

**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 DCL CORPORATION (the "**Applicant**")

**FACTUM OF THE APPLICANT
(Returnable December 20, 2022)**

December 20, 2022

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PART I - OVERVIEW

1. The Applicant seeks certain relief pursuant to a proposed order (the “**Initial Order**”) under the *Companies' Creditors Arrangement Act* (Canada) (“**CCAA**”).¹
2. This application under the CCAA (the “**Application**”) is made in conjunction with a parallel proceeding commenced pursuant to chapter 11 of the United States Bankruptcy Code (the “**Chapter 11 Proceedings**”), by way of a voluntary petition filed on December 20, 2022, in the United States Bankruptcy Court for the District of Delaware, by the Applicant’s U.S. based related parties (collectively, “**DCL US**” and together with the Applicant and the Applicant’s other subsidiaries, the “**DCL Group**”).
3. All currency references contained herein are to USD, unless otherwise indicated.
4. The Applicant is facing a liquidity crisis and urgently requires access to additional capital in order to meet its working capital needs, including to pay employees, vendors, and utilities, and also to pay for the professional advisors required to address these issues.

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

5. The relief sought in the Initial Order will provide the breathing room and stability required to continue business operations while the Applicant seeks a going concern solution to its financial challenges. In that regard, should the requested relief be granted, the Applicant intends to continue to work with its professional advisors to secure a stalking horse purchaser for its business and return to Court to seek the approval of bidding procedures, in a coordinated manner with DCL US. The Applicant is of the view that seeking protection under the CCAA is in the best interest of the broad cross-section of the Applicant's stakeholders.

6. The relief sought in the Initial Order is limited to what is reasonably necessary to allow the Applicant to maintain the status quo and continue operations in the ordinary course during the initial 10-day stay of proceedings (the "**Stay**"). The Applicant intends to return to this Court for additional relief necessary to advance the CCAA proceedings at the Comeback Hearing to be scheduled prior to the expiration of the Stay, on December 29, 2022 (the "**Comeback Hearing**").

PART II - FACTS

7. The facts underlying this Application are more fully set out in the affidavit of Scott Davido, sworn December 20, 2022 (the "**Initial Affidavit**").² All capitalized terms used but not defined herein have the meanings ascribed to them in the Initial Affidavit, unless otherwise indicated.

A. Background and Corporate Structure

8. The Applicant is incorporated under the laws of Ontario and operates the DCL Head Office, the global headquarters for the DCL Group, which is located in Toronto.³ The Applicant is a direct wholly owned subsidiary of its U.S. parent, Colors, which is in turn a wholly owned subsidiary of Holdings.⁴ The Applicant wholly owns DCL UK and DCL NL (collectively, the "**European**

² Initial Affidavit of Scott Davido sworn December 20, 2022 [*Initial Affidavit*].

³ *Ibid* at paras 2, 29.

⁴ *Ibid* at para 21; Exhibit "B" to the Initial Affidavit.

Subsidiaries”), and DCC USA.⁵ The corporate structure of the DCL Group is attached as Exhibit “B” of the Initial Affidavit. The European Subsidiaries will continue to operate in the ordinary course and will not be subject to any insolvency proceeding in any jurisdiction.

B. The Applicant’s Business

9. The DCL Group is in the business of supplying pigments and dispersions to customers in the coatings, plastics, and digital printing markets.⁶ The DCL Group operates six manufacturing facilities throughout Canada, the U.S., the Netherlands, and the United Kingdom.⁷

10. The Applicant’s manufacturing facilities operate out of three Ontario facilities: the New Toronto Plant, the Mississauga Plant, and the Ajax Plant.⁸ The Applicant also operates the Ajax Distribution Centre, which is adjacent to the Ajax Plant.⁹ All of these facilities are currently operating.¹⁰

11. The Applicant employs 206 employees across its operating facilities and provides a host of employee and retirement benefits including through defined benefit and defined contribution pension plans.¹¹

12. The Applicant employs key members of the executive management team for the DCL Group.¹² All such employees regularly work out of the DCL Head Office.¹³ The Chief Executive Officer and Interim Chief Financial Officer of each member of the DCL Group, however, work

⁵ Initial Affidavit at para 21.

⁶ *Ibid* at para 25.

⁷ *Ibid* at para 24.

⁸ *Ibid* at para 29.

⁹ *Ibid*.

¹⁰ *Ibid*.

¹¹ *Ibid* at paras 112, 117.

¹² *Ibid* para 31.

¹³ *Ibid*.

out of facilities in the U.S. The proposed Chief Restructuring Officer works out of both the DCL Head Office and the New York office of Ankura Consulting Group LLC (“**Ankura**”).¹⁴

C. Intercompany Arrangements

13. As a result of a series of intercompany transactions, substantially all of the Applicant’s working capital assets were sold to its U.S. based affiliate, DCL USA LLC, with the effective dates for the principal transactions being August 1, 2021, and July 1, 2022.¹⁵

14. As a result of the sale of its working capital assets to DCL USA LLC, the Applicant only has a small number of third-party customers, and the majority of the inventory it produces is sold to DCL USA LLC which then on sells the inventory to its own customers.¹⁶ DCL USA LLC in turn provides funding to the Applicant.¹⁷ Historically, these intercompany transactions were reflected by way of entries of payables and receivables in the books and records of the parties.¹⁸ The value attributed to the sales and the provision of shared services is determined in consultation with the DCL Group Tax Advisor and is consistent with the DCL Group’s transfer pricing policy.¹⁹ The book entries are subject to ongoing adjustment.²⁰

15. In preparation for the commencement of these proceedings, the Applicant and members of the DCL Group formalized intercompany arrangements related to finished goods inventory sales to DCL USA LLC, shared services, flow through payments by DCL USA LLC to a European Subsidiary, and intercompany loans by DCL USA LLC, through two intercompany agreements: (i) the US/Canada Intercompany Agreement between the Applicant and DCL USA LLC, and (ii)

¹⁴ Initial Affidavit at para 31.

