Court File No. CV-25-00738613-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD., 1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C. UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.

Applicants

FACTUM OF PATHLIGHT CAPITAL LP
(Responding Factum to FILO Agent Motion – August 28, 2025)

August 25, 2025

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PART I - OVERVIEW

1. Pathlight Capital LP ("**Pathlight**")[1] submits the following response to the motion brought by ReStore Capital, LLC (the "**FILO Agent**") seeking an order from this Court requiring, among other things, that "the Pathlight Lenders reimburse the Applicants for the ABL Priority Collateral which was expended for their benefit".[2]

2. The FILO Agent originally sought to have its motion heard on July 15, 2025. However, this Honourable Court ordered that the FILO Agent's motion should be heard together with the Applicants' motion to approve the CW Transactions.[3] The FILO Agent subsequently amended its notice of motion in an obvious effort to mask its opposition to the CW Transactions, implicitly recognizing that its motion is a clear breach of the Intercreditor Agreement among the parties. Such breach was effectively acknowledged in open court on July 15, 2025, when the FILO Agent's counsel conceded – and this Court agreed – that the FILO Agent's motion would conclusively determine the Applicants' motion.[4]

3. Pathlight's response to the FILO Agent's motion focuses principally on the FILO Agent's request for an order requiring Pathlight and/or the purchaser to bear costs associated with pursuing the CW Transactions after July 15, 2025 (the "**Central Walk Costs**"). Pathlight submits that the FILO Agent's motion is senseless and based on incorrect facts and misstated CCAA principles. It should be denied. There is no precedent supporting the imposition of such costs on a potential purchaser without their consent or on a single secured creditor such as Pathlight. The costs of these

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1 The Pathlight Agent and the Pathlight Lenders are referred to collectively as "Pathlight" below, except where otherwise specified.

2 Capitalized terms have the same meaning as in the Affidavit of Franco Perugini sworn July 29, 2025, Applicants' Motion Record dated July 29, 2025, Tab 2 [Perugini Affidavit], unless otherwise indicated.

3 Endorsement of Justice Osborne dated July 15, 2025 [July 15 Endorsement] at paras. 10, 18.

4 July 15 Endorsement at para. 11.

proceedings ***may*** have to be allocated ***as a whole*** among relevant stakeholders at the appropriate time. If such allocation is necessary, as noted by the Monitor, it must be carried out based on all relevant considerations, including what is fair to all stakeholders in the circumstances, and with the benefit of a full record.

4. The allocation of costs in a CCAA proceeding is not a simple exercise of asserting that each creditor who principally benefits from a particular realization process should bear all the costs of that process and then forcing that creditor to bear the costs of that process. This approach fails to reflect the fact that a liquidating CCAA proceeding is carried out holistically, with different processes approved to monetize different types of assets that work harmoniously with each other, all in the hope of generating maximum recoveries for all creditors. During such processes, the debtor company pays for the costs of the proceeding, in the ordinary course, with, if necessary, any allocation of those costs to occur at the end of the proceeding.

5. It would be artificial, not to mention highly prejudicial to Pathlight, to simply impose all of the costs of seeking approval of the CW Transactions on Pathlight at this stage, including costs that have already been borne with respect to a transaction that the Company executed pursuant to a Court-approved process, with the consent of both the FILO Agent and the Monitor. Allocation is a matter for the court to determine based on all the accepted factors, which go beyond whose collateral is at issue and who benefits.

6. The FILO Agent's piecemeal position runs contrary to the CCAA and has already been rejected by this Court in these CCAA proceedings.[5] The cost allocation sought by the FILO Agent isolates the costs of the CW Transactions and ignores all the other matters in the case, to the clear

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[5] *Hudson's Bay Company, Re*, 2025 ONSC 2005 [March 29 Endorsement] at para. 17.

prejudice of Pathlight. Among other considerations, there are clear claims regarding the conduct, costs and realization of the FILO Agent and its affiliates (including those involved in the inventory realization of the Applicants) that ought to be considered and accounted for with respect to any global cost allocation exercise.[6] Pathlight has not brought these arguments forward at this time because it understands that these issues must be dealt with globally at the appropriate time. It is no answer for the FILO Agent to demand that the Court impose the Central Walk Costs on Pathlight now, with reallocation to occur later.

