42] Jacob Ziegel, "New and Old Challenges in Approaching Phase Three Amendments to Canada's Commercial Insolvency Laws" (2002) 37 Can Bus LJ 75 at 79.
[43] *An Act to Amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, SC 1997, c 12, s 124 [*Amending Act*].
[44] *CCAA*, *supra* note 1, s 11.2 as it appeared between 25 April 1997 and 17 September 2009.

> This non-derogation provision has acquired more significance due to the recent amendments to the CCAA, since a number of actions or steps cannot be stayed, or the stay is subject to certain limits and restrictions. See, for example, CCAA Sections 11.01, 11.04, 11.06, 11.07, 11.08, 11.1(2) and 11.5(1).[88]

The model *CCAA* initial order in Alberta does not contain this non-derogation provision.[89]

It is unclear whether the result of the non-derogation provision in the Ontario and BC model orders is that the stays of proceedings remain subject to the section 11.04 restriction. One could perhaps argue that the initial orders granted in the Ontario cases listed above did not actually extend the stay to non-debtor guarantors because they remained subject to the section 11.04 restriction (if section 11.04 is to be interpreted broadly and is considered to be a "right conferred" or an "obligation imposed" by the *CCAA*).

The possibility that there may be a carve-out in initial orders for the restriction in section 11.04 provides another reason why a consistent interpretation of section 11.04 should be developed and recognized.

IV. INTERPRETING SECTION 11.04

1. Modern Approach to Statutory Interpretation

Statutory interpretation is not founded on the wording of the legislation alone.[90] The modern purposive approach to statutory interpretation contemplates that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act,

[88] Ontario Model Initial Order *supra* note 87 at 18, n 6; BC Model Initial Order *supra* note 87 at 18, n 18 [emphasis added].
[89] Court of King's Bench of Alberta, "Alberta Template CCAA Initial Order" (January 2019), online: <https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-(alberta)---jakr-markup.docx?sfvrsn=ed86ad80_4> at para 18.
[90] *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, 1998 CanLII 837 at para 21 (SCC).

and the intention of Parliament."[91] This purposive approach is "the crucial tool for construing skeletal legislation such as the *CCAA*."[92]

The ordinary meaning of a legislative text is the starting point for the interpretive exercise. The ordinary meaning is "the natural meaning which appears when the provision is simply read through".[93] However, even if the ordinary meaning is plain and appears unambiguous, all of the other contextual factors must be taken into account, including the purpose of the legislation, the "mischief" or problem that the legislation was intended to address, related provisions in the same legislation and others, legislative drafting conventions and other rules of construction. An alternative interpretation that modifies or departs from the ordinary meaning may be adopted if it is plausible and the contextual factors justify the departure from the ordinary meaning.[94]

2. Interpreting the *CCAA*: General Principles

The *CCAA* is remedial legislation, the purpose of which is to, where possible, facilitate the reorganization and survival of the debtor company as a going concern and avoid the social and economic costs of liquidating its assets.[95] The *CCAA* also has the subsidiary objectives of providing for the timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor company's assets; ensuring fair and equitable treatment of the claims against the debtor company; protecting the public interest; and enhancing the credit system generally.[96]

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[91] *Ibid*.
[92] *Re US Steel Canada Inc*, 2016 ONCA 662 at para 45.
[93] Ruth Sullivan, *The Construction of Statutes*, 7th ed (Markham: Lexis Nexis Canada, 2022) at § 3.02(1) [Sullivan], citing *Canadian Pacific Air Lines Ltd v Canadian Air Line Pilots Assn*, [1993] 3 SCR 724 at 735, 1993 CanLII 31 (SCC).
[94] *Ibid* at § 3.01(3).
[95] *Century Services, supra* note 10 at paras 15, 70. See also *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at paras 40–41 [*Callidus*].
[96] *Callidus, supra* note 95 at paras 40, 42; *Re Kerr Interior Systems Ltd*, 2011 ABQB 214 at para 23.

As remedial legislation, the provisions of the *CCAA* are given a broad and liberal interpretation to facilitate its objectives.[97] As the Ontario Court of Appeal stated in *Re Metcalfe & Mansfield Alternative Investments II Corp* in the course of endorsing the inclusion of third-party releases in *CCAA* plans where appropriate:

> The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy […]. As Farley J. noted in *Dylex Ltd. (Re)*, […] "[t]he history of CCAA law has been an evolution of judicial interpretation".[98]

This has two implications. First, the provisions of the *CCAA* that *provide* the court with the jurisdiction to facilitate the restructuring of the debtor company should be given a broad reading. The jurisdiction of the court to stay proceedings, which has been described as "the key element of the CCAA process"[99] and "the engine that drives this broad and flexible statutory scheme",[100] has accordingly been construed expansively.[101]

Second, the provisions of the *CCAA* that *restrict* the jurisdiction of the court and potentially hamper its ability to facilitate the *CCAA*'s remedial objectives should be narrowly construed.[102]

3. Considering a Narrow Interpretation of Section 11.04

One interpretation of section 11.04 of the *CCAA* is that it only provides that stays against *debtor companies* do not affect the ability of a creditor to call on a letter

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[97] *Stelco, supra* note 15 at para 32; *Interpretation Act*, RSC 1985, c I-21, s 12.
[98] *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at para 44 [citations omitted], citing *Re Dylex Ltd*, 31 CBR (3d) 106, 1995 CanLII 7370 at para 10 (Ont Sup Ct (Gen Div)).
[99] *Re Canadian Airlines Corp*, 19 CBR (4th) 1, 2000 CarswellAlta 622 at para 13 (QB).
[100] *Stelco, supra* note 15 at para 36.
[101] *Callidus, supra* note 95 at para 67.
[102] *Sproule v Nortel Networks Corporation*, 2009 ONCA 833 at para 17, aff'g 55 CBR (5th) 68, 2009 CarswellOnt 3583 at para 66 (Sup Ct [Comm List]).

> **(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
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> [...]
>
> **Restriction**
>
> **(4)** Orders doing anything referred to in subsection (1) or (2) may only be made under this section.[104]

The language in section 11.02 appears to be aimed at stays of steps and proceedings against the debtor company. Subsections (b) and (c) refer to stays against "the company", not "a company" or "any company", which indicates a reference back to the "debtor company" in the introductory sentence in sections 11.02(1) and 11.02(2).

Section 11.02(4) provides that the orders in sections 11.02(1) and 11.02(2) may only be made under section 11.02. It does not refer to orders made under the general jurisdiction provided in section 11. Sections 11.02(1) and 11.02(2) deal with stays against the debtor company. Thus, only stays against the debtor company are subject to the restriction that they must be made under section 11.02.

Accordingly, reading the language in sections 11.02 and 11.04 in its entirety supports an interpretation that section 11.04 only applies to stays of proceedings against the debtor company issued under section 11.02.

[104] *Ibid*, s 11.02 [emphasis added].

ii. Case law supports that third-party stays may be granted under section 11

The 2009 amendments also introduced the current section 11 of the *CCAA*, which codified the *CCAA* court's broad general jurisdiction to make any order that it considers appropriate in the circumstances.[105]

There has been some divergence in the case law since that time around the source of the *CCAA* court's jurisdiction to issue third-party stays. Some cases have held that third-party stays are grounded in section 11,[106] while other cases have indicated they can be grounded in both sections 11 and 11.02.[107] Some have continued to rely on inherent jurisdiction,[108] and some have even relied on all three potential sources of jurisdiction.[109]

In *9354-9186 Québec inc v Callidus Capital Corp*, the Supreme Court of Canada recently indicated that section 11 of the *CCAA* should be the provision of first resort in anchoring jurisdiction and should be relied upon unless there is another *CCAA* provision that confers more specific jurisdiction:

> Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction.[110]

This rule is supported by the fact that many of the restrictions on the *CCAA* court's jurisdiction refer solely to orders made under section 11.02.[111] By defaulting to an interpretation that orders are made under section 11 and not section 11.02 unless they are stays against the debtor company, the applicability of these restrictions will be narrowed, which will maximize the flexibility provided to the *CCAA* court to facilitate the achievement of the *CCAA*'s objectives.

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[105] *Ibid*, s 11.
[106] *Re Pacific Exploration & Production Corp*, 2016 ONSC 5429 at para 26; *Re JTI-Macdonald Corp*, 2019 ONSC 1625 at para 14.
[107] *Re Target Canada Co*, 2015 ONSC 303 at para 45 [*Target*]; *Laurentian, supra* note 85 at para 39; *Montréal (City) v Deloitte Restructuring Inc*, 2021 SCC 53 at para 65.
[108] *Tamerlane, supra* note 82 at para 21; *Re 4519922 Canada Inc*, 2015 ONSC 124 at para 37.
[109] *McEwan, supra* note 77 at para 42.
[110] *Callidus, supra* note 95 at para 68.
[111] See, eg, *CCAA*, *supra* note 1, ss 11.04, 11.08, 11.1.

iii. The language of the restriction seems designed to fix the Woodward's problem

Section 11.04 provides that no order made under section 11.02—that is, a stay order against the debtor company—"has affect on" a proceeding against an obligor under a letter of credit or guarantee in relation to the company. It is instructive to compare this wording with that contained in the restriction prior to 2009, when it was section 11.2.

