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

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 MCEWAN ENTERPRISES INC.

Applicant

FACTUM OF THE APPLICANT

(Returnable November 26, 2021)

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PART I – INTRODUCTION

1. McEwan Enterprises Inc. (the "**McEwan Group**" or the "**Company**") commenced these proceedings to ensure the ongoing operations of the McEwan Group for the benefit of its many stakeholders and to effectuate a restructuring of the Company and its Business to provide for a right-sized, sustainable Business going forward.[1]

2. The Company is taking all necessary steps, in good faith, to protect and preserve the Business for a broad group of stakeholders. All stakeholders strongly support the Company, except for one landlord who would not be part of the future ongoing Business pursuant to the Company's proposed restructuring. Such landlord has been aggressive in advancing its own agenda and is not taking into account any other parties' interests. This is a case where "real time" restructuring is required to stop the ongoing operating losses and to ensure there is a business at the end of these restructuring proceedings.

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[1] Unless otherwise stated, capitalized terms not defined herein have the meanings given to them in the Affidavit of Dennis Mark McEwan sworn November 12, 2021 (the "**November Affidavit**"), the Affidavit of Dennis Mark McEwan sworn October 1, 2021 (the "**October Affidavit**") or the Purchase Agreement (as defined in the October Affidavit), as amended.

3. On October 15, 2021, the Company sought the Court's approval of its proposed transaction, involving the sale and transfer of all of the McEwan Group's assets and liabilities, with the exception of the Excluded Locations, to the current owners of the McEwan Group (the "**Initial Transaction**"), under Section 36 of the CCAA. The Court issued its November 1 Decision, finding that the Company had not satisfied the mandatory requirements of Section 36(4) of the CCAA at such time, and did not approve the Initial Transaction.

4. Following the issuance of the November 1 Decision, the Company, with the assistance of its advisors, has advanced further good faith efforts, including, among other things, evaluating and discussing with the Monitor in detail with respect to the Y&B Offer; engaging in additional discussions, entering into a confidentiality agreement and sharing detailed Company information with First Capital Holdings (Ontario) Corporation (the "**Y&B Landlord**") to assist with its due diligence in connection with the Y&B Offer; evaluating and discussing with the Monitor in detail with respect to the risks and harm that a sale process would cause to the Business; and amending its Initial Transaction (as amended, the "**Amended Transaction**") to provide for significantly increased consideration to be provided to the Y&B Landlord under the Amended Transaction.

5. The Company strongly believes that a further process that takes additional time will result in increased costs and risks to the Business that the Company cannot bear. A further process will create uncertainty from the perspective of suppliers and customers and negatively impact the Business. A sale process (with the associated risks and additional costs) is not supported by the Company or its key supporting creditors. A sale process would not generate a higher offer for the Business than the Amended Transaction with the Purchaser or offer from the Y&B Landlord.

6. While a different legal test applies to related party transactions under the CCAA, the fact that the Amended Transaction involves related parties should not be assumed to be a negative factor. Related party transactions can have significant benefits for a company as such transactions can often be completed within a shorter period of time, reduce costs, reduce risks, offer superior consideration, stabilize the business and protect and benefit a broad range of stakeholders. A related party transaction must be analyzed and reviewed in its entirety and a review of the outcome and the effect on each class of stakeholders must be fairly considered and reviewed. Assumptions should not be made solely based on the fact that a transaction involves a related party.

7. The Company has made significant efforts to ensure that stakeholders are not prejudiced by the Amended Transaction. All of the liabilities of the Company are being assumed as part of the Amended Transaction, with the exception of the Excluded Locations, and the Amended Transaction provides fair and reasonable consideration to the Y&B Landlord in respect of its contingent, unliquidated claim, including a cash payment equal to 12 months' rent and the Y&B Equipment to facilitate the re-leasing of the Y&B Location.

8. The Amended Transaction has the support of RBC and the Company's key landlord parties in respect of the Company's five Cadillac Fairview Leases (collectively "**Cadillac Fairview**"). The Y&B Landlord remains the only creditor that opposes the Amended Transaction. The Y&B Landlord is seeking to bring a motion to appoint a receiver over the assets and properties of the Company, to conduct a sale process in respect of the Company, which would put the Business in jeopardy. The steps taken by the Y&B Landlord in these proceedings have been solely for its own benefit, and with the effect of creating additional risk, costs and harm to the Business and other

stakeholders. The Company remains concerned about the motivation of the Y&B Landlord based on its conduct in these proceedings.

CCAA, Section 18.6.