¹⁵ *Ibid* at paras 37, 40.

¹⁶ *Ibid* at paras 40, 46.

¹⁷ *Ibid* at para 44.

¹⁸ *Ibid*.

¹⁹ *Ibid* at paras 47, 49.

²⁰ *Ibid*.

the European Intercompany Agreement between the Applicant, DCL USA LLC and the European Subsidiaries, DCL UK and DCL NL (collectively, “**Intercompany Agreements**”).²¹ The Intercompany Agreements govern arrangements from and after the Filing Date.²²

16. The US/Canada Intercompany Agreement provides that title to the inventory sold by the Applicant to DCL USA LLC (the “**DCL USA LLC Inventory**”) will transfer when the DCL USA LLC Inventory leaves the Applicant’s manufacturing facilities.²³ While such inventory produced at the Mississauga Plant is shipped to directly to customers, such inventory produced at the Ajax Plant and the New Toronto Plant is shipped to Distribution Centres located in Ontario.²⁴ The value of the DCL USA LLC Inventory in Ontario is material.²⁵

17. In addition, the US/Canada Intercompany Agreement provides that DCL USA LLC will make monetary “intercompany transfers” to the Applicant.²⁶ As noted above, in addition to payment of obligations owing by DCL USA LLC to the Applicant, the intercompany transfers by DCL USA LLC could include intercompany loans, for the benefit of the Applicant.²⁷

18. It is requested that such intercompany loans to the Applicant be secured by a court-ordered charge in the CCAA proceedings over the property of the Applicant (other than the HSBC Cash Collateral) (the “**Intercompany Charge**”).²⁸ To the extent there is a receivable owing by DCL USA LLC to the Applicant, such receivable will be afforded the priority of an administrative claim

²¹ Initial Affidavit at paras 35, 51. The Applicant does not have material obligations under the European Intercompany Agreement.

²² *Ibid* at para 36.

²³ *Ibid*.

²⁴ *Ibid* at para 49(b).

²⁵ *Ibid* at para 147.

²⁶ *Ibid* at paras 50, 159.

²⁷ *Ibid* at para 50.

²⁸ *Ibid* at para 166; US/Canada Intercompany Agreement, section 4.6.

in the Chapter 11 Proceedings.²⁹ Completion of the Intercompany Agreements was a precondition to securing the required DIP Financing.³⁰

D. Liabilities

(i) *Secured Obligations*

19. As of July 31, 2022, the DCL Group had existing secured indebtedness in the approximate aggregate amount of \$130 million pursuant primarily to a term loan and a revolving credit facility as discussed below.³¹

(a) *The Term Loan*

20. The Applicant and certain of its US affiliated entities entered into the Term Loan.³²

21. As of July 31, 2022, the total principal due by the DCL Group was approximately \$90.5 million.³³ Approximately \$11.6 million was related to direct borrowings by the Applicant.³⁴ The obligations owing by the Applicant under the Term Loan are secured.³⁵

22. The Term Loan includes a negative covenant which mandates that the Term Loan Borrowers shall not exceed indebtedness under the ABL Credit Facility (as described below) above a prescribed amount, which amount could be amended from time to time via waiver letter (the “**ABL Cap**”).³⁶

²⁹ Initial Affidavit at para 167.

³⁰ *Ibid* at para 83.

³¹ *Ibid* at para 65.

³² *Ibid* at para 66.

³³ *Ibid* at para 71.

³⁴ *Ibid*.

³⁵ *Ibid* at para 72.

³⁶ *Ibid* at para 73.

(b) *The ABL Credit Agreement*

23. On April 25, 2018, the Applicant entered into the ABL Credit Agreement for the provision of a revolving credit facility, together with certain affiliated U.S. entities, including DCL USA LLC as a borrower.³⁷ The maximum credit under the ABL Credit Facility available to the DCL Group is \$55 million, but the borrowing capacity is restricted by its borrowing base comprised of eligible accounts receivable and inventory.³⁸ As noted above, this maximum is further restricted by the ABL Cap under the Term Loan.³⁹ The total obligations owing under the ABL Credit Facility were typically at or near the ABL Cap and substantially all of the obligations, until shortly before the filing of the Application, were drawn by the Applicant.⁴⁰

24. A series of defaults have occurred under the ABL Credit Agreement.⁴¹

25. Independent counsel to the Proposed Monitor has reviewed the ABL Pre-Filing Security and issued an opinion to the Proposed Monitor that subject to standard assumptions, qualifications and limitations customary in rendering security opinions of this nature, the security granted by the Applicant in respect of the ABL Credit Facility constitutes valid and enforceable security perfected by registration in the Province of Ontario.⁴²

(c) *ABL Credit Facility Restructuring*

26. Following certain preliminary steps, on December 16, 2022, in cooperation with the Pre-Filing ABL Agent, the DCL Group restructured the ABL Credit Facility to make DCL USA LLC the sole party with borrowings under the ABL Credit Facility.⁴³ The primary purpose of the

³⁷ Initial Affidavit at para 76.