The legislative evolution of statutory provisions may be relied on by courts to assist interpretation, as "prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it."[112] It is presumed that amendments to the wording of a legislative provision are made for a good reason.[113]

Section 11.2 provided that no order could be made "staying or restraining" a proceeding against an obligor under a letter of credit or guarantee in relation to the company.[114] This language was arguably inadequate to fix the procedural problem introduced by *Woodward's*, a fact that was noted by commentators at the time.[115] If a letter of credit or guarantee required a demand or notice to be sent to the debtor company, the stay of proceedings against the debtor company would only have stayed the delivery of that demand or notice. It would have the practical effect of preventing the creditor from calling on the letter of credit or guarantee, but the order itself would not provide that it was staying the letter of credit or guarantee.

The language "has affect on" in section 11.04 is broader and does appear better suited to fix this procedural problem. A stay against the debtor company may "have affect on" the creditor's ability to call on a letter of credit or guarantee if a prerequisite step against the debtor company is required. Section 11.04 provides

[112] Sullivan, *supra* note 93 at § 23.02(2).
[113] *Ibid* at § 23.02(3).
[114] *CCAA*, *supra* note 1, s 11.2 as it appeared between 25 April 1997 and 17 September 2009.
[115] Mendelsohn and Cohen, *supra* note 46 at 6.

that a debtor company's stay cannot affect the creditor's ability to call on the letter of creditor or guarantee. If section 11.04 is interpreted as being intended only to fix the procedural problem introduced by *Woodward's*, meaning is given to this amendment.

iv. Consistent with majority of case law

A narrow interpretation of section 11.04 is consistent with many orders made since 2009, which have extended non-debtor stays to guarantors, and with cases that have indicated that the existence of a guarantee has become a factor in favour of a non-debtor stay.

v. Potential inconsistency with legislative history

It is possible to argue that a narrow interpretation is inconsistent with certain elements of the legislative history. Legislative history, including reports of law reform commissions and other authoritative bodies submitted to Parliament, legislative and committee debates, explanatory notes and backgrounders may be relied upon in determining the intent of legislation.[116]

In 1997, at the time the restriction in section 11.2 of the *CCAA* was being adopted, third-party stays had been granted in favour of issuers of letters of credit and guarantors in a few cases; however, third-party stays and releases were not as prevalent as they would become in later years.[117] The recommendation of the BIAC that led to the adoption of the initial restriction was expressed as the need to "provide that the court may not stay *demands* on letters of credit or upon guarantors."[118] On the one hand, it refers to demands specifically, so it could potentially be interpreted as only being directed toward addressing the procedural problem introduced by *Woodward's*. On the other hand, it does not refer to demands against the debtor company that are a

[116] Sullivan, *supra* note 93 at § 23.03(1)(a).
[117] Luc Morin and Arad Mojtahedi, "Catch Me If You Can: Third Party Releases Under the Companies' Creditors Arrangement Act" in Jill Corraini & the Honourable D Blair Nixon, eds, *Annual Review of Insolvency Law*, 19th ed, 2021 CanLIIDocs 13544.
[118] BIAC Recommendations, *supra* note 41 at 10-5 [emphasis added].

section 11.02 being the sole source of jurisdiction is so that all of the restrictions found in other sections of the *CCAA* (such as section 11.04) will apply to those stays. In fact, the commentary suggests that the legislature was primarily concerned with ensuring that the restrictions *in* section 11.02—such as the restriction that initial stays can only be granted for a period of 30 (and now 10) days—continued to be applied to stays.[127]

Accordingly, it is not clear that the legislature turned its mind to third-party stays against issuers of letters of credit and guarantors and determined that they should only be issued pursuant to section 11.02 and be subject to the restriction in section 11.04.

vi. Impacts on reliability of letters of credit and guarantees

In *Keddy* and *Northern Transportation*, the courts raised a policy concern around courts retaining the ability to extend stays to issuers of letters of credit and guarantors.[128] The concern is that these instruments may be viewed as less valuable to lenders, landlords, suppliers and other counterparties and it may be more difficult and/or expensive for a company to obtain the financing, goods and other things that are necessary to run its business.

Despite the potential concern, courts have been extending stays to third-party guarantors on numerous occasions over the last decade. Whether the feared consequences have come to fruition is not apparent.

This argument is also undermined by the fact that, even if the court has the jurisdiction to extend stays to issuers of letters of credit and guarantors, the court is not required to do so. In this regard, letters of credit and guarantees may give rise to different public policy and other considerations depending on their terms in a particular case. A “one size fits all” approach may not be desirable for all letters of credit and guarantees. The court can decline to exercise its jurisdiction to

[127] 2007 Briefing Book, *supra* note 64, cl 128, s 11.02.
[128] *Keddy, supra* note 29 at para 13; *Northern Transportation, supra* note 66 at para 100.

extend the stay, or it can lift a stay that was previously granted, if it determines that the stay is not appropriate in the circumstances. Judges supervising *CCAA* proceedings are specialized, sophisticated jurists who are capable of balancing these interests while keeping an eye on the impact that extending the stay in particular circumstances would have on the business and credit environment more generally.

4. Considering a Broad Interpretation of Section 11.04

Another interpretation of section 11.04 of the *CCAA* is that it prohibits a *CCAA* court from extending stays to third parties that are issuers of letters of credit or guarantees in relation to the debtor company *in any circumstances*.

i. Remedial purpose of the CCAA

A broad interpretation of section 11.04 could impinge on the remedial purpose of the *CCAA*. The willingness of courts to extend stays to third-party guarantors in recent years indicates that courts have determined that it is appropriate to do so in many circumstances and will assist the debtor company in maintaining the status quo while attempting to restructure its business. A broad interpretation of section 11.04 would reduce the flexibility of the *CCAA* and lessen the *CCAA* court's ability to facilitate the restructuring of the debtor company's business.

A broad interpretation that frustrates the legislative purpose or undermines the legislative scheme should not be adopted where a more restrictive interpretation is available.[129]

ii. Narrow interpretations have been applied to other restrictions

As noted above, it is a general interpretive principle that restrictions on a *CCAA* court's jurisdiction should be narrowly construed. Accordingly, narrow interpretations have been given to other restrictions on the court's jurisdiction to

[129] Sullivan, *supra* note 93 at § 10.04(2).

grant stays of proceedings with respect to eligible financial contracts,[130] regulatory proceedings[131] and payment for goods and services provided to the debtor company post-filing.[132] It would be anomalous if a broad interpretation were given to section 11.04.

iii. A broad interpretation could extend the restriction beyond guarantees

If section 11.04 was interpreted very broadly, and read literally, it would prohibit a stay being extended to *any* action, suit or proceeding against a non-debtor guarantor—not just those actions, suits or proceedings related to the guarantee. There does not appear to be any reason why a court should not be able to grant a stay to a non-debtor guarantor for obligations that are unrelated to the guarantee in appropriate circumstances.

Where a broad interpretation of general words may lead to unintended negative consequences, the absurdity principle of statutory interpretation may be employed to reject that interpretation in favour of a narrower one.[133]

iv. A broad interpretation may force otherwise solvent entities to file for CCAA protection

It is not uncommon in large corporate groups for some types of obligations to be guaranteed and cross-collateralized across some or all of the enterprise. If section 11.04 were to be interpreted broadly to prohibit a third-party stay from being extended to a related company guarantor of the obligations of the debtor company, the guarantor may be forced to file for *CCAA* protection even if they otherwise do not need the full protection of being a *CCAA* debtor. Including the guarantor as a *CCAA* debtor may have undesired effects on the business, which

[130] *Re Blue Range Resource Corp*, 2000 ABCA 239 at para 39. See also *Re Calpine Canada Energy Ltd*, 2006 ABQB 153 at para 24 [*Calpine*].
[131] *Re Northstar Aerospace Inc*, 2012 ONSC 4423 at para 51.
[132] *Re Smith Brothers Contracting Ltd*, 53 BCLR (3d) 264, 1998 CanLII 3844 at para 41 (BCSC); *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2012 ABQB 59 at para 20 *Re Quest University Canada*, 2020 BCSC 921 at para 54.
[133] Sullivan, *supra* note 93 at § 10.03(2).

could be disadvantageous to creditors and other stakeholders as well. This could be lessened with the use of a more limited stay in favour of the guarantor.

v. A broad interpretation may result in stays being unavailable to partnerships and individuals

The case law has generally held that individuals and partnerships do not fall within the definition of a "debtor company" and therefore cannot file for protection under the *CCAA* and obtain a stay of proceedings in their own right.[134] *CCAA* stays that are extended to individuals and partnerships are generally third-party stays.[135]

Third-party stays have been extended to partnerships, including guarantors, on numerous occasions where their operations and obligations are so intertwined with those of the debtor companies that irreparable harm may result if the stay is not extended to them.[136] Under a broad interpretation of section 11.04, a third-party stay could not be extended to an individual or partnership that is a guarantor.

If key individuals or partnerships cannot obtain the benefit of a stay of proceedings, a corporate group's ability to successfully restructure may be undermined, which is inconsistent with the purpose of the *CCAA*.

vi. Inconsistent with increased use of stays for other types of joint or derivative obligations

In recent years, *CCAA* proceedings have increasingly been used as a forum to settle complex multi-party litigation involving the debtor company. The first notable use of the *CCAA* for this purpose occurred in 2006, in the proceedings of

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[134] CCAA, *supra* note 1, s 2(1) "company"; *Lehndorff, supra* note 13 at para 15.
[135] There is at least one decision that has held that, in the context of a limited partnership, it is unnecessary to extend the stay of proceedings to the partnership where the general partner is a debtor company: *Asset Engineering LP v Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para 20. However, the general practice has remained to seek a third-party stay with respect to partnerships.
[136] *Canwest, supra* note 79 at para 29; *Calpine, supra* note 130 at paras 33–34; *Re Boreal Capital Partners Ltd et al*, 2021 ONSC 7802 at paras 18–19.