9. The Y&B Landlord's claim is a contingent, unliquidated claim. The Amended Transaction provides greater consideration for the Y&B Landlord than a preferred landlord claim under the BIA and represents a fair estimate of actual damages. The Y&B Landlord does not have the ability to unilaterally assume its own lease and claim it is providing superior consideration. The Y&B Landlord is entitled only to its preferred claim under the BIA or to actual damages after taking into account mitigation efforts. The Amended Transaction satisfies or exceeds both scenarios. The treatment of the Y&B Landlord under the Amended Transaction is fair and reasonable treatment and protects the interest of all other stakeholders.

10. On November 18, 2021, the Y&B Landlord delivered a letter to the Monitor advising that it was amending the Y&B Offer (the "**Amended Y&B Offer**") to, among other things, provide the same increased consideration as the Purchaser under the Amended Transaction, all of which increased consideration the Y&B Landlord would pay directly back to itself on implementation of the Amended Y&B Offer (which offer was further "clarified" pursuant to a subsequent letter to the Monitor dated November 21, 2021). For the Y&B Landlord to say that it will pay itself the increased consideration cannot in any reasonable way be considered to be true additional consideration. The Amended Y&B Offer is also not executable on its terms, with multiple issues and conditions that cannot be satisfied on the existing terms. The Company notes that the Y&B Landlord delivered its initial letter to the Monitor the day after the Y&B Landlord advised the Company that it would not be filing any further materials in advance of the November 26, 2021

hearing (the "**Hearing**") and obtaining confirmation from the Company that, as a result, the Company would not be cross-examining the Y&B Landlord's representative.

11. The Company considered the Y&B Offer and Amended Y&B Offer in good faith, and on the basis that it would have represented the highest offer that would be made by any third party in a sale process. The Company compared such offer directly against the consideration, terms, conditions, benefits, timing and risks of the Amended Transaction, and on that basis it believes the Amended Transaction remains superior. A summary of key factors is set out as follows:

	Amended Transaction	**Amended Y&B Offer**
Purchaser	The Purchaser	The Y&B Landlord
Purchase Price	(A) $2,200,000, plus (B) an amount equal to Cure Costs, plus (C) the assumption of the Assumed Obligations by the Purchaser	(A) $2,200,000, plus (B) an amount equal to Cure Costs, plus (C) the assumption of the Assumed Obligations by the Y&B Landlord
Consideration provided to the Y&B Landlord	Purchaser pays to the Y&B Landlord: (A) $2,200,000 (equal to 12 months' rent, including HST), plus (B) the Y&B Equipment, and the Y&B Landlord obtains the return of the Y&B Location (with the benefit of the Y&B Equipment to assist with re-leasing the Y&B Location). **Implication:** the Y&B Landlord receives the cash and equipment from a third party, and MEI exits the Y&B Location for the Y&B Landlord to re-lease with the benefit of the existing equipment.	Y&B Landlord pays to itself: (A) $2,200,000, plus (B) the Y&B Equipment, and assumes its own lease obligations under the Y&B Lease. **Implication:** the Y&B Landlord assumes its own lease, pays itself the additional cash, and transfers the Y&B Equipment to itself.
Stakeholder Support	• RBC – secured lender and secured equipment lessor • Cadillac Fairview – secured creditor and landlord of five locations.	No stakeholder support.

	Amended Transaction	**Amended Y&B Offer**
Risks	No due diligence condition, and only certain limited customary closing conditions. Can be completed with limited time and no additional risk to the Business.	• No stakeholder support • Does not provide for the payment of obligations which cannot by assumed by the Y&B Landlord without consent. • Does not include amended lease terms with Cadillac Fairview, resulting in unsustainable lease obligations for the Business. • No restructuring of the Business, resulting in Business that is not viable upon implementation. • Provides for the potential of splitting up the Business and future risk to stakeholders as a result. • Additional time and costs to closing. • Increased risks for suppliers, employees and other stakeholders. • Does not have the commitment of the face and leader of the Business.

12. The Amended Y&B Offer is flawed in that it, among other things, assumes that the Y&B Landlord can simply step into the Purchaser's position under the terms of the Amended Transaction without the consent of the counterparties with respect to, among other things, assuming the obligations: (i) owing to RBC of approximately $3.3 million; (ii) owing to Cadillac Fairview of approximately $1.0 million, and excluding Cadillac Fairview's security and the Fabbrica Don Mills lease for no consideration; (iii) owing to Fairfax of approximately $2.3 million; (iv) owing under the Interim Transaction Funding of $600,000 to date; (v) relating to employee severance, estimated to be at least $1.2 million in the event the Amended Y&B Offer proceeds; and (vi) relating to the Directors' Charge. The Amended Y&B Offer does not provide for the cash payment on closing of these obligations and the relevant parties have not consented to the assumption by the Y&B Landlord of their claims.