³⁸ *Ibid* at para 77.

³⁹ *Ibid* at para 78.

⁴⁰ *Ibid*; Pre-Filing Report of the Proposed Monitor dated December 20, 2022 at para 4.17 [*Pre-Filing Report*].

⁴¹ Initial Affidavit at paras 79-80.

⁴² *Ibid* at para 84.

⁴³ *Ibid* at para 81.

transaction was to align the indebtedness under the ABL Credit Facility with the party that has ownership of the DCL Group's primary working capital assets and provide the Applicant with borrowing capacity under the DIP ABL Facility (as discussed below).⁴⁴ The restructuring of the ABL Credit Facility was a precondition to securing the required DIP Financing, as discussed below.⁴⁵

27. The Applicant's other secured obligations are set out in the Initial Affidavit.⁴⁶

(ii) *Unsecured Obligations*

28. The Applicant has significant unsecured obligations. Most notably, the Applicant is liable to KNRV for earn-out obligations in the amount of CAD \$9,822,000 and does not have the capacity to pay such obligation at this time.⁴⁷ The Applicant also owes approximately \$11.9 million to third-party vendors and trade creditors as of the week ended December 9, 2022, and approximately \$2.2 million of this liability is overdue by 90 days.⁴⁸ The Applicant's other unsecured obligations are set out in the Initial Affidavit.⁴⁹ The Applicant is unable to pay its obligations generally as they become due.⁵⁰

(iii) *Statutory Obligations*

29. The Applicant is current on its obligations for payroll, source deductions, current pension liabilities, and HST, and is not in arrears in respect of any of these matters.⁵¹

⁴⁴ Initial Affidavit at para 83.

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at paras 88-89.

⁴⁷ *Ibid* at para 108.

⁴⁸ *Ibid* at para 109.

⁴⁹ *Ibid* at paras 90-110.

⁵⁰ See *e.g. ibid* at para 131-137.

⁵¹ *Ibid* at para 111.

E. Issues Leading to the CCAA Filing

30. The DCL Group's profitability depends, in large part, on the varying economic and other conditions of the markets they serve and the input prices from their cost of goods sold.⁵² Until recently, the demand for the DCL Group's products has remained within the range of expected forecasts, however, the DCL Group's input costs have increased due to several macro-economic circumstances.⁵³ Heavy inflation has required multiple rounds of input cost increases.⁵⁴ The Applicant was also faced with supply chain issues due to substantial delays and restrictions in receiving raw materials, higher costs and a higher working capital requirement.⁵⁵ In addition, the Applicant faced challenges with retaining and recruiting employees.⁵⁶

F. The Pre-Filing Sale Process

31. Prior to making any final determination with respect to commencing formal insolvency proceedings, the DCL Group had retained TM Capital to market its business and assets as a going concern.⁵⁷ Although the results of the process were encouraging, the DCL Group concluded that it would not be possible to enter into, execute, and close a binding purchase agreement with a potential bidder in sufficient time to address the DCL Group's liquidity crisis without additional financing.⁵⁸

32. As a result of the foregoing, the Applicant seeks relief under the CCAA to prevent any creditor action, to give the Applicant the opportunity to secure additional financing, and to give

⁵² Initial Affidavit at para 132.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid* at para 142.

⁵⁸ *Ibid* at para 144.

the Applicant the opportunity to implement a going concern solution.⁵⁹ With the commencement of the Chapter 11 Proceedings, the integrated nature of the DCL Group's businesses including its financing, now make the commencement of these proceedings in Canada necessary in order to maintain coordination and stability.⁶⁰

G. Chief Restructuring Officer

33. Prior to the commencement of these proceedings, the Applicant engaged Scott Davido, a Senior Managing Director from Ankura and an experienced senior executive management and financial/restructuring advisor, to act as Chief Restructuring Officer (the "CRO") and to provide financial, advisory, and consulting services to the Applicant.⁶¹

H. Financing During the Proceedings

34. The Applicant urgently requires access to additional capital in order to meet its working capital needs, including to pay employees, vendors, utilities, and to pay the professional advisors required to address these issues.⁶²

35. The Applicant and DCL US have settled on the terms for the provision of the DIP Financing with the DIP Agent, which will permit the Applicant to continue its operations during these CCAA proceedings.⁶³

36. Key features of the proposed DIP Facility include: (a) applying cash receipts to amounts outstanding under the ABL Credit Facility while new borrowings will be made under the proposed DIP Facility (as a result of the restructuring of the ABL Credit Facility, however, all such outstanding borrowings now reside with DCL USA LLC); (b) obligations outstanding under the

⁵⁹ Initial Affidavit at para 145.

⁶⁰ *Ibid.*

⁶¹ Pre-Filing Report at paras 11.1-11.2.

⁶² Initial Affidavit at para 137.

⁶³ *Ibid* 153.