Muscletech Research and Development Inc.[137] It has continued in the *CCAA* proceedings of Sino-Forest Corporation, Montreal, Maine & Atlantic Canada Co, 4519922 Canada Inc, CannTrust Holdings Inc and the ongoing *CCAA* proceedings of Imperial Tobacco Canada Limited, JTI-Macdonald Corp and Rothmans, Benson & Hedges, Inc, among others.

In each of these cases, *CCAA* courts extended stays of proceedings to third parties such as co-defendants in the litigation, including with respect to joint or derivative obligations of those third parties, to facilitate a global resolution of the litigation. For example, Imperial Tobacco Canada Limited, JTI-Macdonald Corp and Rothmans, Benson & Hedges, Inc, were unrelated companies that had been held jointly and severally liable to pay a significant class action judgment and were subject to various other litigation. In the *CCAA* initial order granted to each of these companies, the stay of proceedings was extended to the other companies with respect to their joint and several liability.[138]

As the *CCAA* has continued to evolve to meet the progressively more complex restructuring challenges facing businesses, courts have increasingly recognized the value of the flexibility that the *CCAA* provides to grant broad stays where appropriate, including stays of joint or derivative obligations of third parties. This evolution supports a narrow interpretation of the restriction in section 11.04, as it would be anomalous if a *CCAA* court could not grant a third-party stay with respect to one type of joint or derivative obligation—guarantees—but was free to grant stays for other joint and several obligations and had repeatedly recognized that as a valuable tool to achieve the *CCAA*'s objectives.

[137] Alain Riendeau and Brandon Farber, "Using the CCAA to Achieve a Global Resolution of Complex Litigation 'To Infinity and Beyond!' (Buzz Light Year, Toy Story)" in Janis P Sarra and Barbara Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Thomson Reuters, 2017).

[138] *Re JTI-Macdonald Corp*, 2019 ONSC 1625 at paras 12–13; *Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 1684 at paras 3–5; *Re Rothmans, Benson & Hedges Inc* (22 March 2019), Toronto CV-19-616779-00CL (Ont Sup Ct [Comm List]), Initial Order.

V. CONCLUSION

The intended scope of the restriction in section 11.04 of the *CCAA* has been unclear since it was adopted in 1997. As a result of the ambiguity in the language of section 11.04, there are at least three potential interpretations of its intended scope, each of which has factors militating for and against its adoption.

On balance, the factors seem to weigh in favour of a narrow interpretation of section 11.04 that would maintain the *CCAA* court's flexibility to grant stays of proceedings that are necessary to facilitate the restructuring of the debtor company while preserving the court's discretion to refuse to extend stays to issuers of letters of credit and guarantors if it is not appropriate to do so in the circumstances of a particular case. It that regard, it would be reasonable to expect that courts may draw a distinction between the treatment of letters of credit and guarantees in light of different policy and other considerations relating to them depending on their terms.

Section 11.04 would benefit from clarification by the legislature or the courts to resolve the ambiguity in its wording and provide guidance and greater certainty to debtor companies, guarantors, creditors and other stakeholders in *CCAA* proceedings.

TAB 9

Court File No. CV-24-00726584-00CL

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 2675970 ONTARIO INC., 2733181 ONTARIO INC., 2385816 ALBERTA LTD., 2161907 ALBERTA LTD., 2733182 ONTARIO INC., 2737503 ONTARIO INC., 2826475 ONTARIO INC., 14284585 CANADA INC., 2197130 ALBERTA LTD., 2699078 ONTARIO INC., 2708540 ONTARIO CORPORATION, 2734082 ONTARIO INC., TS WELLINGTON INC., 2742591 ONTARIO INC., 2796279 ONTARIO INC., 10006215 MANITOBA LTD., AND 80694 NEWFOUNDLAND & LABRADOR INC.

SUPPLEMENTARY AFFIDAVIT OF ANDREW WILLIAMS
(sworn September 26, 2024)

I, **ANDREW WILLIAMS**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY**:

1. This supplementary affidavit is sworn in support of the Applicants' motion for an amendment to the amended and restated initial order dated September 6, 2024 (the "**ARIO**") to stay all proceedings against or in respect of DAK Capital Inc. ("**DAK**"), an entity related to the Applicants, that relate to or involve any of the Applicants or Non-Applicant Entities[1] (any such proceeding a "**Related Proceeding**") except with the written consent of DAK and the Monitor, or with leave of this Court (the "**Related Proceeding Stay**").

[1] As defined in my affidavit sworn September 12, 2024, which I understand is also tendered on this motion (my "**First Affidavit**").

2. I swear this affidavit to provide certain further information in response to the affidavit of Dave Paterson, sworn September 20, 2024 (the "**Canopy Affidavit**"). Where I state that I am relying on information provided by others, I believe that information to be true.

3. A number of the exhibits to my affidavit contain redactions. With the exception of the redaction noted in paragraph 8 of my affidavit, these are redactions of the personal contact information and signatures of company personnel (on either the Applicants/DAK side or the Canopy Growth/Tweed[2] side).

I. NEGOTIATION OF THE SHARE PURCHASE AGREEMENT

4. As discussed in the Canopy Affidavit, DAK, 267 Ontario, Canopy Growth Corporation ("**Canopy Growth**"), and Tweed Inc. ("**Tweed**") are parties to a Share Purchase Agreement dated September 23, 2022, as amended by the Amendment to Share Purchase Agreement dated December 30, 2022 (the "**SPA**"). Attached as **Exhibit "A"** is a copy of the SPA dated December 30, 2022.

5. DAK, an affiliate of the Applicants, has no employees and was heavily reliant on management employees from 216 Alberta and 267 Ontario (the "**TS Management Team**") for the negotiation of the SPA (defined below) and the commercial discussions that led to it. These employees include:

(a) Jurgen Schreiber, Chief Executive Officer at 267 Ontario, who led the negotiation on behalf of 267 Ontario;

(b) Myself, President at 267 Ontario; and

[2] Both as defined below.

(c) Greg Bedford, Assistant Treasurer of 267 Ontario.

II. CANOPY BREACHES THE SPA

6. On or about December 30, 2022 (the "**Closing Date**"), 267 Ontario closed the transaction as set out in the SPA and took possession of Canopy Growth's Canadian retail stores.

7. Following the Closing Date, 267 Ontario became aware that Canopy Growth and Tweed (together, the "**Vendors**") had breached the SPA. The breaches included:

(a) **Inadequate inventory levels:** As of the Closing Date, the value of the inventory and prepaid inventory balance were substantially lower than what had been represented by the Vendors and agreed in the SPA;

(b) **Canopy price reductions**: The Vendors had not conducted Business (defined in the SPA) in the ordinary course during the Interim Period (defined in the SPA). This included impermissible drastic price reductions on Canopy products without the knowledge or consent of 267 Ontario; and

(c) **Irregular discounts**: Following the Closing date, 267 Ontario discovered instances of discounts that had been applied to inventory outside the ordinary course of the Business. This included discounts of up to 60% on full-price products (together, the **"Canopy Breaches**").

8. In response to these breaches, on or about January 10, 2023, 267 Ontario and DAK gave notice to the Vendors of their concerns regarding the state of inventory on closing. The Vendors responded on January 11, 2023. Attached as **Exhibit "B"** is a copy of that email exchange. I am advised by Mr. Main that the top of this exchange has been redacted for privilege.

9. On or about January 16, 2023, 267 Ontario and DAK gave notice to the Vendors that a Direct Claim was forthcoming. Attached as **Exhibit "C"** is a copy of that correspondence.

10. On or about April 28, 2023, 267 Ontario and DAK provided the Vendors with a Direct Claim Notice pursuant to section 8.9 of the SPA. Attached as **Exhibit "D"** is a copy of the Direct Claim Notice.

11. On or about June 27, 2023, the Vendors provided a Response to the Direct Claim Notice**.** Attached as **Exhibit "E"** is a copy of the Vendors' Response to the Direct Claim Notice.

12. On or about July 18, 2023, 267 Ontario and DAK provided a Reply to the Vendors' Response to the Direct Claim Notice. Attached as **Exhibit "F"** is a copy of 267 Ontario and DAK's Reply.

13. On or about November 7, 2023, the Vendors wrote to Mr. Schreiber regarding various alleged overdue payments**.** Attached as **Exhibit "G"** is a copy of the Vendors' letter.

14. On or about December 1, 2023, 267 Ontario and DAK responded to the Vendors' November 7, 2023 letter. Attached as **Exhibit "H"** is a copy of 267 Ontario and DAK's letter.

15. To date, none of the Canopy Breaches have been remedied.

III. THE CANOPY ARBITRATION

16. On March 8, 2024, Canopy Growth, Tweed, and Tweed Leasing Corporation (collectively, the "**Canopy Claimants**") issued a Notice of Arbitration against four of the Applicants - 267 Ontario, 216 Alberta, 2733181 Ontario Inc., and 14284585 Canada Inc. (collectively, the "**TS Respondents**"), and DAK (the "**Canopy Arbitration**"). Attached as **Confidential Exhibit "I"** is a copy of the Notice of Arbitration dated March 8, 2024.

17. In total, the Canopy Claimants seek more than $5 million from DAK, on a joint and several basis with 267 Ontario.

18. Without any intention to waive any applicable privilege, I am advised by Mr. Schreiber that DAK intends to pursue all substantive avenues to defend the claims made against it, including but not limited to defences going to the enforceability of the guarantee.