13. Critically, a transaction cannot be completed without the consent of Cadillac Fairview, who has a veto on any transaction based on multiple factors, and the amended terms being finalized between the Company and Cadillac Fairview have only been made available in connection with a transaction with the Purchaser. Without Cadillac Fairview's consent:

(a) there is no ability to amend any of the Cadillac Fairview Leases;

(b) a purchaser would need to satisfy Section 11.3 of the CCAA to assign all of the Cadillac Fairview Leases on their existing contractual terms, and there is significant risk whether a purchaser can satisfy the requirements for assignment, in particular where the Business has not been restructured into a viable, sustainable business going forward;

(c) a purchaser would need to cure all monetary defaults under all assigned leases in cash on closing, which are currently estimated to be approximately $700,000;

(d) a purchaser would need to assume all of the security granted in favour of Cadillac Fairview (which the Y&B Offer excludes); and

(e) a purchaser would need to pay in full the secured claims of Cadillac Fairview in respect of any disclaimed or terminated leases (which the Y&B Offer does not provide in respect of the excluded Fabbrica Don Mills lease).

In that regard, the Company's proposed form of Order provides that no assumed Cadillac Fairview Leases may be removed from the Amended Transaction without Cadillac Fairview's consent.

14. The Y&B Landlord initially delivered its Y&B Offer to the Monitor on October 11, 2021, and approximately four weeks later first provided its initial comments on the Company's non-disclosure agreement, which the parties then proceeded to settle shortly thereafter. The Company has been acting in good faith in responding to the Y&B Landlord's due diligence requests pursuant to the non-disclosure agreement. The Company is not aware of any efforts by the Y&B Landlord

over the approximately six-week period since it provided its Y&B Offer to address the key gating items and key consents that would be required to complete the Amended Y&B Offer, resulting in the Amended Y&B Offer continuing to remain "too speculative".

> *McEwan Enterprises Inc.*, 2021 ONSC 6878 at para. 58; Book of Authorities of the Applicant ("**BOA**"), Tab 1.

15. Based on the above factors and considerations, the Company believes that the Amended Transaction is fair and reasonable, provides superior consideration and is the best alternative for the Business and the McEwan Group's stakeholders. There is no prejudice to parties, and only significant benefits for the Company's many stakeholders, including its employees, suppliers, customers and other key stakeholders. A sale process will not produce a better result.

16. The Y&B Landlord effectively has two paths in respect of the Company's restructuring. It can maximize its recovery and receive an amount for the termination of its lease, which route could be a BIA preferred claim or an estimated amount for actual damages. Alternatively, with such amounts guaranteed for the Y&B Landlord under the current Amended Transaction, it can try to harm the Business or increase the costs to be paid or assumed by the Purchaser to gain greater leverage or to try to harm the McEwan Group for the termination of Y&B Lease. In not continuing with the Business, this second route is a plausible path for the Y&B Landlord.

17. The Company believes that based on its additional good faith efforts and the significantly increased consideration under the Amended Transaction, the Company satisfies the requirements under Section 36 of the CCAA in respect of the Amended Transaction.

18. In the alternative, if the Court determines that the Company has not satisfied the mandatory provisions of Section 36 of the CCAA, the Company is seeking approval of the Amended Transaction pursuant to the CJA (the "**Receivership Transaction Alternative**"), subject to (a) the

appointment of a receiver over the property, assets and undertakings of the Company for the purpose of implementing the Amended Transaction, (b) the assignment of MEI into bankruptcy, and (c) the termination of the CCAA proceedings (collectively, the "**Receivership Transaction Approval Conditions**"). The Company is seeking to proceed with this alternative if the Amended Transaction cannot be approved pursuant to the CCAA as, for the reasons discussed above, the Company strongly believes that the Amended Transaction is the best transaction for the Company and has the best prospect of protecting the Business for the benefit of its stakeholders. The Company submits that the Court has broad authority to consider all matters with respect to the Amended Transaction under the CJA and its inherent jurisdiction, and the Amended Transaction satisfies the test for approval in connection with a receivership proceeding.

PART II – SUMMARY OF THE FACTS

19. The key terms of the Initial Transaction and Purchase Agreement are summarized in the October Affidavit. The amended terms under the Amended Transaction, which are discussed in the November Affidavit and set out in detail in the Amending Agreement, include:

(a) an increase to the Base Purchase Price from $520,000 to $2.2 million, which amount would be paid by the Purchaser to the Y&B Landlord on closing;

(b) an assignment of the equipment (the "**Y&B Equipment**") at the McEwan Yonge & Bloor location (the "**Y&B Location**") to the Y&B Landlord on closing, with the original cost of the Y&B Equipment being approximately $2.5 million; and

(c) the Purchaser shall acquire all the Purchased Assets and assume all the Assumed Liabilities, with no ability to allocate Purchased Assets or Assumed Liabilities to nominee entities, to ensure the Business is transferred as a whole for the benefit of stakeholders.

October Affidavit at para. 45; Motion Record of the Applicant returnable November 26, 2021 (the "**Motion Record**"), Tab 4B.