7. The FILO Agent's motion is a thinly disguised attempt to recover their indebtedness ahead of others, in the face of the Monitor's earlier refusal to agree to a larger distribution to the FILO Agent. It constitutes a collateral attack on Pathlight's collateral, contrary to the Intercreditor Agreement that the FILO Agent freely entered into with Pathlight. The Consent (defined below) relied upon by the FILO Agent is not in effect, and in any event, is wholly irrelevant.

8. For all of the above reasons, the FILO Agent's motion should be denied.

PART II - FACTS

9. On December 23, 2024, Hudson's Bay, as borrower, entered into an amended and restated credit agreement with Pathlight Capital LP (the **"Pathlight Agent"**), as agent, and the Pathlight Lenders, as set out in the Pathlight Credit Agreement. Certain affiliates act as guarantors.[7]

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[6] See paragraphs 27 to 50 of the Affidavit sworn by Michael Culhane on July 13, 2025 in this CCAA proceeding, which raises numerous issues with the liquidation process and fees (in excess of $40 million) generated therein (the "**Hilco/FILO Issues**").

[7] Affidavit of Jennifer Bewley sworn March 7, 2025, Application Record, Tab 2 [Initial Bewley Affidavit] at para. 146.

10. As of March 7, 2025, the outstanding principal owing under the Pathlight Credit Facility was approximately US$68,569,092. The Pathlight Credit Facility matured on May 1, 2025.[8]

11. The relative priorities between the Revolving Credit Facility, the FILO Credit Facility and the Pathlight Credit Facility are governed by a second amended and restated intercreditor agreement dated as of December 23, 2024 (the "**Intercreditor Agreement**").[9] Pursuant to the Intercreditor Agreement, the Pathlight Agent has priority over the ABL Agent as to certain property, including various leasehold interests in real property and the fixtures, accounts, and proceeds related thereto (the "**Pathlight Priority Collateral**").[10] The FILO Agent has a first ranking priority security interest in the Applicants' other assets (over which Pathlight holds a second ranking priority interest). The purpose of the Intercreditor Agreement is to allow each party the clear authority to consent to matters relating to their own priority collateral without interference from the other party.[11]

12. The Pathlight Priority Collateral includes 19 of the 25 CW Leases that are the subject of the requested CW Leases Assignment Order.[12]

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8 Initial Bewley Affidavit, paras. 147, 152; Third Report of the Monitor dated May 9, 2025 at para. 8.1.

9 Initial Bewley Affidavit, para. 162.

10 Initial Bewley Affidavit, para. 163.

11 Section 6.4 of the Intercreditor Agreement provides that "The ABL Agent agrees, on behalf of itself and the ABL Secured Parties, that it will not oppose (and shall be deemed to have consented to) any sale consented to by the Term Loan Agent of any Term Loan Priority Collateral…so long as the Proceeds received by the Term Loan Agent of such sale are applied in accordance with this Agreement."

12 The Pathlight Priority Collateral includes all CW Leases listed at Exhibit C to the Perugini Affidavit other than the CW Leases for Guildford Town Centre, Mapleview Centre, Masonville Place, Oshawa Centre, St. Laurent Shopping Centre and Southgate Shopping Centre.

13. While it is impossible to know with complete certainty who the fulcrum creditor will be at this stage of a CCAA proceeding, the Applicants have repeatedly expressed, and continue to express, the view that Pathlight is the "fulcrum" creditor in these proceedings.[13]

PART III - ISSUES AND THE LAW

14. Pathlight's response to the FILO Agent's motion addresses whether there is any legal or factual basis on which this Court could grant the relief sought by the FILO Agent in relation to the Central Walk Costs. It submits that the answer to both of these questions is no.

A. Responsibility for the Central Walk Costs

15. Pathlight does not agree with the FILO Agent that any single stakeholder in these proceedings should be required to bear the Central Walk Costs at all, and certainly not at this stage.