19. Without waiving applicable privilege or limiting DAK or the TS Respondents' defences to the Canopy Arbitration, I am advised by Simon Bieber of Adair Goldblatt Bieber LLP, the TS Respondents' and DAK's legal counsel in the Canopy Arbitration, that DAK may plead in its defence that the alleged guarantees are unenforceable due to certain actions and/or inactions of the Vendors prior to the entering into of the SPA, or which constitute breaches of the SPA.

20. I am advised by Mr. Schreiber that DAK will need to rely on the TS Management Team to effectively respond to the Canopy Claimants' claims, and to defend itself in the arbitration. DAK will need to obtain information, documents, and evidence from the TS Management Team as DAK does not have any separate internal sources for such information, documents, and evidence.

21. At minimum, I expect DAK will need to work with Mr. Schreiber, Mr. Bedford, and myself in the TS Management Team to collect the information, documents, and evidence that will be required to produce as a respondent in the Canopy Arbitration and to advance the defences to the enforceability of the guarantee that DAK intends to advance.

IV. INFORMATION REQUIRED TO CALCULATE THE DEFERRED CONSIDERATION CLAIM

22. The Canopy Claimants claim more than $2 million jointly and severally from 267 Ontario and DAK relating to the "Deferred Consideration" formulas in the SPA. Sections 2.7(a)(ii), (iii),

and (v) of the SPA set out calculations that are required to determine the Deferred Consideration applicable to the alleged guarantees. Those calculations require a significant amount of specific financial information that needs to be obtained from the TS Respondents. DAK does not maintain information about the operations of the TS Respondents, or store-level sales.

23. The information needed to calculate Deferred Consideration is not readily available and must be compiled and analyzed by the TS Management Team. Paragraph 14 of the Canopy Affidavit intimates that the work required to calculate the Deferred Consideration has already been done by the TS Respondents. This is not correct. That work has not been done to date as it is not urgent and not critical to the TS Respondents' restructuring, which is the current focus of the TS Management Team's efforts.

24. Paragraph 14 of the Canopy Affidavit goes on to suggest that, to the extent the work required to calculate the Deferred Consideration has not already been completed, the information required to do that would be readily accessible to the TS Respondents and DAK. This is not correct. Such information would not be readily accessible to DAK. DAK would need to rely on the TS Respondents and the TS Management Team, which would need to perform the work to compile and analyze the information.

V. RISK OF ADVERSE FINDINGS

25. Without any intention to waive any applicable privilege, I am advised by Mr. Bieber that findings of fact and liability in respect of the SPA's formation and the parties' performance of the obligations contained therein are likely to be required to determine the claims against DAK, and that such findings may directly or indirectly impact on defences available to the TS Respondents in respect of the claims against them.

26. I am concerned about the risk that findings relating to the claims against DAK could affect or be unhelpful to the TS Respondents' ability to defend the same or other claims in the Canopy Arbitration. For this reason, it is the TS Respondents' reluctant intention to participate in the arbitration if it proceeds against DAK, to ensure that accurate information and documents are tendered, and appropriate arguments are advanced on their behalf.

VI. DIVERSION OF RESOURCES FROM THE RESTRUCTURING EFFORT

27. The TS Respondents cannot meaningfully participate in the Canopy Arbitration, or work with DAK on its efforts to defend the Canopy Arbitration, and continue to devote due attention to the restructuring.

28. I am one of the key members of the TS Management Team leading the operational restructuring of the Applicants. My time and resources, and those of the TS Management Team, are presently fully engaged by:

(a) Carrying out the TS Respondents' financial and operational restructuring effort;

(b) Supporting the sale and investment solicitation ("**SISP**") process being conducted by the TS Respondents. The SISP is of critical priority given the strict timelines and court-ordered procedural steps to be taken; and

(c) Overseeing ongoing day-to-day operations such as dealing with vendors, suppliers, and landlords, including the operations of more than 60 stores.

29. The milestone for the selection of a successful bid in the SISP is November 13, 2024, and the deadline to close a successful transaction is December 6, 2024. I expect that until the conclusion of the SISP and closing, and provided the Canopy Arbitration is not permitted to

proceed against DAK, I and the rest of the TS Management Team will be prioritizing work on the SISP rather than any non-urgent litigation matters.

30. At minimum, I expect that Mr. Schreiber, Mr. Bedford, and I will be required to be substantively involved in the Canopy Arbitration when it proceeds. At this time, Mr. Schreiber, Mr. Bedford, and I are focused on the requirements of the SISP and wish to make the most of the opportunity to market the business. The SISP is critical to the restructuring effort.

31. If DAK were required to respond to the claims of the Canopy Claimants during the next six weeks this would result in a significant burden to these individuals working on the SISP process and broader restructuring. Such further resource drain would likely have a de-stabilizing effect on the process, and a negative impact on the Applicants' ability to successfully complete the restructuring and sale process. The failure of that process would have significant consequences for the more than 350 employees of the Applicants, as well as the Applicants' contractual counterparties including landlords, suppliers, and customers. The successful conclusion of the restructuring and sale process will avoid these consequences.

32. Even having to respond to the Canopy Claimants' opposition to this motion has diverted important resources from the restructuring effort, and strained the capacity of myself and my colleagues. I expect that the Canopy Arbitration, if it was permitted to proceed concurrently with the CCAA process, would likely result in an even more significant drain on our resources.

VII. NO PREJUDICE TO THE CANOPY CLAIMANTS

33. There was no sense of urgency on the part of the Canopy Claimants to move this arbitration forward prior to the commencement of this CCAA proceeding on August 28, 2024.

34. I am advised by Mr. Bieber that no substantive progress was made in the Canopy Arbitration between the Notice of Arbitration, dated March 8, 2024, and the commencement of the CCAA proceeding:

(a) No Statement of Defence was delivered;

(b) No discovery plan was set, or even proposed;

(c) No timetable for the arbitration was set, or even proposed;

(d) No arbitration procedure was agreed; and

(e) No Arbitrator was appointed.

35. The Canopy Affidavit makes a number of statements regarding without prejudice discussions that took place between the Canopy Claimants and the TS Respondents and DAK since the Notice of Arbitration was served. I am advised by Mr. Bieber that it was not proper for the Canopy Claimants to lead this evidence. However, as they have done so, I correct inaccuracies and misleading statements contained in that evidence:

(a) Paragraph 26 of the Canopy Affidavit states that “At the urging of the TS Parties, Canopy agreed to defer prosecution of the Arbitration while the parties engaged in without prejudice settlement discussions”. This is not correct. Canopy indicated to the TS Parties that they also wanted to engage in without prejudice settlement discussions; and

(b) Paragraph 27 of the Canopy Affidavit states that “the TS Parties cancelled a mediation that was scheduled to be held on June 24, 2024 in Toronto. Attempts to reschedule the

mediation were not met with cooperation from the TS Parties, who were non-communicative and/or non-committal. It is now apparent that while the TS Parties were delaying both the adjudication and resolution of Canopy's claims, they were preparing to file for protection under the *Companies' Creditors Arrangements Act*, RSC 1985, c C-36 (the "CCAA").” This is not correct. The TS Respondents and DAK advised Canopy in advance of the date that it may not be workable on their end, which turned out to be the case. Following which, the parties continued their discussions. The TS Respondents and DAK remained open to scheduling a further date for mediation.

36. On September 24, 2024, Sharon Kour of Reconstruct LLP, counsel for the Applicants in these CCAA Proceedings, sent an email to Colin Pendrith of Cassels Brock & Blackwell LLP, counsel to the Vendors, advising that the Applicants are willing to withdraw the stay motion being brought in the CCAA Proceeding if the parties will agree to proceed with the arbitration on the following timetable:

(a) January 30, 2025: DAK delivers a defence and counterclaim;

(b) February 15, 2025: Vendors delivers defence to counter claim and reply;

(c) February 28, 2025: DAK delivers reply to defence to counter claim;

(d) April 30, 2025: Parties exchange productions;

(e) June 30, 2025: Parties complete examinations;

(f) July 31, 2025: Parties deliver Answers to Undertakings;

(g) August 30, 2025: Follow-up examinations; and

(h) October/November 2025: Arbitration Hearing.

Attached as **Exhibit "J"** is a copy of the correspondence dated September 24, 2024.

37. DAK is not a party to the CCAA proceeding. DAK is a solvent entity. DAK has existed for a number of years. Canopy accepted DAK as guarantor under the SPA. I know of no reason that DAK would be in a worse position to honour any guarantee obligations it is found to owe after a six week stay of the Canopy Arbitration.

38. I swear this affidavit in support of the Applicants' motion and for no other or improper purpose.

SWORN REMOTELY by Andrew Williams stated as being located in the City of Toronto in the Province of Ontario before me at the City of Toronto, in the Province of Ontario this 26th day of September, 2024, in accordance with O. Reg 431/20, *Administering Oath or Declaration Remotely*.

Signed by: Gabrielle Schachter 88545D85499D4AA...

A Commissioner for taking Affidavits.
Name: Gabrielle Schachter

DocuSigned by: Andrew Williams 0F1870E63F1941C...