November Affidavit at paras. 12-13; Motion Record, Tab 4.

Amending Agreement dated November 12, 2021 at section 1.1; Motion Record, Tab 4D.

20. The Amended Transaction provides a going-concern solution for the Business that will right-size the Business and reduce material and unsustainable lease obligations in a process that is fair and reasonable to all stakeholders. Any successful restructuring of the Business requires the closing of the Excluded Locations as well as significant amendments to the remaining Cadillac Fairview Leases. The Amended Transaction will result in a sustainable Business going forward for the benefit of the Company'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 be unaffected and assumed by the Purchaser. The Amended Transaction provides certainty, stability and funding for the Business at this critical time, and has strong support from key stakeholders, including RBC and Cadillac Fairview.

October Affidavit at paras. 30, 32, 35, 37, 42, 56-57; Motion Record, Tab 4B.

November Affidavit at paras. 18, 28-29; Motion Record, Tab 4.

21. In the alternative, if the Court does not approve the Amended Transaction pursuant to the CCAA, the Company has filed the form of purchase agreement (the "**Receivership Purchase Agreement**") that the Company proposes to be entered into as part of implementing the Amended Transaction pursuant to the Receivership Transaction Alternative, if approved by the Court. The Receivership Purchase Agreement is based on the Purchase Agreement, as amended by the Amending Agreement, subject to applicable changes in connection with implementing the Amended Transaction under the Receivership Transaction Alternative.

November Affidavit at paras. 26-27; Motion Record, Tab 4.

PART III – ISSUES AND THE LAW

22. The issues to be considered on this motion are whether the Court should: (a) approve the Amended Transaction pursuant to the CCAA (the "**CCAA Amended Transaction Alternative**"); (b) in the alternative, approve the Amended Transaction subject to the Receivership Transaction Approval Conditions pursuant to the Receivership Transaction Alternative; (c) grant certain related relief with respect to the Amended Transaction; and (d) approve additional interim funding and grant a Court-ordered charge in respect thereof.

A. THE AMENDED TRANSACTION SHOULD BE APPROVED UNDER THE CCAA AMENDED TRANSACTION ALTERNATIVE

(i) Factors for Court approval of a sale transaction under the CCAA

23. It is well-established that the Court has the jurisdiction to approve a sale of the assets of a debtor company in a CCAA proceeding in the absence of a plan of arrangement where such sale is in the best interests of stakeholders generally. The sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA.

> *Nortel Networks Corp., Re*, (2009), 55 C.B.R. (5th) 229 (Ont. Sup. Ct. J. [Commercial List]) at paras. 35-40 and 47-48; BOA, Tab 2.
>
> *Brainhunter Inc., Re*, (2009) O.J. No. 5207 (Ont. Sup. Ct. J. [Commercial List]) at paras. 12-13, 15-16; BOA, Tab 3.
>
> *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10 at paras. 40-43, 45 [*Callidus*]; BOA, Tab 4.
>
> CCAA, Section 36(1).

24. Section 36(3) of the CCAA sets out a list of factors for the Court to consider in determining whether to authorize the sale of a debtor company's assets outside the ordinary course of business. In addition, the Ontario Court of Appeal in *Soundair* adopted the following factors, which overlap with the Section 36(3) factors and remain relevant when considering the statutory test: (a) whether

sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently; (b) whether the interests of all parties have been considered; (c) the efficacy and integrity of the process by which offers have been obtained; and (d) whether there has been unfairness in the working out of the process.

CCAA, Section 36(3).

Royal Bank v. Soundair Corp., (1991), 83 D.L.R. (4th) 76 (Ont. C.A.) [*Soundair*] at para. 16; BOA, Tab 5.

Target Canada Co., Re, 2015 ONSC 2066 at paras. 4, 15 [*Target*]; BOA, Tab 6.

25. Such factors are not exhaustive, and do not necessarily need to all be fulfilled in order for a Court to approve a sale of assets by a debtor company. Rather, the Court must look at a proposed transaction as a whole and determine whether it is appropriate, fair and reasonable. The Court can grant such approval on the basis of factors listed, or not listed, in Section 36.

Target, *supra* at para. 15; BOA, Tab 6.

White Birch Paper Holding Co., Re, 2010 QCCS 4915 at paras. 47-49; BOA, Tab 7.

26. Section 36(4) sets out the following additional factors that apply in the context of a sale to a related party: (a) whether good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and (b) whether the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

CCAA, Section 36(4).

(ii) The Amended Transaction meets the criteria for approval under the CCAA

27. The Company submits that the Amended Transaction satisfies the factors under Sections 36(3) and (4), fulfills the *Soundair* principles and is in the best interest of stakeholders.