16. There is no basis for relieving the Applicants of their obligations to pay Rent under the CW Leases; the Rent payable under the CW Leases remain an obligation of the Applicants owing to the Objecting Landlords unless and until this Court either approves the assignment of the CW Leases to Central Walk who will then take over that obligation, or they are disclaimed on the basis that the CW Transactions are not approved. This position is supported by the Monitor.[14]

17. Equally, Pathlight submits that it would be fundamentally unfair to require Pathlight to bear the Central Walk Costs or to require Central Walk to bear any Applicant costs associated with the CW Transactions.

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[13] Perugini Affidavit, paras. 16, 45.

[14] Eighth Report of the Monitor dated August 20, 2025 [Eighth Report] at para. 7.9.

(a) Pathlight Should Not Be Required to Bear the Central Walk Costs

(i) Such relief is unprecedented

18. The FILO Agent suggests that Pathlight, as a party that stands to benefit from the CW Transactions, should bear the costs of pursuing the CW Transactions, regardless of whether or not the transaction is approved.

19. The FILO Agent has cited no case that stands for the proposition that a specific secured creditor that stands to realize a material subset of the benefits from a particular transaction must be prospectively required to bear all the costs attributable to the interim period leading up to the Court's hearing of the motion to approve that transaction or to the period after Court approval and prior to implementation of the transaction, which may include the time for appeals.

20. Pathlight does not dispute that, in certain circumstances, courts can allocate costs incurred in a CCAA proceeding. The mere fact that costs were incurred, however, does not make their allocation appropriate now or ever, nor does it dictate the manner of allocation, should such allocation eventually be necessary.

21. This Court has already held, in declining to approve the Restructuring Framework Agreement entered into in these proceedings, that even if the debtor company's assets are encumbered, those assets can still be sold, encumbered or disposed of as part of the CCAA proceeding. Moreover, a secured creditor cannot impose the terms on which those assets can be monetized. As Justice Osborne stated:

> it is not unusual in CCAA proceedings that assets of the debtor, including assets in which secured creditors assert a security interest and even a first ranking security interest, may, as appropriate in the particular circumstances of any given case and under the auspices of the Court-appointed Monitor and pursuant to Court order, sell, dispose of or encumber those assets.

> Those secured creditors are not automatically entitled to a veto over the sale of such collateralized assets, and nor are they entitled to unilaterally impose terms on the sale of such assets.[15]

22. The Applicants, in an exercise of their business judgment after receiving professional advice, and with the support of the Monitor, Pathlight and the FILO Agent, determined to pursue the CW Transactions on the basis that Central Walk was the successful bidder in the court-approved Lease Monetization Process. It was for the Applicants to decide whether to continue to pursue the CW Transactions in the face of the opposition from the Objecting Landlords and the need to work with the potential purchaser, on the basis that there was a reasonable prospect that the CCAA factors for the approval of the CW Transactions could be satisfied.

23. Pathlight supported this course of action as the best available means to maximize value for the assets subject to the CW Transactions, including the Pathlight Priority Collateral, but also for stakeholders as a whole. Obviously, the decision to execute the Central Walk APA was that of the Applicants, done with the FILO Agent's consent, and it would be fundamentally unfair to now order that Pathlight must bear the costs associated with the Applicants' decision.

24. The FILO Agent suggests that the relief being sought does not require a "further advance of money or credit" and that it is a matter relating only to future distributions. However, there is no urgency or reason whatsoever for cost allocation to be considered at this stage, on an incomplete record and in a vacuum relative to other costs and issues in this ongoing case. As the Monitor has noted, allocation of the Central Walk Costs "should be dealt with at a subsequent hearing on a full record after the Court has made a decision in respect of the Central Walk Approval Motion".[16]

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[15] March 29 Endorsement at para. 17(b).

[16] Eighth Report, para. 7.9.