Andrew Williams

TAB 10

Court File No. CV-24-00726584-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	WEDNESDAY, THE 18TH
	)	
JUSTICE CAVANAGH	)	DAY OF SEPTEMBER, 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 2675970 ONTARIO INC., 2733181 ONTARIO INC., 2385816 ALBERTA LTD., 2161907 ALBERTA LTD., 2733182 ONTARIO INC., 2737503 ONTARIO INC., 2826475 ONTARIO INC., 14284585 CANADA INC., 2197130 ALBERTA LTD., 2699078 ONTARIO INC., 2708540 ONTARIO CORPORATION, 2734082 ONTARIO INC., TS WELLINGTON INC., 2742591 ONTARIO INC., 2796279 ONTARIO INC., 10006215 MANITOBA LTD., AND 80694 NEWFOUNDLAND & LABRADOR INC. (individually, an "**Applicant**" and collectively, the "**Applicants**")

FURTHER AMENDED AND RESTATED INITIAL ORDER

THIS MOTION, made by the Applicants, for an order amending and restating the initial order of Justice Cavanagh issued on August 28, 2024 (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 by judicial videoconference.

ON READING the affidavits of Andrew Williams sworn August 28, 2024 (the "**Initial Williams Affidavit**"), September 3, 2024 (the "**Second Williams Affidavit**") and the Exhibits thereto, and September 12, 2024 (the "**Third Williams Affidavit**") and the Exhibits thereto and the pre-filing report of Alvarez & Marsal Canada Inc. ("**A&M**"), in its capacity as proposed monitor of the Applicants, dated August 27, 2024, the first report of A&M in its capacity as monitor (in such capacity, the "**Monitor**") dated September 4, 2024 and the second report of the Monitor dated September 16, 2024 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 to Bank of Montreal ("**BMO**"), the Applicants' senior secured lender, counsel for TS Investments Corp. (the "**DIP Lender**") and such other counsel as were present as listed on the Counsel Slip, no one appearing for any other person although duly served as appears from the affidavits of service of Jared Rosenbaum sworn September 4, 2024, Julie Mah sworn September 5, 2024 and Julie Mah sworn September 13, 2024, as 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.

APPLICATION

2. **THIS COURT ORDERS** that each of the Applicants is a company 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 respective 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, contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty, subject to the terms of the Definitive Documents (as hereinafter defined), 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 central cash management system currently in place as described in the Initial Williams 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(s) (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 the Applicants, subject to terms of the Definitive Documents, shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the Initial Filing Date:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and other employee related 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 actually supplied to the Applicants prior to the Initial Filing Date if, in the opinion of the Applicants following consultation with the Monitor, such payment is necessary or desirable during these proceedings.

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 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 on or following the Initial Filing Date.

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 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.

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 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 Initial Filing Date, 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 Initial Filing Date 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 other than interest and expenses due and payable to BMO under the BMO Credit Agreement (as defined in the Initial Williams Affidavit); (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. Notwithstanding the foregoing, the Applicants shall be entitled to continue to operate the Cash Management System.

RESTRUCTURING

11. **THIS COURT ORDERS** that each of the Applicants shall, subject to such requirements as are imposed by the CCAA, and subject to the terms of 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 outside of the ordinary course of business not exceeding $250,000 in any one transaction or $1,000,000 in the aggregate, provided that, with respect to any leased premises, the debtors may, subject to paragraphs 12 and 13 herein, vacate, abandon or quit the whole, but not part of any leased premises and may permanently, but not temporarily cease, downsize or shut down,

(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 restructuring of their Business and 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 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 any applicable secured creditors, 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 and any such secured creditors. If the Applicants disclaim 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 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 Applicants 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 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 December 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**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or their respective employees and representatives acting in such capacities, 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 PROCEEDINGS AGAINST THE NON-APPLICANT ENTITIES

15. **THIS COURT ORDERS** that during the Stay Period, no Proceeding shall be commenced or continued against or in respect of the TS-IP Holdings Ltd., TS Programs Ltd, 1000451353 Ontario Inc., and 1000451354 Ontario Inc. (collectively, the "**Non-Applicant Entities**") or their respective employees and representatives acting in such capacities, or affecting their business or their property, except with the written consent of the Non-Applicant Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Non-Applicant Entities 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, the Monitor, or the Non-Applicant Entities, 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 and the Non-Applicant Entities to carry on any business which they 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 discontinue, suspend, 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.

NO PRE-FILING VS POST-FILING SET-OFF

18. **THIS COURT ORDERS** that, no Person shall be entitled to set off any amounts that: (a) are or may become due to the Applicants in respect of obligations arising prior to the Initial Filing Date with any amounts that are or may become due from the Applicants in respect of obligations arising on or after the Initial Filing Date; or (b) are or may become due from the Applicants in respect of obligations arising prior to the Initial Filing Date with any amounts that are or may become due to the Applicants in respect of obligations arising on or after the Initial Filing Date, in each case without the consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

19. **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, security 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, suspending 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 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

20. **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 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.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

21. **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 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.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

22. **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 the director's or officer's gross negligence or wilful misconduct.

23. **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 $3 million, as security for the indemnity provided in paragraph 22 of this Order. The Directors' Charge shall have the priority set out in paragraphs 44 and 46 herein.

24. **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 22 of this Order.

APPOINTMENT OF MONITOR

25. **THIS COURT ORDERS** that A&M 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.

26. **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 (as hereinafter defined)), including the management and deployment/use of funds advanced by the DIP Lender to the Applicants under the Definitive Documents;

(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 timely 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 or as required pursuant to the Definitive Documents;

(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 or as required pursuant to the Definitive Documents;

(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' 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.

27. **THIS COURT ORDERS** that the Monitor shall not occupy, take control, care, charge, possession or management (collectively, "**Possession**") of (or be deemed to take Possession of) or exercise 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 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, 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*, S.O. 2017, c. 26, Sched. 2, as amended, *The Cannabis Control (Saskatchewan) Act*, S.S. 2018, c. C-2.111, as amended, *The Cannabis Control (Saskatchewan) Regulations*, RRS, c. C-2.111 Reg 1, as amended, 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. 2018, c. C-4.1, as amended, the Newfoundland and Labrador *Cannabis Control Regulations*, Nfld. Reg. 93/18, as amended, the Newfoundland and Labrador *Cannabis Licensing and Operations Regulations*, Nfld. Reg. 94/18.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. For clarity, 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.

28. **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* 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.

29. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicants, including BMO, 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.

30. **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, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out 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.

31. **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, by the Applicants as part of the costs of these proceedings, whether incurred prior to, on, or subsequent to the Initial Filing Date. 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 as otherwise agreed among the parties.

32. **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.

33. **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 $850,000, as security for their professional fees and disbursements incurred at their standard rates and charges, 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 44 and 46 hereof.

DIP FINANCING

34. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow, on a joint and several basis, under the DIP Facility Term Sheet dated as of August 27, 2024 and attached to the Initial Williams Affidavit as Exhibit "BB", among the Applicants as borrowers, and the DIP Lender, as lender (as may be amended, restated, supplemented and/or modified from time to time, the "**DIP Term Sheet**"), in order to finance the Applicants' working capital requirements, other general corporate purposes, accrued interest, expenses, and capital expenditures, all in accordance with the Definitive Documents, provided that borrowings under the DIP Term Sheet shall not exceed $8 million plus interest, fees and expenses, unless permitted by further Order of this Court (the "**DIP Facility**").

35. **THIS COURT ORDERS** that the DIP Facility shall be on the terms and subject to the conditions set forth in the DIP Term Sheet and the other Definitive Documents.

36. **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 (as may be amended, restated, supplemented and/or modified from time to time, and 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, expenses, liabilities and obligations to the DIP Lender under and pursuant to the DIP Term Sheet and the other 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.

37. **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 any and all DIP Obligations. 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 set out in paragraphs 44 and 46 hereof.

38. **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 may cease making advances to the Applicants and may make demand, accelerate payment and give other notices, and, upon five (5) days notice to the Applicants and the Monitor, may exercise any and all of its other 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 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, 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.

39. **THIS COURT ORDERS** that the DIP Lender and BMO shall be treated as unaffected in any Plan filed by the Applicants under the CCAA, or any proposal filed by any of the Applicants under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), with respect to any advances made under the Definitive Documents or the BMO Credit Agreement (as defined in the Initial Williams Affidavit).

40. **THIS COURT ORDERS** that, notwithstanding anything to the contrary herein, this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**"), such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as made prior to the Variation), under the Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the Definitive Documents.

KEY EMPLOYEE RETENTION PLAN

41. **THIS COURT ORDERS** that the Key Employee Retention Plan (the "**KERP**"), as described in the Second Williams Affidavit, an unredacted copy of which is attached as the Confidential Exhibit to the Second Williams Affidavit, is hereby approved and the Applicants are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

42. **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.

43. **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 $218,500 to secure any payments to the Key Employees under the KERP. The KERP Charge shall have the priority set out in paras 44 and 46 herein.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

44. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, the Directors' Charge, and the KERP Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $850,000);

Second – DIP Lender's Charge (to the maximum amount of the DIP Obligations at the relevant time);

Third – Director's Charge (to the maximum amount of $3 million); and

Fourth – KERP Charge (to the maximum amounts of $218,500).

45. **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.

46. **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 except that the DIP Lender's Charge, Director's Charge, and KERP Charge will rank subordinate to any and all amounts owed to BMO under the BMO Credit Agreement (as defined in the Initial Williams Affidavit); provided that the Charges shall rank behind Encumbrances in favour of any Person that has not been served with notice of this Application. The Applicants and the beneficiaries of the Charges (collectively, the "**Chargees**") shall be entitled to seek priority ahead of such Encumbrances on a subsequent motion on notice to those Persons likely to be affected thereby.

47. **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 and the Chargees, or further Order of this Court.