(a) *The process leading to the Amended Transaction was fair and reasonable in the circumstances; there are no issues as to its efficacy or integrity; and there has been no unfairness in the working out of the process*

28. The Company's process carried out in advance of the commencement of the CCAA proceedings sought to identify, assess and advance potential options and transaction alternatives, while minimizing disruption to the Business and preserving stability and value for the Business for the benefit of stakeholders. Such process included the review and due consideration of a potential third party sale process. The Company's challenges and efforts leading up to the commencement of these CCAA proceedings and pursing the Initial Transaction in the interests of the McEwan Group's stakeholders are described in the October Affidavit.

October Affidavit at paras. 20, 22, 24-26, 38; Motion Record, Tab 4B.

29. Following the issuance of the November 1 Decision, the Company reviewed and assessed its potential options and alternatives, discussed and reviewed such matters with the Monitor and engaged in discussions and consulted with various stakeholders.

November Affidavit at para. 10; Motion Record, Tab 4.

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

November Affidavit at para. 11; Motion Record, Tab 4.

31. The Company reviewed and considered potential changes to the Initial Transaction and determined to enter into the Amending Agreement with the Purchaser, amending the Purchase Agreement and the Initial Transaction, to provide for, among other things, significantly increased consideration for the Y&B Landlord to be paid by the Purchaser. The increased Base Purchase

Price of $2,200,000 is equivalent to the cash payment of one year's worth of rent payments under the Yonge & Bloor Lease, including HST, as calculated in consultation with the Monitor, and the Y&B Equipment would have substantial value to a replacement tenant at the Y&B Location and will assist the Y&B Landlord in re-leasing the premises to another food or grocery store operator.

November Affidavit at paras. 12-14; Motion Record, Tab 4.

32. The Company, with the assistance of its advisors, also further reviewed and considered the Y&B Offer and the subsequent amendments thereto, and further discussed with the Monitor in connection therewith. The Company considered all of the terms, conditions, risks and benefits of the Y&B Offer and the Amended Y&B Offer on the basis of a third party purchaser not related to the Company (and on the assumption of the satisfaction of the due diligence condition contained in the offers). The Company considered the Y&B Offer and the Amended Y&B Offer in good faith, and on the basis that it would have represented the highest offer that would be made by any third party in a sale process. The Company compared the Amended Y&B Offer directly against the Amended Transaction (as set forth in paragraph 11 above). Based on such considerations, the Company believes that the Amended Transaction, in its entirety, provides superior consideration and is the best alternative for the Business and the McEwan Group's stakeholders.

November Affidavit at para. 16; Motion Record, Tab 4.

33. The Company engaged in discussions with respect to a potential consensual resolution of matters with the Y&B Landlord, entered into a non-disclosure agreement with the Y&B Landlord and worked diligently to provided detailed due diligence information to assist the Y&B Landlord in advance of the Hearing.

November Affidavit at para. 17; Motion Record, Tab 4.

34. The Company believes there is no prejudice to stakeholders from not completing a third party sale process and no sale process will produce a better result than the Amended Transaction.

November Affidavit at para. 16; Motion Record, Tab 4.

October Affidavit at paras. 26, 32, 36; Motion Record, Tab 4B.

(b) The Company has made good faith efforts as provided for under Section 36(4)(a)

35. Section 36(4)(a) of the CCAA does not require the Company to complete a third party sale process in connection with a sale to a related party. Rather, the Court "must be satisfied, overall, that sufficient safeguards were adopted to ensure that a related party transaction is in the best interests of the stakeholders…and that the risk to the estate associated with a related party transaction have been mitigated." Courts consider a broad range of factors in determining whether to approve a related party sale absent a sale process, including, among others, the risk and costs of such process, its likelihood to achieve a better result, the impact of the proposed transaction on stakeholders, and whether alternative courses of action have been considered. This is consistent with the Court's approach prior to the enactment of the CCAA amendments that incorporated Section 36 into the CCAA.

Target, *supra* at paras. 9-10, 13, 15-16, 19; BOA, Tab 6.

Clearbeach Resources Inc. and Forbes Resources Corp., Re, 2021 ONSC 5564 at paras. 27(a), (b); BOA, Tab 8.

Tool-Plas Systems Inc., Re, (2008), 48 C.B.R. (5th) 91 (Ont. Sup. Ct. J. [Commercial List]) at paras. 10, 15-18 [*Tool-Plas*]; BOA, Tab 9.

Canwest Global Communications Corp., Re, (2009), 183 A.C.W.S. (3d) 325 (Ont. Sup. Ct. J. [Commercial List]) at paras. 37-40 [*Canwest Global*]; BOA Tab 10.

OEL Projects Ltd,, Re, 2020 ABQB 365 at paras. 28-29, 33-34, 37; BOA, Tab 11.