ABL Credit Facility will act as a dollar for dollar block on availability under the DIP ABL Credit Facility; (c) the Applicant will guarantee the US DIP Borrowers (the “**Post-Filing Guarantee**”) and the US DIP Borrowers will guarantee the Applicant, in part, as consideration for the DCL USA LLC’s agreement to pay off the amounts owed by the Applicant under the ABL Credit Agreement, which paydown as noted above, has been completed; (d) DIP Financing will consist of up to \$55 million of revolving loans provided to the US DIP Borrowers and the Applicant, subject to the applicable borrowing bases; and (e) the DIP Financing is to be secured by a Court-ordered charge against the Property, other than Excluded Collateral (as such terms are defined in the Initial Order and the Initial Affidavit, respectively).⁶⁴

I. The Proposed Monitor

37. It is proposed that Alvarez & Marsal Canada Inc. will act as the Monitor in these CCAA proceedings (the “**Proposed Monitor**”).⁶⁵

PART III - ISSUES

38. The issue before this Court is whether the relief requested in the Initial Order should be granted. The requested relief includes:

- (a) a declaration that the Applicant is a “debtor company” to which the CCAA applies;
- (b) an extension of a related party stay of proceedings to DCL USA LLC in respect of DCL USA LLC Inventory;
- (c) the appointment of a chief restructuring officer;
- (d) approval of the proposed DIP Facility and the granting of the DIP Charge (as defined below);

⁶⁴ Initial Affidavit at para 155.

⁶⁵ *Ibid* at para 150.

- (e) the granting of the proposed Administration Charge (as defined below);
- (f) the granting of the proposed Directors' Charge (as defined below); and
- (g) the approval of the Intercompany Agreements and the granting the proposed Intercompany Charge.

PART IV - THE LAW AND DISCUSSION

A. The CCAA applies

39. The Applicant is a company to which the CCAA applies. As detailed in the Initial Affidavit, (i) the Applicant is incorporated in Ontario,⁶⁶ (ii) is insolvent and unable to meet its obligations as they generally become due, and (iii) has claims in excess of CAD\$5 million against it.⁶⁷

40. This Application is properly before this Court as the Applicant's head office is in Toronto, Ontario.⁶⁸

41. The Applicant has also complied with the obligations of section 10(2) of the CCAA, which sets out the documentation required in connection with an initial application.⁶⁹ This initial Application is accompanied by (a) a statement indicating the weekly projected cash flow of the company;⁷⁰ (b) a report containing the prescribed representations of the company regarding the preparation of the cash-flow statement;⁷¹ and (c) copies of applicable financial statements.⁷²

B. The Stay of Proceedings should be extended to DCL USA LLC

42. Stays of proceedings with respect to an applicant company are routinely granted by initial orders commencing CCAA proceedings. Courts have also extended that relief to non-debtor parties

⁶⁶ Initial Affidavit at para 14.

⁶⁷ CCAA, s 3(1), definition of "debtor company".

⁶⁸ Initial Affidavit at para 2; CCAA, s 9(1).

⁶⁹ CCAA, s 10(2).

⁷⁰ Pre-Filing Report at paras 8.1-8.5.

⁷¹ *Ibid* at para 8.1, Appendix "B" to the Pre-Filing Report.

⁷² Initial Affidavit at para 63; Exhibit "E" to the Initial Affidavit.

in appropriate circumstances.⁷³ In doing so, courts have looked at factors including whether the subsidiaries of the CCAA applicant had guaranteed the applicant's secured loans and whether the non-applicants were deeply integrated into the applicant's business operations.⁷⁴

43. In this case, these factors weigh in favour of extending the Stay to protect the DCL USA LLC Inventory located in the Distribution Centres in Ontario: (i) DCL USA LLC and the Applicant guarantee each others secured debts as contemplated by the DIP ABL Credit Agreement, (ii) the two parties are deeply integrated, including because the Applicant sells substantially all of its manufactured finished goods inventory to DCL USA LLC, (iii) the US/Canada Intercompany Agreement provides that DCL USA LLC will own the finished goods inventory located in the Distribution Centres in Ontario, and (iv) the value of finished goods inventory located in the Distribution Centres in Ontario is material.⁷⁵

44. In order to ensure that this inventory is not subject to any precipitous creditor action, the Applicant requests that, in addition to the standard stay of proceedings in favour of the Applicant, this Court grant a narrow, related party stay of proceedings in favour of DCL USA LLC, staying any creditor action with respect to the DCL USA LLC Inventory. The Applicant believes such stay will help maintain the status quo and preserve value for the Applicant and its stakeholders by maintaining a stable and secure supply of inventory to its main customer, DCL USA LLC.

C. The CRO should be appointed

45. The Applicant seeks to have the CRO court-appointed, and granted the protections and safeguards afforded to court-appointed officers, in the discharge of his obligations. The Court has held that the appointment of a CRO is appropriate where such expertise will assist the debtor in

⁷³ CCAA, s 11.02(1). See also *e.g. Re Target Canada Co*, 2015 ONSC 303 at para 48 [*Target*].

⁷⁴ *Re Canwest Global Communications Corp.*, [2009] OJ No 4286, 2009 CanLII 55114 (On Sup Ct) at paras 28-30 [*Canwest* 2009]; *Target* at para 49.

⁷⁵ Initial Affidavit at para 147.

achieving the objectives of the CCAA.⁷⁶ The Court has the statutory authority to make an order appointing a CRO pursuant to section 11 of the CCAA.⁷⁷

46. Mr. Davido's expertise and continued participation are critical to achieving the objectives of the CCAA. Mr. Davido has the knowledge and expertise derived from prior large restructurings, including those with cross-border elements, to fulfill his obligations as CRO.⁷⁸ The engagement of Mr. Davido enables the Applicant's senior management to continue to focus on operations while Mr. Davido concentrates his efforts on the Applicant's restructuring efforts.