48. **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 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 the 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 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 Definitive Documents shall create or be deemed to constitute a breach by any of the Applicants of any Agreement to which the applicable Applicant 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 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.

49. **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.

TOLLING OF LIMITATION PERIOD OF RESCISSION CLAIMANTS

50. **THIS COURT ORDERS** that to the extent any prescription, time, or limitation period may expire during the pendency of these CCAA proceedings or within thirty days following the expiry of the Stay Period relating to any claim, action, or proceeding that could be commenced, including

under the *Arbitration Act, 1991,* SO 1991, c 17, by any of 1000032072 Ontario Inc., 2810434 Ontario Incorporated, 2736192 Ontario Inc., 2826139 Ontario Inc., 2837433 Ontario Inc., and The Infamous Enterprises Inc. (collectively, the "**Rescission Claimants**") in respect of their former "Tokyo Smoke" franchise businesses as against any of 2733181 Ontario Inc., 2737503 Ontario Inc., 2161907 Alberta Ltd., 2675970 Ontario Inc., TS Programs Ltd., and their former or current directors and officers, employees, and representatives including, but not limited to, Jürgen Schreiber, Justin Farbstein, and Josh Davidson (collectively, the "**Tolling Parties**"), the term of such prescription, time, or limitation period shall hereby be deemed to be tolled and extended sixty days following the expiry of the Stay Period, during which extension period the Rescission Claimants may commence such claim, action, or proceeding against the Tolling Parties despite the expiry of any limitation period during the pendency of the Stay Period or within thirty days of its expiry. The sixty day extension period may be modified on written consent of the affected Rescission Claimants, the affected Tolling Parties, and the Monitor, or by further order of this Court. For greater clarity, nothing in this Order shall impair or affect any relief sought by the Applicants in respect of any transaction culminating from any sale and investment solicitation process approved by this Court, or any plan of arrangement that may be filed by the Applicants.

51. **THIS COURT ORDERS t**hat none of the Tolling Parties may rely on any limitation defence, the defence of laches, or any other statutes or rules of substance or procedure governing or pertaining to the time for the commencement of any such claim, action, or proceeding to assert or plead that any claim, action, or proceeding of the Rescission Claimants, or any of them, is time-barred or otherwise precluded due to the failure to commence same during the pendency of the CCAA Proceedings or within thirty days following the expiry of 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 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 or by electronic message to the e-mail addresses as last shown in the Applicants' records, a notice to every known creditor who has a claim against any of 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 individual 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.alvarezandmarsal.com/TokyoSmoke (the "**Monitor's Website**").

54. **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, provided that the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

55. **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.

56. **THIS COURT ORDERS** that the Applicants, 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. Any such distribution or service shall be deemed to be in satisfaction of a legal or

juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

SEALING PROVISION

57. **THIS COURT ORDERS** that the Confidential Exhibit to the Second Williams Affidavit is hereby sealed and kept confidential pending further Order of the Court and shall not form part of the public record.

GENERAL

58. **THIS COURT ORDERS** that the Applicants, the Monitor, BMO 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 their respective powers and duties hereunder.

59. **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.

60. **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.

61. **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.

62. **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.

63. **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 any need for entry and 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 2675970 ONTARIO INC. et al.

Court File No. CV-24-00726584-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FURTHER AMENDED AND RESTATED INITIAL ORDER

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TAB 11

Sale and Investment Solicitation Process

Introduction

On August 28, 2024, 2675970 Ontario Inc., 2733181 Ontario Inc., 2385816 Alberta Ltd., 2161907 Alberta Ltd., 2733182 Ontario Inc., 2737503 Ontario Inc., 2826475 Ontario Inc., 14284585 Canada Inc., 2197130 Alberta Ltd., 2699078 Ontario Inc., 2708540 Ontario Corporation, 2734082 Ontario Inc., TS Wellington Inc., 2742591 Ontario Inc., 2796279 Ontario Inc., 10006215 Manitoba Ltd., and 80694 Newfoundland & Labrador Inc. (collectively, the "**Companies**") obtained an initial order (as amended and restated from time to time, the "**Initial Order**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") from the Ontario Superior Court of Justice (Commercial List) (the "**Court**"). Pursuant to the Initial Order, Alvarez & Marsal Canada Inc., a licensed insolvency trustee, was appointed as monitor in the CCAA proceedings (in such capacity, the "**Monitor**") and an interim financing facility put forward by TS Investments Corp. (in such capacity, the "**DIP Lender**") was approved.

On September 18, 2024, the Court granted an order (the "**SISP Order**") authorizing the Monitor, with the assistance of the Companies, to undertake a sale and investment solicitation process ("**SISP**"). The SISP is intended to canvass the market and solicit interest in, and opportunities for, a sale of, investment in or recapitalization of, all or part of the Companies, their assets and business operations. The SISP will be conducted by the Monitor in the manner set forth herein and in accordance with the SISP Order.

Pursuant to the SISP Order, the Court also approved a subscription agreement (the "**Stalking Horse Agreement**") between the Companies as issuers and the DIP Lender as purchaser (in such capacity, the "**Stalking Horse Bidder**"). For the avoidance of doubt, the implementation of the transactions contemplated by the Stalking Horse Agreement is conditional upon the Stalking Horse Agreement 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 Companies following the completion of the SISP.

This document sets out the procedures for the conduct of the SISP, which will include two phases for qualified interested bidders and will provide the parameters for the selection of a successful bid.

Opportunity

1. The SISP is intended to solicit interest in, and opportunities for, a sale of, investment in, or recapitalization of, all or part of the Companies, their assets, and business operations (the "**Opportunity**"). The Opportunity may include one or more of: (i) a recapitalization, arrangement or other form of investment in or reorganization of the business and affairs of the Companies as a going concern, (ii) a sale of all, substantially all or one or more components of the Companies' business operations (the "**Business**") as a going concern, or (iii) a sale of all, substantially all or one or more components of the Companies' assets (including without limitation the shares of the Companies) (the "**Property**") as a going concern or otherwise.

2. The procedures set out herein (the "**Bidding Procedures**") describe the manner in which prospective bidders may gain access to due diligence materials concerning the Companies, the Property and the Business, the manner in which bidders may participate

in the SISP, requirements for bids received, the ultimate selection of a Successful Bidder(s) (as defined herein) and the requisite approvals to be sought from the Court in connection therewith.

3. Subject to Section 7 herein, the Monitor shall have the right to modify, amend, vary or supplement the Bidding Procedures (including extending the deadlines set forth herein) in order to give effect to the substance of the SISP, the Bidding Procedures or the SISP Order, without the need for obtaining an order of the Court or providing notice to Participants (as defined herein); provided that, the Monitor may not modify, amend, vary or supplement sections 13.i, 14, 19.i, and 20 of the Bidding Procedures, without the prior written consent of the Stalking Horse Bidder or Bank of Montreal ("**BMO**"), the Companies senior secured lender. In addition, the Monitor shall not make any modification, amendment or supplement to the Bidding Procedures that materially affects the rights of the Stalking Horse Bidder, except with the written consent of the Stalking Horse Bidder, which consent shall not be unreasonably withheld.

4. The Monitor will post on the Monitor's website, as soon as practicable, any such modification, amendment, variation or supplement to the Bidding Procedures and inform the bidders impacted by such modifications.

5. In the event of a dispute as to the interpretation or application of the SISP Order or Bidding Procedures, the Court will have exclusive jurisdiction to hear and resolve such dispute.

6. Certain bid protections are provided for in the Stalking Horse Agreement (including a break fee), subject to the conditions set forth therein. No other bidder may request or receive any form of bid protection as part of any bid made pursuant to the SISP.

7. The following table sets out the key milestones under the SISP, which milestones and deadlines may be extended or amended by up to two weeks by the Monitor, in consultation with the Companies, without court approval; provided that, the milestone with respect to the closing of the Successful Bid(s) can only be extended or amended, without court approval, with the prior written consent of the DIP Lender and BMO, in each case, acting reasonably:

Milestone	**Deadline**
Marketing and due diligence commences and access to the virtual data room is granted to Participants having executed NDAs as defined herein) and, if requested by the Monitor, Participants who have provided evidence reasonably satisfactory to the Monitor in consultation with the Companies, of their financial wherewithal to complete on a timely basis a transaction in respect of the Opportunity (as defined herein) (the "**Commencement Date**")	As soon as reasonably practicable but no later than September 20, 2024
Deadline to submit a non-binding Letter of Interest (the "**Phase 1 Bid Deadline**")	5:00 p.m. (Eastern Time) on October 21, 2024

Deadline to submit a Binding Offer (the "**Phase 2 Bid Deadline**")	5:00 p.m. (Eastern Time) on November 11, 2024
Selection of Successful Bid(s), including the holding of an Auction, if needed (as defined herein)	No later than 5:00 p.m. (Eastern Time) on November 13, 2024
Motion for Court Approval of Successful Bid(s)	As soon as reasonably practicable following the selection of the Successful Bid, but by no later than November 22, 2024
Closing of Successful Bid(s)	No later than December 6, 2024

Solicitation of Interest and Notice of the SISP

8. As soon as reasonably practicable, but, in any event, by no later than the Commencement Date:

   a. the Monitor, in consultation with the Companies, will prepare a list of potential bidders, including (i) parties that have approached the Companies or the Monitor indicating an interest in the Opportunity, (ii) local and international strategic and financial parties which the Monitor, in consultation with the Companies, believes may be interested in the Opportunity, and (iii) parties that have otherwise showed an interest in the Companies, the Property and/or the Business prior to the date of the SISP Order; in each case, whether or not such party has submitted a letter of intent or similar document (collectively, the "**Known Potential Bidders**");

   b. the Monitor will publish a notice of the SISP and any other relevant information that the Companies, in consultation with the Monitor, consider appropriate, on the Monitor's website, and in publications as may be considered appropriate by the Monitor;

   c. a press release setting out relevant information regarding the commencements of the SISP and the Opportunity generally will be issued by the Companies with Canada Newswire designating dissemination in Canada;

   d. the Monitor, in consultation with the Companies, 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 (an "**NDA**") in form and substance satisfactory to the Monitor, the Companies, and their respective counsel, which agreement shall enure to the benefit of the Successful Bidder(s); and

   e. the Monitor, in consultation with the Companies, will prepare and maintain a virtual data room (the "**VDR**") containing due diligence information and documentation in relation to the Opportunity. The VDR may be updated from time to time throughout the SISP. Participants (as defined below), must direct all due diligence questions in connection with the VDR, on a without liability or representation basis, to the Monitor.