25. The FILO Agent's request for an order requiring Pathlight to bear responsibility for the Central Walk Costs is effectively a thinly-disguised attempt to persuade this Court to engage in a premature cost-allocation process in this CCAA proceeding in a manner that materially disadvantages one creditor – Pathlight. This request is being made in the midst of continuing monetization activities being undertaken by the company who is paying the costs associated with *all* such activities, in complete isolation from the numerous other factors that may impact the global cost allocation that may ultimately be needed in this case.

26. The FILO Agent's own materials make clear it is asking for an allocation – "the FILO Agent seeks an equitable allocation of the transaction proceeds so that its priority collateral will not have been unduly depleted for the benefit of other creditors" – and also acknowledges that there will likely need to be a subsequent and final re-allocation of costs.[17] There is accordingly no logical or practical basis for such an artificial interim cost allocation exercise at this stage.

27. This unjustifiable proposed interim cost allocation is also serving as a basis for the FILO Agent's latest unprecedented request that was not contained in its original or amended notices of motion. The FILO Agent requests that they be paid $4 million of proceeds from realization on collateral over which they acknowledge Pathlight holds priority. This further ask, which is without legal or logical foundation, demonstrates that the FILO Agent's motion is really an attempt to obtain recovery ahead of other creditors, in the face of the Monitor's earlier refusal to authorize a larger distribution to the FILO Agent. It is also an impermissible attack on Pathlight's collateral, as submitted further below.

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[17] Reply Affidavit of Ian Fredericks sworn August 12, 2025, Reply Motion Record of the FILO Agent dated August 12, 2025, Tab A [Fredericks Reply Affidavit] at para. 35; FILO Agent Factum, para. 46: "To the extent necessary, any allocation of costs can be subject to final re-allocation."

(ii) Allocation process cannot be carried out prematurely

28. Pathlight accepts that there ***may*** need to be a formal allocation process at a later date, once the outcome of the CW Transactions approval motion is known, the entitlement to pension surplus has been determined, the art auction and matters related to the Charter are complete, assessment of intercreditor issues has been undertaken, and there has been consideration of any additional costs that may be incurred to complete the liquidation and wind-down of the Applicants' business. Such a process can only be carried out with the benefit of a full record, including the costs and outcome of each of the asset monetization processes. Such a record does not and could not exist at this incomplete stage of the proceedings. Again, the Monitor supports this position.[18]

29. In a future global allocation process, Pathlight would have the full opportunity to make submissions regarding the costs of all of the asset monetization processes carried out in this liquidating CCAA proceeding, including whether there has been improvident realization of collateral on which Pathlight has a second-ranking security interest. Cost allocation on a piecemeal basis, in the middle of the CCAA proceeding, in the absence of a full record, and with no urgency or basis for such exceptional relief, should be summarily rejected.

30. Cost allocation in the CCAA is not a mathematical exercise of determining whether one creditor did or did not receive actual or direct benefit from the CCAA proceeding and the related costs that were incurred.[19] Allocation is conducted on a case-by-case basis, based on what is "fair and equitable" in all of the circumstances, taking into consideration a variety of factors. The Court considers allocation in light of the priorities between creditors and the relative benefits or

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[18] Eighth Report, paras. 7.10, 10.4.

[19] See *Winnipeg Motor Express Inc., et al*, 2009 MBQB 204 [*Winnipeg Motor*] at para. 52.

detriments to particular creditors. The exercise is not a "strict accounting" of such benefits or detriments; a creditor need not benefit directly before the costs of an insolvency proceeding can be allocated against that creditor's recovery.[20]

31. Nor is the exercise a strict cost/benefit analysis.[21] It cannot be sufficient for a creditor to baldly assert that the creditor did not actually benefit from the CCAA proceeding as a whole, or from some isolated aspect of it. The question of "who benefited more" would require a careful accounting and cost benefit analysis of each party's circumstances. Such an exercise would be disproportionately costly and time-consuming and is therefore not the correct approach. [22] To the extent benefit to particular creditors is relevant, it is the potential benefits of the costs that are relevant.[23] In other words, it is not a hindsight exercise based on which creditors actually benefited.