D. The proposed DIP Facility should be approved and the DIP Charge be granted

(i) *DIP Financing Generally*

47. Pursuant to section 11.2(5) of the CCAA, where an interim financing order is requested, the Court must be 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."⁷⁹

48. Courts have approved interim financing where it would provide stability to the debtor's business, ensure liquidity, prevent customers from going elsewhere, and ensure the continued day-to-day operations of the debtor's business.⁸⁰

49. Absent the proposed DIP Facility, the Applicant would be unable to continue its business operations in the ordinary course. Given the current economic and market conditions and the

⁷⁶ [Re Walter Energy Canada Holdings Inc, 2016 BCSC 107](#) at para 35 [*Walter*].

⁷⁷ CCAA, s 11.

⁷⁸ Pre-Filing Report at para 11.1-11.2.

⁷⁹ CCAA, s 11.2(5).

⁸⁰ [Re Mobilicity Group, 2013 ONSC 6167](#) at paras 30-31.

Applicant's extensive liabilities, the proposed DIP Facility is urgently needed to pay the Applicant's working capital needs and other costs associated with these proceedings.⁸¹

50. As the Applicant's initial borrowing capacity as set out in the Initial Order is restricted to \$5 million under the DIP Facility and is limited to what is strictly necessary for the continued operations of the Applicant until the Comeback Hearing,⁸² the requirement in subsection 11.2(5) is satisfied.⁸³

(ii) *The DIP Charge*

51. Sections 11.2 and 11.2(2) of the CCAA provide the Court with express statutory authority to approve the DIP Charge and to order that it rank in priority over the claims of any secured creditor.⁸⁴ The Applicant, however, is not seeking to have the proposed DIP Charge in the proposed Initial Order rank in priority to any party not served with this Application, subject to the Applicant intends to seek elevation of the DIP Charge at the Comeback Hearing, following service to all Notice Parties.

52. In the Initial Order, the Applicant is seeking a DIP Charge that will rank subordinate to the proposed Administration Charge but have priority over the proposed Directors' Charge and the proposed Intercompany Charge. The proposed DIP Charge also respects the priorities established in the Intercreditor Agreement between the Pre-Filing ABL Agent and the Term Loan Agent over different categories of collateral.⁸⁵

⁸¹ Initial Affidavit at paras 132, 153.

⁸² *Ibid* at para 158.

⁸³ CCAA, s 11.2(5).

⁸⁴ *Ibid*, s 11.2.

⁸⁵ Initial Affidavit at Exhibit "H"

53. Section 11.2(4) of the CCAA sets out non-exhaustive factors for a Court to consider when deciding whether to create an interim financing charge.⁸⁶ These factors are met in the circumstances of this case and support approval of the DIP Financing and the DIP Charge being requested by the Applicant:

- (a) The Length of the Proceedings. The Applicant seeks to secure a Stalking Horse Agreement on or before January 31, 2023⁸⁷ and complete a going concern sale of its business, in coordination with other members of the DCL Group, by March 31, 2023.⁸⁸ The Applicant is of the view that such timeframe is reasonable and appropriate in the circumstances;
- (b) Management of Business. The proposed restructuring efforts of the Applicant will be overseen by a seasoned CRO, with the support of an experienced management team focussed on achieving pragmatic solutions on an expedited basis;⁸⁹
- (c) Confidence of Major Creditors. The Pre-Filing ABL Agent and ABL Lenders have agreed to act as DIP Agent and DIP Lenders, respectively, and are providing the proposed DIP Financing pursuant to an agreed upon DIP Budget.⁹⁰ The Term Loan Lenders have been consulted in connection with these proceedings and the provision of the proposed DIP Financing;⁹¹
- (d) Enhance Prospects of Viable Restructuring. The proposed DIP Financing is vital in providing the Applicant a window of opportunity to pursue and secure a going concern solution. Absent the proposed DIP Financing, the Applicant would have to cease

⁸⁶ CCAA, s 11.2(4).

⁸⁷ Initial Affidavit at para 186.

⁸⁸ *Ibid* at para 156(i).

⁸⁹ Pre-Filing Report at para 11.2.

⁹⁰ *Ibid* at para 4.17.

⁹¹ Initial Affidavit at para 75.

operations, causing disruption to the Applicant's employees, customers, suppliers, landlords and creditors. The proposed DIP Financing preserves the opportunity to enhance value for the Applicant and its stakeholders;⁹²

- (e) Nature of the Company's Property. The Applicant's borrowings under the proposed DIP Facility will be limited by its borrowing base.⁹³ Accordingly, it is anticipated that the assets over which the DIP Charge will have priority should be sufficient to satisfy the obligations of the Applicant under the proposed DIP Facility. The Applicant's guarantee obligations are discussed below;
- (f) Material Prejudice to Creditors as a Result of Charge. As confirmed by the review of the ABL Pre-Filing Security by independent counsel to the Proposed Monitor, the ABL Facility constitutes valid and enforceable security perfected by registration in the Province of Ontario.⁹⁴ The DIP Charge essentially has the same relative priority as did the ABL Pre-Filing Security and the overall secured debt owing by the Applicant, as principal borrower, has been significantly reduced as a result of the restructuring of the ABL Credit Facility.⁹⁵ The proposed DIP Charge is a condition of the DIP Financing. Creditors are not materially prejudiced by the requested DIP Charge; and
- (g) Monitor's Report on Cashflows. The DIP Financing is appropriate having regard to the Applicant's cash-flow statement, and the amount that is proposed to be funded prior to the Comeback Hearing is only the portion necessary to keep the Applicant operating in the ordinary course of business during that time.⁹⁶

⁹² Pre-Filing Report at para 6.1.