9. As soon as reasonably practicable following the SISP Order, the Monitor will cause the Teaser Letter and NDA to be sent to each Known Potential Bidder 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.

Phase 1: Non-Binding Letters of Interest

10. In order to participate in the SISP, and prior to the distribution of any confidential information to an interested party (including access to the VDR), such interested party must deliver to the Monitor (a) the executed NDA, and (b) if requested by the Monitor, evidence, reasonably satisfactory to the Monitor in consultation with the Companies, of its financial wherewithal to complete on a timely basis a transaction in respect of the Opportunity.

11. Interested parties that deliver the NDA and financial information referred to in paragraph 10 (together with the Stalking Horse Bidder, the "**Participants**" and each a "**Participant**"), will be granted access to the VDR by the Monitor. The Companies, the Monitor, and their respective advisors make no representation or warranty as to the information contained in the VDR, including, without limitation, as to its accuracy, completeness, quality or fitness for purpose.

12. The Monitor may limit any Participant's access to specific confidential information and to customer and supplier names and information where, the Companies determine, following consultation with the Monitor, that such access could negatively impact the SISP, the ability to maintain the confidentiality of the confidential information, the Business, or the Property.

13. All Participants wishing to bid for the Business or Property are required to submit a non-binding letter of interest ("**LOI**") in accordance with the Bidding Procedures. An LOI submitted by a Participant will only be considered a "**Phase 1 Qualified Bid**" (and the Participant who submits a Phase 1 Qualified Bid, a "**Phase 1 Qualified Bidder**") if the LOI complies at a minimum with the following:

    a. it has been duly executed by all required parties;

    b. it is received by the Monitor on or before the Phase 1 Bid Deadline;

    c. it provides written evidence, satisfactory to the Monitor, in consultation with the Companies, of the Participant's ability to consummate the transaction within the timeframe contemplated by the SISP and to satisfy any obligations or liabilities to be assumed on closing of the transaction, including, without limitation, a specific indication of the sources of capital and, to the extent that the Participant expects to finance any portion of the purchase price, the identity of the financing source;

    d. it identifies the terms and conditions of the proposed transaction including:

        i. a description of the specific assets/shares that are expected to be subject to the transaction and any assets/shares expected to be excluded;

        ii. a description of those liabilities and obligations (including operating liabilities and obligations to employees) which the Participant intends to

assume and which liabilities and obligations it does not intend to assume and are to be excluded as part of the transaction;

iii. whether the proposed transaction is to be implemented by way of a "reverse vesting order"; and

iv. any other terms or conditions of the proposed transaction that the Phase 1 Qualified Bidder believes are material to the transaction;

e. it identifies all proposed material conditions to closing including, without limitation, any internal, regulatory or other approvals and any form of consent, agreement or other document required from a government body, stakeholder or other third party, and an estimate of the anticipated timeframe and any anticipated impediments for obtaining such conditions, along with information sufficient for the Monitor, in consultation with the Companies, to determine that these conditions are reasonable in relation to the Participant;

f. it identifies the Participant and representatives thereof who are authorized to appear and act on behalf of the Participant for all purposes regarding the contemplated transaction;

g. it fully discloses the identity of each entity or person that will be sponsoring, participating in or benefiting from the transaction contemplated by the LOI, and it identifies all legal, financial, accounting and other advisors that have been or that are expected to be retained by the Participant in connection with the contemplated transaction;

h. it identifies any additional due diligence required to be completed in order to submit a Binding Offer (as defined below);

i. it identifies the investment amount or purchase price that must, at a minimum, provide cash consideration sufficient to pay in full on closing of the transaction: (i) the amount equal to the purchase price in the Stalking Horse Agreement plus an incremental overbid amount (in the minimum amount of $250,000); (ii) an administrative reserve in an amount satisfactory to the Monitor necessary to wind-down the CCAA proceeding; and (iii) a break fee in the amount of $390,000 as contemplated in the Stalking Horse Agreement (the aggregate of these amounts, the "**Minimum Purchase Price**"). The Monitor may deem this criterion satisfied if the LOI, together with one or more other non-overlapping LOIs, have an aggregate value that meets or exceeds the Minimum Purchase Price (the "**Aggregated Bids**");

j. it confirms that the Participant will bear its own costs and expenses (including legal and advisor fees) in connection with the LOI and the proposed transaction, and by submitting its LOI is agreeing to refrain from and waive any assertion or request for reimbursement on any basis;

k. it does not provide for any break fee or expense reimbursement, it being understood and agreed that no bidder other than the Stalking Horse Bidder will be entitled to any such bid protections; and

l. it contains such other information as may be reasonably requested by the Monitor, in consultation with the Companies.

14. The Monitor, in consultation with the Companies, may waive compliance with any one or more of the requirements specified in Section 13, except for 13.i), and deem any such non-compliant LOI to be a Phase 1 Qualified Bid.

15. Notwithstanding anything to the contrary herein, including the requirements set out in sections 13 and 19, as applicable, the Stalking Horse Agreement shall constitute a Phase 1 Qualified Bid and a Phase 2 Qualified Bid, and the Stalking Horse Bidder shall constitute a Phase 1 Qualified Bidder and a Phase 2 Qualified Bidder, and the Stalking Horse Bidder shall be permitted to proceed to Phase 2 of the SISP.

Assessment of Phase 1 Qualified Bids and Subsequent Process

16. Following the receipt of any LOI, the Monitor may, in consultation with the Companies, seek clarification with respect to any of the terms or conditions of such LOI and/or request and negotiate one or more amendments to such LOI prior to determining if the LOI should be considered a Phase 1 Qualified Bid.

17. Following the Phase 1 Bid Deadline, the Monitor, in consultation with the Companies, shall assess the LOIs. If the Monitor determines that a LOI constitutes a Phase 1 Qualified Bid, then such Participant who submitted the LOI will be deemed to be qualified to participate in Phase 2 of the SISP (in that capacity a "**Phase 2 Qualified Bidder**") and the Monitor will notify in writing each Phase 2 Qualified Bidder that it has been selected as a Phase 2 Qualified Bidder within three (3) business day following the Phase 1 Bid Deadline, or at such later time as the Monitor deems appropriate, in consultation with the Companies.

18. In the event that no Phase 1 Qualified Bid is received, or the Monitor has determined in its reasonable business judgment that it would not be appropriate to select any Phase 2 Qualified Bidders, the Monitor will, as soon as reasonably possible, declare the Stalking Horse Bidder as the Successful Bidder, post a notice on its website that the SISP has been terminated and the Companies shall promptly seek from the Court the approval order contemplated in the Stalking Horse Agreement.

Phase 2: Binding Offers and Selection of Successful Bidder

19. Any Phase 2 Qualified Bidder that wishes to make a formal offer in the SISP shall submit a binding offer ("**Binding Offer**" and the Phase 2 Qualified Bidder who submits a Binding Offer, a "**Binding Bidder**") prior to the Phase 2 Bid Deadline that complies with the following terms:

    a. the Binding Offer shall be submitted to the Monitor on or before the Phase 2 Bid Deadline;

    b. it identifies all executory contracts of the Companies that the Phase 2 Qualified 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;

    c. if the bid is structured as a "reverse vesting transaction", it includes a duly authorized and executed binding transaction agreement, including all exhibits and schedules contemplated thereby, together with a blackline against the Stalking Horse Agreement (which shall be posted in Word format in the VDR), describing the terms and conditions of the proposed transaction, including any liabilities and obligations proposed to be assumed, the purchase price, the structure and

financing of the proposed transaction, and any regulatory or other third-party approvals required;

d. if the bid is structured in a form other than a "reverse vesting transaction", it includes a duly authorized and executed, definitive transaction agreement, containing the detailed terms and conditions of the proposed transaction, including the Business or the assets proposed to be acquired, the obligations and liabilities to be assumed/excluded, the detailed structure of the transaction, the final purchase price or investment amount, and any other key economic terms expressed in Canadian dollars, together with all exhibits and schedules thereto, all applicable ancillary agreements with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such ancillary agreements), and the proposed form of order(s) for the Court to consider in the motion to approve the transaction;

e. it is not subject to any financing condition;

f. it 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;

g. it 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";

h. among other representations and acknowledgments that may be requested by the Monitor or the Companies, it includes acknowledgments and representations of the Phase 2 Qualified 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 Business in making its Binding Offer;

    iii. did not rely upon any written or oral statements, covenants, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Company, the business, the Property, the Opportunity, the SISP, or any information provided in connection with the SISP, including, without limitation, any information disclosed in the Teaser Letter and the VDR, or the accuracy, completeness, quality or fitness for purpose of any information provided in connection therewith, other than as expressly set forth in 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 in the cannabis sector;

i. it provides for net cash proceeds that are not less than the Minimum Purchase Price; unless it is a part of Aggregated Bids, in which case the total net cash

proceeds of the Aggregated Bids will be not less than the Minimum Purchase Price;

j. it is accompanied by a letter that confirms that:

i. the Binding Offer may be accepted by the Companies by countersigning the Binding Offer;

ii. the Binding Offer is irrevocable and capable of acceptance until the earlier of (A) two business days after the date of closing of the Successful Bid(s); and (B) December 6, 2024 (the "**Outside Date**"); and

iii. the Phase 2 Qualified Bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the Binding Offer and the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis;

k. it does not provide for any break or termination fee, expense reimbursement or similar type of payment, it being understood and agreed that no bidder other than the Stalking Horse Bidder will be entitled to any bid protections;

l. it is accompanied by 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**"), along with acknowledgement (i) that if the Phase 2 Participant is selected as the Successful Bidder, the Deposit will be nonrefundable subject to approval of the Successful Bid by the Court and (ii) of the terms described in paragraph 31 below; and

m. it contemplates and reasonably demonstrates a capacity to consummate a closing of the transaction set out therein on or before November 29, 2024, 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 and in any event no later than the Outside Date.