36. In the November 1 Decision, while the Court found that the Company had not satisfied the requirement under Section 36(4)(a) at such time, the Court did not provide that a sale process would be a strict requirement to satisfy the applicable test. The Company respectfully submits that its additional efforts since the issuance of the November 1 Decision, including, without limitation, the steps and efforts discussed above in connection with advancing matters with the Y&B Landlord

with respect to a potential consensual resolution and with respect to the Y&B Offer and Amended Y&B Offer, satisfy the requirements under Section 36(4)(a).

37. The Company considered the potential disruption, costs and uncertainty to the Business that would be caused by any third party sale process, taking into account the Company's ongoing losses and additional funding needed to sustain its operations during the foreseeable future.

November Affidavit at paras. 11, 18; Motion Record, Tab 4.

October Affidavit at paras. 6, 35-36, 46; Motion Record, Tab 4B.

38. The Company strongly believes that a further process that takes additional time will result in increased costs and risks to the Business that it cannot bear. A further process will create uncertainty from the perspective of suppliers and customers and negatively impact the Business. A further process will also increase the professional fees and expenses being incurred by the Company, adding to the debt of the Company and impacting the potential viability of the Business.

November Affidavit at para. 24; Motion Record, Tab 4.

39. The Company has made significant efforts to ensure that stakeholders are not prejudiced by the Amended Transaction. All of the Company's liabilities are being assumed as part of the Amended Transaction, with the exception of the Excluded Locations, and the Amended Transaction provides fair and reasonable consideration to the Y&B Landlord, including an amount equal to 12 months' rent and the Y&B Equipment to facilitate the re-leasing of the Y&B Location.

November Affidavit at paras. 12-14; Motion Record, Tab 4.

40. The Company does not believe there is prejudice to stakeholders from not having completed a sale process. Stakeholder interests have been thoroughly considered. The Company, in consultation with the Monitor, has evaluated the salability of the Business to an unrelated company, does not believe that a third-party purchaser would acquire the Business for

consideration superior to the Amended Transaction, and determined that a sale process would not result in a better transaction but rather could have a negative effect on the Business.

October Affidavit at paras. 25, 26, 28, 36; Motion Record, Tab 4B.

November Affidavit at paras. 16, 18; Motion Record, Tab 4.

41. Although the Company did not complete a third party sale process, taking into account the process the Company has undertaken, and the facts and circumstances of the Company and the Business, the Company submits it has satisfied the requirements of Section 36(4)(a) with respect to the Amended Transaction.

November Affidavit at para. 25; Motion Record, Tab 4.

(c) *The Company consulted with the Monitor*

42. The Company and its counsel consulted with the Monitor in connection with the process to review and consider the Company's options and alternatives, and the various factors and circumstances considered by the Company as part of its process leading to the Initial Transaction. Following the issuance of the November 1 Decision, the Company and its counsel reviewed and assessed the Company's potential options and alternative with the Monitor; discussed with the Monitor amending the Initial Transaction, the increased consideration for the Y&B Landlord and advancing the Amended Transaction; reviewed and discussed with the Monitor the Y&B Offer and the Amended Y&B Offer; and discussed in further detail with the Monitor the harm and risks of a further process to the Business.

November Affidavit at paras. 10-11, 16; Motion Record, Tab 4.

(d) *The Amended Transaction is more beneficial to creditors than a sale under bankruptcy*

43. The Amended Transaction provides for the going concern sale of the Business, the continuation of most of the McEwan Locations, the assumption of all of the Company's

obligations, with the exception of the Excluded Locations, and the payment of the Base Purchase Price and the transfer of the Y&B Equipment to the Y&B Landlord. The Amended Transaction results in treatment for all creditors that is equal to or better than treatment that would be available in a bankruptcy or liquidation scenario.

November Affidavit at paras. 16, 18, 43; Motion Record, Tab 4.

(e) *Creditors were consulted; the interests of all parties have been considered; and the Amended Transaction is a positive development for stakeholders generally*

44. The McEwan Group has considered the interests of all stakeholders throughout its strategic review efforts leading to the Initial Transaction, and as part of its additional efforts following the November 1 Decision leading to the Amended Transaction. The Company has at all times been mindful of the interests of its long-time business partners and supporters, including RBC, landlords, employees, suppliers and customers. The Company reviewed in detail, with the assistance of its advisors, its available options and alternatives, and engaged in extensive discussions with landlords to seek consensual arrangements. Following the November 1 Decision, the Company engaged in additional discussions and consultation with key stakeholders, and advanced further efforts to seek a consensual resolution with the Y&B Landlord. The Company has been clear in its intentions to seek a solution that provides for the best reasonably available result for its stakeholders. For these reasons, the Company arrived at the Amended Transaction, providing substantial benefits for the Company's stakeholders, including: (a) the going-concern sale of the Business resulting in a right-sized sustainable Business going forward for the benefit of a broad range of stakeholders; (b) the assumption of all the Assumed Liabilities, estimated at approximately $11 million as at October 31, 2021; (c) the continuation of most of the McEwan Locations and assumption of those lease obligations going forward; (d) the assumption of all existing supply arrangements as part of the go-forward operations and thereby continued business

for the Company's suppliers; (e) continued employment for all of the Company's 268 employees (including those currently at Excluded Locations); (f) fair and reasonable consideration for the Y&B Landlord; and (g) no prejudice to any stakeholders.