32. Assertion by secured creditors that they would have been in a better position had they been able to simply realize on their security is also not the determining factor. As the Court held in *Winnipeg Motor*, "that may or may not have been so, but of course the point of the CCAA is that the collective good and the benefit to all stakeholders governs."[24]

33. All of these principles clearly demonstrate that cost allocation can only be fair and equitable when the Monitor and/or the Court has all of the relevant information before it, and each stakeholder whose recoveries will bear the impact of such allocation has the full opportunity to make submissions. The FILO Agent's attempt to impose the Central Walk Costs on Pathlight is

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20 *Arrangement relatif à FormerXBC inc. (Xebec Adsorption inc.)*, 2023 QCCS 2417 [*Xebec*] at paras. 44-45.

21 *Winnipeg Motor* at para. 52; *Xebec* at paras. 44-45.

22 *Winnipeg Motor* at para. 52.

23 *Winnipeg Motor* at para. 41.

24 *Winnipeg Motor* at para. 45.

not only premature, but directly contrary to the principles that the caselaw has stated should apply in a formal allocation process. Furthermore, it is noteworthy that the FILO Agent attempts to "solve" for all the complexity and issues noted above with the simple structure of the Court ordering the Monitor to prepare a proposed allocation in accordance with directions "reflected in the …. endorsement". This undeveloped approach to an unjustifiable isolated cost allocation, delivered in the absence of a full record or any urgency whatsoever, does not make sense.

(iii) FILO Agent's motion is a breach of the Intercreditor Agreement

34. Not only is the FILO Agent's approach unfair and without precedent, but the FILO Agent's motion (which appears to evolve with every document filed with the Court) is a breach of its obligations under the Intercreditor Agreement.

35. Section 6.4 of the Intercreditor Agreement grants Pathlight the exclusive authority to approve the sale of the Term Loan Priority Collateral (as defined in the Intercreditor Agreement), without any opposition from an ABL Secured Party, which includes the FILO Agent. This provision operates as a complete bar to the FILO Agent's attempt to require the Applicants and/or the Monitor to cancel the Central Walk APA and disclaim the CW Leases, or to oppose the approval of the CW Transactions in any way. Perhaps recognizing this issue, the FILO Agent has now apparently changed its approach, stating in its evidence on this motion that it "takes no position as to whether or not the Central Walk APA is approved by this Court."[25]

36. Yet the FILO Agent's position requiring Pathlight to bear responsibility for the Central Walk Costs continues to be a thinly-disguised attempt to give effect to its impermissible opposition to the CW Transactions, despite the fact that the approval of the CW Transactions would provide

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[25] Fredericks Reply Affidavit at para. 35.

value for the six CW Leases over which the FILO Agent has the first-ranking security interest. The fact that the FILO Agent's motion is in clear breach of the Intercreditor Agreement should further signal to this Court that the equities are against the FILO Agent. As noted above, matters of allocation must be both fair and equitable in all the circumstances.

37. The FILO Agent seeks to avoid this obstacle, which undermines the entire basis for its motion, by relying on an agreement to vary the Intercreditor Agreement (the "**March 17 Consent**") that is both completely irrelevant and was never in effect.[26]

38. Paragraph 3(a) of the March 17 Consent, read in isolation, states that "the ABL Priority Collateral (or proceeds of it) [can] only be used to fund lease payments until the week ending July 5, 2025."[27] However, read in its proper context, paragraph 3(a) was intended solely to confer rights on Pathlight in connection with the DIP Budget – Pathlight would not be entitled to withhold consent to a change to the DIP Budget involving the elimination of certain rent obligations to be paid after July 5.[28] The issue before the Court regarding the payment of the Central Walk Costs has nothing to do with the DIP Budget.

39. In any event, the March 17 Consent is not, and never has been, effective. The March 17 Consent is stated to only become effective upon satisfaction (or waiver) of the conditions in paragraph 4(d), which never happened. These conditions included that: "The Court shall have granted (i) the amended and restated Initial Order, which shall be in form and substance

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[26] Consent to Intercreditor Agreement, dated as of March 17, 2025 (the "**March 17 Consent**," appended as Exhibit "1" to the Fredericks Reply Affidavit).