20. The Monitor may not waive compliance with any one or more of the requirements specified above and may not deem any non-compliant Binding Offer to be a Successful Bid.

21. Notwithstanding anything to the contrary contained herein, the Stalking Horse Agreement shall constitute a Binding Offer.

Selection of Successful Bid(s)

22. The Monitor, in consultation with the Companies, may, following the receipt of any Binding Offer, 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 a Successful Bid.

23. If any Binding Offers are received (other than the Stalking Horse Agreement) the Monitor will, in consultation with the Companies:

a. review and evaluate each Binding Offer based on various factors in addition to those set out at Section 19 of the SISP, as the Monitor deems appropriate in its reasonable business judgment including, without limitation,

i. the purchase price and the net value provided by such bid including the proposed form, composition, and allocation of such consideration;

ii. the identity, circumstances and ability of the Phase 2 Qualified Bidder to successfully complete such transaction,

iii. the proposed transaction documents;

iv. the effects of the bid on the stakeholders of the Companies;

v. factors affecting the speed, certainty, and value of the transaction (including any regulatory or licensing approvals or third-party contractual arrangements required to close the transactions);

vi. the assets and/or liabilities included or excluded from the bid;

vii. any related restructuring costs, and the likelihood and timing of consummating such transaction; and

viii. the likelihood of the Court to approve such Successful Bid; and

b. consult with BMO regarding the aspects of a Binding Offer related to payout or assumption of the BMO's debt, which shall include providing a summary of the terms of each Binding Offer to BMO; and

c. select the best bid(s) (the "**Successful Bid(s)**") within two (2) business days of the Phase 2 Bid Deadline and following such selection will promptly notify the Binding Bidder making such Successful Bid that it has been selected as a successful bidder (the "**Successful Bidder**").

24. Any Successful Bid will be subject to approval by the Court.

25. In the event that no Binding Offer is received (other than the Stalking Horse Agreement), the Monitor will, as soon as reasonably possible, post a notice on its website that the SISP has concluded and will promptly seek from the Court the approval and vesting order contemplated in the Stalking Horse Agreement.

26. If a Binding Offer is received other than the Stalking Horse Agreement, the Monitor, in consultation with the Companies, will direct such Binding Bidders to participate in an auction (the "**Auction**") to be conducted and administered by the Monitor in accordance with the Auction Procedures Letter (as defined below).

27. In the event that it is determined that there is to be an Auction in respect of some or all of the Property or Business, the Auction shall be governed by an auction procedures letter ("**Auction Procedures Letter**") to be prepared by the Monitor and sent to all applicable Binding Bidders setting out, among other things, (a) the date, time and location of the Auction (including whether in person or by videoconference); (b) the amount of the starting bid; and (c) the initial minimum overbid.

Approval of Successful Bid(s)

28. The Companies will make a motion to the Court (the "**Approval Motion**") for one or more orders:

    a. 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; and

    b. 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 in the name of the Successful Bidder(s) and/or vest unwanted liabilities out of one or more of the Companies (collectively, the "**Approval Order(s)**").

29. The Approval Motion will be held on the earliest possible date after the selection of the Successful Bid, taking into account Court availability. With the consent of the Monitor and the Successful Bidder(s), and in consultation with the DIP Lender and BMO, the Approval Motion may be adjourned or rescheduled by the Companies without further notice, by an announcement of the adjourned date at the Approval Motion or with notice to the service list of the CCAA proceedings prior to the Approval Motion. The Companies will consult with the Monitor, and the Successful Bidder(s) regarding the application material to be filed by the Companies for the Approval Motion.

30. All Binding Offers (other than the Successful 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 Companies to any unsuccessful Phase 2 Qualified Bidders.

Deposits

31. The Deposit(s):

    a. will, upon receipt from the Phase 2 Qualified Bidder(s), be retained by the Monitor and deposited in a non-interest-bearing trust account;

    b. received from the Successful Bidder(s) will:

        i. be applied to the purchase price to be paid by the applicable Successful Bidder(s) whose Successful Bid is the subject of the Approval Order(s), upon closing of the approved transaction; and

        ii. otherwise be held and refundable in accordance with the terms of the definitive documentation in respect of any Successful Bid provided that all such documentation will provide that the Deposit will be retained by the Companies and forfeited by the Successful Bidder if the Successful Bid fails to close by the Outside Date, and such failure is attributable to any failure or omission of the Successful Bidder to fulfil its obligations under the terms of the Successful Bid;

    c. received from the Phase 2 Qualified Bidder(s) that are not the Successful Bidder will be fully refunded to the Phase 2 Qualified Bidder(s) that paid the Deposit(s) as soon as practical following the closing of the Successful Bid.

32. Notwithstanding anything to the contrary herein, the Stalking Horse Bidder will not be required to provide a Deposit.

"As is, where is"

33. Any sale (or sales) of the Property or 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 Companies or any of their respective agents, advisors or estates, except for representations and warranties that are customarily provided in purchase agreements for a company subject to CCAA proceedings, and that may be expressly provided in the final documentation and Approval Order(s). Any such representations and warranties provided for in the definitive documents will not survive closing.

Free of Claims and Interests

34. Pursuant to the applicable Approval Order and to the extent permitted by law, all of the rights, title and interests of the Companies in and to the Property or the Business to be acquired will be sold free and clear of, *inter alia*, all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein (collectively, the "**Claims and Interests**") pursuant to the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Property or Business (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 and the applicable Approval Order.

Confidentiality

35. For greater certainty, other than as required in connection with any Approval Motion, neither the Companies nor the Monitor will disclose: (i) the identity of any Participant (other than the Stalking Horse Bidder); or (ii) the terms of any bid, LOI, Phase 1 Qualified Bid, Phase 2 Qualified Bid, or Binding Offer (other than the Stalking Horse Agreement), with any other bidder without the consent of such party (including by way of email), subject to applicable law.

Further Orders

36. At any time during the SISP, 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 their powers and duties hereunder.

Additional Terms

37. In addition to any other requirement of the SISP:

    a. The Monitor will at all times prior to the selection of a Successful Bid(s) 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 high-potential bidders in a process of this kind or who may be reasonably proposed by any of the Companies' stakeholders as a high-potential bidder.

    b. Any consent, approval or confirmation to be provided by the Stalking Horse Bidder, the DIP Lender, BMO, the Companies 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.

38. The DIP Lender, BMO, and any other secured creditor of the Companies shall have the right (subject to compliance with the terms of this SISP) to credit bid their secured debt against the assets secured thereby up to the full face value of such secured lender's claims, including principal, interest and any other obligations owing to such secured lender; provided that any such secured lender shall be required to: (a) pay in full in cash, or assume (with the consent of the holder of the priority claim), any obligations of the Companies in priority to its secured debt; and (b) pay appropriate consideration for any assets of the Companies which are contemplated to be acquired and that are not subject to such secured lender's security.

39. Any requirement to deliver notices, bids, consents, or any other information, documentation, or other material to the Monitor pursuant to this SISP shall be satisfied by delivery via courier or electronic transmission to the Monitor at the following addresses:

To the Monitor:

ALVAREZ & MARSAL CANADA INC.
200 Bay Street
Toronto, Ontario M5J 2J1
Canada

Attention:
Josh Nevsky – jnevsky@alvarezandmarsal.com
Skylar Rushton – srushton@alvarezandmarsal.com

With a copy to counsel to the Monitor

STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9
Canada

Attention:
Maria Konyukhova - mkonyukhova@stikeman.com
Lee Nicholson - leenicholson@stikeman.com

40. Other than as specifically set forth in a definitive agreement between the Companies and a Successful Bidder, the SISP does not, and will not be interpreted to, create any contractual, fiduciary, or other legal relationship between the Monitor, the Companies, and any other person.

41. The Monitor, the Companies, and their advisors shall not be liable for any claim for commission, finder's fee or like payment in respect of the completion of any of the transactions completed under the SISP. Any such claim shall be the sole liability of the bidder who completes a transaction under the SISP pursuant to which the claim is being made.

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 2675970 ONTARIO INC. et al.
Applicants

Court File No. CV-24-00726584-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

COMPENDIUM OF THE APPLICANTS
(Re: FARIO re Extend Stay)

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