⁹³ Initial Affidavit at para 155(d).

⁹⁴ Pre-Filing Report at para 4.17.

⁹⁵ Initial Affidavit at para 155(f).

⁹⁶ Pre-Filing Report at para 8.3.

(iii) The Post-Filing Guarantee

54. The DIP ABL Credit Agreement provides that the Applicant will guarantee the obligations of DCL USA LLC, including those subject to the “creeping roll-up.”⁹⁷ The Applicant did not previously guarantee DCL USA LLC’s obligations under the ABL Credit Facility.

55. In *Re Indalex Ltd.*, under a similar fact pattern, the Court considered the appropriateness of approving a guarantee in connection with a cross-border interim financing facility based on the following factors: (a) the need for additional financing by the Canadian debtor to support a going concern restructuring; (b) the benefit of breathing space afforded by CCAA protection; (c) the availability (or lack thereof) of any financing alternatives, including the availability of alternative terms to those proposed by the interim financing lender; (d) the practicality of establishing a stand-alone solution for the Canadian debtors; (e) the contingent nature of the liability of the proposed guarantee and the likelihood that it will be called on; (f) any potential prejudice to the creditors of the entity if the request is approved, including whether unsecured creditors are put in any worse position by the provision of a cross-guarantee of a foreign affiliate than they were prior to the filing, apart from the impact of the super-priority status of new advances to the debtor under the interim financing facility; (g) the benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied; and (h) a balancing of the benefits accruing to stakeholders generally against any potential prejudice to creditors.⁹⁸

56. The Applicant submits that the facts set out above satisfy the foregoing criteria for approving the proposed Post-Filing Guarantee as follows:

⁹⁷ Initial Affidavit at para 155(b).

⁹⁸ [*Re Indalex Limited*, \(2009\) 52 CBR \(5th\) 61, 2009 CanLII 17351](#) at paras 8, 38.

- (a) Need for Additional Financing. The Applicant is in need of the additional financing in order to support continued operations during the period in which the Applicant will seek a going concern restructuring;⁹⁹
- (b) Breathing Space. The breathing space that will be afforded by the proposed DIP Financing will permit the Applicant the wherewithal to identify a going concern solution;¹⁰⁰
- (c) No Alternatives. There is no other viable alternative available to the Applicant to fund its pursuit of a going concern solution;¹⁰¹
- (d) No Stand-Alone Solution. A stand-alone solution is impractical given the integrated nature of the DCL Group's business and the divestiture of the Applicant of its primary working capital assets.¹⁰² The Applicant requires the financial support of DCL USA LLC, whose obligations are being guaranteed under the proposed DIP Financing, during these proceedings;¹⁰³
- (e) Contingent Nature of Guarantee. DCL USA LLC's borrowings are supported by its own borrowing base, which is based on a percentage of the value of eligible inventory and receivables.¹⁰⁴ Accordingly, it is anticipated that in a realization scenario, the assets of DCL USA LLC will satisfy its own obligations and therefore it is not anticipated that the proposed Post-Filing Guarantee will be called upon.¹⁰⁵

In addition, the DIP ABL Credit Agreement includes provisions that require that, upon the maturity of the DIP Facility or an event of default thereunder, the proceeds of the

⁹⁹ Pre-Filing Report at para 6.1.

¹⁰⁰ Initial Affidavit at para 153; Pre-Filing Report at para 6.1.

¹⁰¹ Pre-Filing Report at para 6.3(i)-(ii).

¹⁰² See *e.g.* Initial Affidavit at para 152.

¹⁰³ *Ibid* at paras 153, 155(c).

¹⁰⁴ Pre-Filing Report at para 6.3(iv)(a).

¹⁰⁵ *Ibid* at para 6.3(b).

collateral of DCL Canada shall be applied to satisfy obligations of the US Borrowers only after the proceeds of substantially all of the ABL Priority Collateral of the US Borrowers has been applied to such obligations, making it less likely the Post-Filing Guarantee will be called upon.¹⁰⁶ This Court has previously approved of this “quasi-marshalling” concept as a being a reasonable and pragmatic approach to addressing concerns arising for the provision of a cross-border guarantee;¹⁰⁷

- (f) No Potential Prejudice. Had the debt restructuring not taken place, the Applicant would have continued to be liable for virtually the entire amount of the indebtedness under the ABL Credit Facility.¹⁰⁸ The Applicant has no greater liability than that as a result of the proposed Post-Filing Guarantee itself. Accordingly, the proposed Post-Filing Guarantee does not materially change the collateral position of subordinate creditors of the Applicant, relative to their pre-filing position. The balance of prejudice favours the granting of the proposed Post-Filing Guarantee;
- (g) Benefits to Stakeholders. As described above, the Applicant’s previous indebtedness of approximately \$40 million under the ABL Facility was restructured to make DCL USA LLC the sole borrower with borrowings under the DIP ABL Facility.¹⁰⁹ The proposed Post-Filing Guarantee was part of the consideration of that paydown.¹¹⁰ The paydown of the Applicant’s ABL Facility debt allows the Applicant to have borrowing capacity under the DIP Facility needed to benefit its stakeholders as a whole, as outstanding amounts under the ABL Facility act as a dollar for dollar block on availability under the DIP ABL

¹⁰⁶ Pre-Filing Report at para 6.3(iv)(a).