[27] Fredericks Reply Affidavit, paras. 5-13.

[28] The Recitals to the March 17 Consent provide as follows: "WHEREAS, certain of the terms of such Junior DIP Financing require the consent of the Term Loan Agent under the Intercreditor Agreement, and the Term Loan Agent is willing to provide such consent, on the terms and subject to the conditions set forth in this Consent."

satisfactory to the Term Loan Agent". The form of Initial Order that would be satisfactory to the Term Loan Agent (i.e. Pathlight) was appended to the March 17 Consent and included the approval of an Amended DIP Facility, which was never sought.[29] This form of order was not granted, and Pathlight objected to the form that ultimately was granted.

40. In addition, Pathlight has not received the bargained-for benefits under the March 17 Consent and the DIP facility contemplated thereunder. For example, paragraph 9 of the Amended and Restated Junior DIP Term Sheet, which was attached to the March 17 Consent, contemplated that Pathlight would be paid interest and fees, which has not occurred.

41. In the earlier Consent to Intercreditor Agreement, dated March 7, 2025 (the "**March 7 Consent**"), which remains in force given the failure to satisfy the conditions precedent to the March 17 Consent, there is no equivalent to paragraph 3(a).[30] The Intercreditor Agreement contains no provision that would permit the FILO Agent to require Pathlight to bear the Central Walk Costs. The FILO Agent's motion is therefore contrary to the Intercreditor Agreement and is therefore an attempt to enlist this Court's assistance in mounting an impermissible collateral attack on Pathlight's priority security.

(b) Central Walk Should Not Bear Responsibility for Central Walk Costs

42. As the Monitor notes, there is no precedent in which a CCAA court has required a potential purchaser to fund the costs (or even a substantial portion of the costs) of a CCAA proceeding during the period while the debtor company seeks approval of a transaction that has been determined to be the successful bid following a court-approved sale process and/or during the

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29 March 17 Consent, Exhibit B-1.

30 Affidavit of Marleigh Dick affirmed August 25, 2025 at Exhibit "A".

period following approval or rejection of the transaction by the court.[31] If the CCAA court were to make such an order without the purchaser's consent, it would have a chilling effect on future sale processes.

43. It would also be highly prejudicial, regardless of whether the proposed transaction is approved. If the transaction receives court approval, the pricing of the bid would effectively be subject to retroactive adjustment by the Court. Such adjustment would apply even though the Lease Monetization Order in this case did not signal to bidders that their bid should make allowances for such costs.

44. If the transaction is not approved, and the potential purchaser is saddled with some or all of the costs of the debtor company's operations in the period required to seek the court's approval of the proposed transaction, the potential purchaser would stand to lose not only the potentially significant costs invested in their bid (including costs of due diligence and in preparing necessary business plans or other transaction documentation), but also would be forced to bear the costs of the CCAA proceedings during the period leading up to the Court's refusal to approve their transaction and even beyond. Many purchasers may consider this to pose unreasonable and unacceptable risks and decide not to bid in other CCAA proceedings.

45. Such an approach would be fundamentally inconsistent with the objectives of the CCAA and the need to facilitate restructuring options that maximize value for creditors as a whole. For this reason, this Court should refuse any request by the FILO Agent that some or all of the Central Walk Costs be imposed on the potential purchaser.

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[31] Eighth Report, para. 7.11.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of August, 2025.

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SCHEDULE "A"

LIST OF AUTHORITIES

Cases

1. *Arrangement relatif à FormerXBC inc. (Xebec Adsorption inc.)*, 2023 QCCS 2417
2. *Hudson's Bay Company, Re*, 2025 ONSC 2005
3. *Winnipeg Motor Express Inc., et al*, 2009 MBQB 204

I certify that I am satisfied as to the authenticity of every authority.

Date August 25, 2025

Signature

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF THE 1242939 B.C. UNLIMITED LIABILITY COMPANY et al.

Applicants

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PROCEEDING COMMENCED AT TORONTO

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