October Affidavit at paras. 8, 17-22, 24-25, 30-31, 37-38, 40-44; Motion Record, Tab 4B.

November Affidavit at paras. 4, 10-12, 16-18, 23, 40, 43; Motion Record, Tab 4.

(f) The consideration for the assets is reasonable and fair taking into account the market value of the assets, represents the best price that could achieved in the circumstances and is superior than consideration that would be received under any other transaction

45. The Amended Transaction offers superior consideration and is the best available transaction. For the reasons discussed above, the Amended Transaction is superior to the Amended Y&B Offer, and no potential third party purchaser would pay more for the Business than the consideration under the Amended Transaction or the Amended Y&B Offer.

November Affidavit at para. 16; Motion Record, Tab 4.

46. Pursuant to the Amended Transaction, the Y&B Landlord will receive a cash payment of $2.2 million and the Y&B Equipment from the Purchaser, and would receive the Y&B Location to re-lease to a new party. The $2.2 million is equivalent to the cash payment of one year's worth of original contractual rent under the Y&B Lease, including HST, and the Y&B Equipment will assist the Y&B Landlord in re-leasing the premises to another food or grocery store operator.

November Affidavit at paras. 12-14; Motion Record, Tab 4.

47. The Y&B Landlord states that: (a) the Y&B Location is located in "one of the City's most prestigious and prominent areas for shopping, dining and living"; (b) the Y&B Location "attracts a substantial volume of daily vehicular and pedestrian traffic"; (c) the "minimum rent was set at below-market rates for a location of this nature"; (d) it continues to have confidence in the location; (e) it "has been successful with having Whole Foods as an anchor grocery tenant in the concourse

level at Yorkville Village"; and (f) it "is landlord to every major grocery store chain in Canada" and has "experience with grocery store operations". The evidence is clear that for the McEwan Group, the Y&B Location is "the biggest hole we have, and after looking at it and turning it every which way, we don't see a path forward with that property". While the Company has failed in all of its efforts to make the McEwan Yonge & Bloor location profitable, the Y&B Landlord is strong and confident in the future viability for this location. Accordingly, the Company believes that the consideration payable to the Y&B Landlord pursuant to the Amended Transaction is fair and reasonable satisfaction of the Y&B Landlord contingent claim in respect of the Y&B Lease and to facilitate the transition to a new grocery tenant that may have greater success than the Company.

> November Affidavit at paras. 13-14, 16; Motion Record, Tab 4.
>
> Affidavit of Jordan Robins sworn November 4, 2021 (the "**Robins Affidavit**") at paras. 9, 13-14; Motion Record of First Capital Holdings (Ontario) Corporation returnable November 26, 2021 (the "**First Capital Motion Record**"), Tab 4.
>
> Transcript of the Cross-Examination of Dennis Mark McEwan conducted on October 4, 2021 at questions 155-157.

48. As discussed above, the payment of $2.2 million and transfer of the Y&B Equipment by the Y&B Landlord to itself is circular and does not provide any incremental value to the transaction following the assumption of the Y&B Lease by the Y&B Landlord.

49. The Amended Transaction is superior to the Amended Y&B Offer and the best available transaction for, among other things, the following reasons:

(a) the Amended Transaction properly restructures the Business, excludes the non-viable Excluded Locations, and amends the remaining Cadillac Fairview Leases as a global consensual package;

(b) absent the restructuring of the Business, it will not be viable going forward;

(c) the amended lease terms being finalized with Cadillac Fairview are only available to the Purchaser and not to the Y&B Landlord;

(d) the Y&B Landlord states it will assume the Y&B Lease on existing terms, which the evidence makes clear is one of the primary causes of the McEwan Group's insolvency;

(e) the Amended Transaction has the support of key stakeholders, whereas there is no stakeholder support of the Amended Y&B Offer;

(f) the Amended Transaction can be completed in short order, reducing execution risk and cost to the Business;

(g) the Amended Y&B Offer cannot be completed on its terms and would require significant cash payments on closing, not currently included in the Amended Y&B Offer, including, among others, to satisfy the claims of RBC, Cadillac Fairview, Fairfax and the Purchaser;

(h) the Amended Transaction provides for the continuation of the Business as whole under the Purchaser, whereas the Amended Y&B Offer contemplates the possibility that the Business could be fragmented, which is not in the interests of the Company's stakeholders; and

(i) the Amended Transaction has the support of the face and leader of the Business and does not result in the risk to the Business that a change of senior leadership would create.