¹⁰⁷ [*Re Hollander Sleep Products, LLC et al*, 2019 ONSC 3238](#) at para 51.

¹⁰⁸ Pre-Filing Report at para 6.3(iv)(c).

¹⁰⁹ Initial Affidavit at para 82.

¹¹⁰ *Ibid* at para 155(c).

Facility.¹¹¹ This accommodation could not be achieved without the granting of the proposed Post-Filing Guarantee; and

- (h) Balancing of Interest. For the reasons set out above, when viewed in totality, the benefits of the proposed DIP Financing far outweigh the relatively remote prejudice that may be suffered by stakeholders as a result of the granting of the proposed Post-Filing Guarantee.

E. The Administration Charge should be granted

57. The Applicant is seeking a Court-ordered charge over the Property (as defined in the Initial Order) (other than the HSBC Cash Collateral) in the amount of \$175,000 to secure the professional fees and expenses of the Applicant, the Proposed Monitor, and counsel to the Proposed Monitor (the “**Administration Charge**”).¹¹²

58. 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.¹¹³ The Applicant does not seek to prime any secured creditor not served with the Application, subject to the right to seek elevation of the Administration Charge at the Comeback Hearing following service to the Notice Parties.¹¹⁴

59. The Court in *Re Canwest Publishing Inc.* articulates the following non-exhaustive list of factors to assess when determining whether to grant an administration charge: (a) the size and complexity of the businesses being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the

¹¹¹ Initial Affidavit at para 155(d).

¹¹² *Ibid* at para 162.

¹¹³ CCAA, s 11.52(1)-(2); [Re US Steel Canada Inc., 2014 ONSC 6145](#) at paras 13, 21 [*US Steel*]; *Canwest* 2009 at paras 37-38; [MPX International Corporation, 2022 ONSC 4348](#) at para 62 [*MPX*].

¹¹⁴ Pre-Filing Report at paras 12.2-12.4; Initial Affidavit at para 162.

proposed charge appears to be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the monitor.¹¹⁵

60. The Applicant submits that it is appropriate for this Court to exercise its jurisdiction and grant the proposed Administration Charge, given that:

- (a) Size and complexity. The Applicant operates a complex and sizeable business and requires the knowledge, expertise, and continued participation of the beneficiaries of the proposed Administration Charge during these CCAA proceedings;¹¹⁶
- (b) Role of beneficiaries. The beneficiaries of the Administration Charge have continued and will continue to contribute to these CCAA proceedings and assist the Applicant with continuing to operate its business in the ordinary course;
- (c) No duplication. The only beneficiaries of the proposed Administration Charge are counsel to the Applicant, the Proposed Monitor and counsel to the Proposed Monitor, each of which play unique and distinct roles in advancing the efforts of the Applicant to restructure and provide the requisite oversight and supervision required by this Court;
- (d) Quantum. The quantum of the proposed Administration Charge was calculated with the assistance of the Proposed Monitor and considered in light of similar CCAA proceedings;¹¹⁷ and
- (e) Secured creditors. The DIP Agent and DIP Lenders have consented to the proposed Administration Charge and the Term Loan Lenders have been advised of the proposed Administration Charge and the quantum and have raised no objection.¹¹⁸

¹¹⁵ [*Canwest Publishing Inc.*, 2010 ONSC 222](#) at para 54.

¹¹⁶ *Ibid*; *Target* at paras 73-75.

¹¹⁷ Pre-Filing Report at para 12.6.

¹¹⁸ See Exhibit “L” to the Initial Affidavit.

- (f) Monitor's Position. The Proposed Monitor is supportive of the proposed Administration Charge and believes it to be reasonable and appropriate in the circumstances.¹¹⁹

F. The Directors' Charge should be granted

61. The Applicant is seeking a charge over the Property (other than the HSBC Cash Collateral) in the amount of CAD\$1,000,000 to secure the indemnity of its directors and officers for liabilities that they may incur during these CCAA proceedings (the "**Director's Charge**").¹²⁰

62. Section 11.51 of the CCAA authorizes this Court to grant a charge in favour of a debtor company's directors and officers in an amount it considers appropriate where the secured creditors are likely to be affected by the charge are given notice thereof.¹²¹

63. In granting charges securing the indemnity of a debtor company's directors and officers, courts have considered, among other things, whether: (a) notice has been given to the secured creditors likely to be affected by the charge; (b) the amount of the proposed charge is appropriate given the directors' and officers' estimated exposure; (c) a debtor company could obtain adequate indemnification insurance for the director at a reasonable cost;¹²² and (d) the proposed charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct.

64. The Applicant submits it is appropriate in these circumstances for this Court to exercise its jurisdiction and grant the proposed Directors' Charge given that:

- (a) Notice to Secured Creditors. The Applicant does not seek to prime any secured creditor who has not received notice of this Application, subject to the Applicant's ability to seek

¹¹⁹ Pre-Filing Report at para 12.6.

¹²⁰ Initial Affidavit at para 164.

¹²¹ CCAA, s 11.51(1)-(4); *US Steel* at para 20; *Canwest* 2009 at para 45.

¹²² [*Lydian International Limited*, 2019 ONSC 7473](#) at paras 52-54; *MPX* at paras 66-68; *Canwest* 2009 at paras 47-48.

elevation of the Directors' Charge of the Comeback Hearing, following service to the Notice Parties.¹²³

- (b) Amount of Charge. The Proposed Monitor assisted the Applicant in the calculation of the Directors' Charge, taking into consideration the amount of the Applicant's payroll, vacation pay and federal and provincial sales tax liabilities during the initial 10-day stay period. The Proposed Monitor is of the view that the proposed Directors' Charge is required and reasonable in the circumstances.¹²⁴
- (c) Director's and Officers Insurance. The proposed Director's Charge will only apply in circumstances where directors' and officers' insurance are not available.¹²⁵
- (d) Gross negligence or willful misconduct. The proposed Directors' Charge will not apply in circumstances of gross negligence or willful misconduct.¹²⁶

G. The Intercompany Agreements should be approved, and the Intercompany Charge should be granted

65. The Applicant is part of an integrated business with the DCL Group and the Applicant sells substantially all of its manufactured finished goods inventory to DCL USA LLC.¹²⁷

66. The Intercompany Agreements formalize intercompany transactions between the Applicant and other members of the DCL Group that are anticipated to continue following the commencement of these proceedings.¹²⁸ They were prepared in coordination with the DCL Group's Tax Advisor.¹²⁹ The Intercompany Agreements are also a condition of the proposed DIP

¹²³ Pre-Filing Report at para 12.4.

¹²⁴ *Ibid* at para 12.11.

¹²⁵ *Ibid* at para 12.10.

¹²⁶ *Ibid* at para 12.9.

¹²⁷ Initial Affidavit at paras 46, 131.

¹²⁸ *Ibid* at para 36.

¹²⁹ *Ibid* at paras 52.

Facility.¹³⁰ It is reasonable and appropriate to approve the Intercompany Agreements in these circumstances.

67. Where the operations and expenses of debtor companies are funded in the ordinary course through intercompany advances, it is appropriate for the CCAA court to approve the continuation of those arrangements during the CCAA proceedings and to grant an intercompany charge over the assets of the borrowers.¹³¹

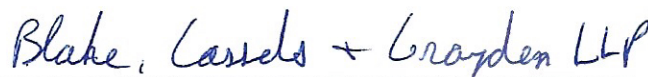
68. Intercompany charges to protect intercompany advances have been approved in CCAA proceedings under the general power in section 11 of the CCAA to make such orders as the court considers appropriate.¹³²

69. The Intercompany Charge is required and reasonable in the circumstances as it will serve to ensure the Applicant is able to receive sufficient funding from DCL USA LLC and that the stakeholders of DCL USA LLC, which itself is subject to insolvency proceedings, will not be unduly prejudiced as intercompany financing will be provided on a secured basis.¹³³

PART V - RELIEF REQUESTED

70. For the foregoing reasons, the Applicant submits that the relief sought on the within Application is appropriate in the circumstances and respectfully requests that the proposed form of Initial Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th day of December 2022.



Blake, Cassels & Graydon LLP
Lawyers for the Applicant

¹³⁰ *Ibid* at para 35.

¹³¹ *Re Performance Sports Group Ltd*, 2016 ONSC 6800 at paras 33-35 [*Performance Sports Group*]; *Walter* at paras 62-67; *Arrangement Relatif à BioAmber Canada Inc*, 2018 QCCS 317 at paras 20-22.

¹³² *Performance Sports Group* at para 34.

¹³³ Initial Affidavit at paras 167.

SCHEDULE “A”

LIST OF AUTHORITIES

<u>Case</u>	
1.	<i>Re Target Canada Co</i>, 2015 ONSC 303
2.	<i>Re Canwest Global Communications Corp.</i>, [2009] OJ No 4286, 2009 CanLII 55114 (On Sup Ct)
3.	<i>Re Walter Energy Canada Holdings Inc.</i>, 2016 BCSC 107
4.	<i>Re Mobilicity Group</i>, 2013 ONSC 6167
5.	<i>Re Indalex Limited</i>, (2009) 52 CBR (5th) 61, 2009 CanLII 17351
6.	<i>Re Hollander Sleep Products, LLC et al</i>, 2019 ONSC 3238
7.	<i>Re US Steel Canada Inc.</i>, 2014 ONSC 6145
8.	<i>MPX International Corporation</i>, 2022 ONSC 4348
9.	<i>Canwest Publishing Inc.</i>, 2010 ONSC 222
10.	<i>Lydian International Limited</i>, 2019 ONSC 7473
11.	<i>Re Performance Sports Group Ltd.</i>, 2016 ONSC 6800
12.	<i>Arrangement Relatif à BioAmber Canada Inc.</i>, 2018 QCCS 317

SCHEDULE “B”

RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

Definitions

2 In this Act,

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

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

trustee or ***licensed trustee*** means a person who is licensed or appointed under this Act.

Companies’ Creditors Arrangement Act, R.S.C., 1985, c. C-36

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

Affiliated companies

(2) For the purposes of this Act,

(a) 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; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Documents that must accompany initial application

10(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.

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.

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;

(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.

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.

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.

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

(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.

Priority

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

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.

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.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DCL CORPORATION

Applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding Commenced at Toronto

**FACTUM OF THE APPLICANT
(Returnable December 20, 2022)**

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