October Affidavit at paras. 21, 32, 37, 40-42, 47; Motion Record, Tab 4B.

November Affidavit at paras. 12, 16, 18, 21, 23, 29; Motion Record, Tab 4.

Robins Affidavit; First Capital Motion Record, Tab 4K.

50. The Company strongly believes that the Amended Y&B Offer does not resolve any of the McEwan Group's financial and other issues that led to its insolvency. Without restructuring the Business and significantly reducing the Company's unsustainable lease obligations, the Business will continue to be insolvent and doomed to fail on the completion of the Amended Y&B Offer. The Company respectfully submits that creating a business that is knowingly insolvent without a

realistic solution at the time of creation demonstrates an element of bad faith, as was noted by the Court in *Abbey Resources*, and that this Court ought to take into consideration such factor as part of assessing the Amended Y&B Offer as compared to the Amended Transaction.

October Affidavit at paras. 12, 13, 32, 37; Motion Record, Tab 4B.

Abbey Resources Corp. Re, (13 August 2021), Saskatoon, Sask. Q.B., QBG 733 of 2021 (Fiat of Meschishnick J.) at paras. 25-26, 29; BOA, Tab 12.

51. The Company's decision to advance the Amended Transaction was made following the completion of extensive review and consideration of the Company's circumstances and its options and alternatives, consideration of the November 1 Decision, the Company's additional efforts to reach a consensual arrangement with the Y&B Landlord, and a thorough review and assessment of the consideration, terms, conditions and risks of the Y&B Offer. The Company, in consultation with its advisors, believes that the Amended Transaction is the best available alternative, provides superior consideration, and is supported by the Company's key stakeholders.

November Affidavit at paras. 10-12, 16-18, 23, 25, 28-29, 43; Motion Record, Tab 4.

B. IN THE ALTERNATIVE, THE AMENDED TRANSACTION SHOULD BE APPROVED UNDER THE RECEIVERSHIP TRANSACTION ALTERNATIVE

(i) Factors for Court approval of a sale transaction under a receivership

52. The *Soundair* factors listed above apply to a sale of a debtor company's assets in a receivership process. In addition, Courts have noted that a related party transaction under a receivership process is subject to greater scrutiny and the Court may take into consideration, but is not bound by, the factors set forth in Section 36(4) of the CCAA in determining whether the best result is being achieved.

Soundair, *supra* at para. 16; BOA, Tab 5.

Elleway Acquisitions Ltd. v. 4358376 Canada Inc., 2013 ONSC 7009 at paras. 31, 44-45 [*Elleway*]; BOA, Tab 13.

The Toronto Dominion Bank v. Canadian Starter Drives Inc., 2011 ONSC 8004 at paras. 4, 7; BOA, Tab 14.

53. The factors set forth in Section 36(4) of the CCAA are not a mandatory requirement under a receivership process, and the Court has broader discretion and inherent jurisdiction to look at the Amended Transaction in its entirety, to look at the potential outcome to stakeholders and to examine any prejudice to stakeholders.

Tool-Plas, *supra* at paras. 15-19; BOA, Tab 9.

Elleway, *supra* at paras. 33, 36-37; BOA, Tab 13.

54. For the reasons discussed in Section A above, the Company submits that the *Soundair* factors have been satisfied by the Company in respect of the Amended Transaction pursuant to the Receivership Transaction Alternative.

55. The CCAA is intended to facilitate restructuring transactions and structures that benefit stakeholders. Novel and creative restructuring approaches that achieve the purposes of the CCAA for the social and economic benefit of stakeholders are approved by CCAA Courts.

Ted Leroy Trucking [Century Services] Ltd., Re, 2010 SCC 60 at paras. 15, 19, 21, 58-61; BOA, Tab 15.

Callidus, *supra* at paras. 40-41, 73; BOA, Tab 4.

C. THE RELATED RELIEF UNDER THE APPROVAL AND VESTING ORDER SHOULD BE GRANTED

56. In connection with the Amended Transaction, the Company is seeking an Order providing that, from and after the Closing Date, all Persons shall be deemed to have waived any and all defaults and events of default of the Company under the Assumed Contracts committed by the Company, or caused by the Company, as a result of the insolvency of the McEwan Group, the commencement or continuation of the Company's applicable proceedings, by any of the provisions

in the Purchase Agreement or steps or transactions contemplated in the Purchase Agreement and/or any other Orders of this Court.

57. Such relief is necessary and appropriate in order to facilitate a successful restructuring of the Business. The requested waivers are limited in scope to defaults relating to the Company's applicable proceedings and the Amended Transaction, and are necessary to ensure that the positive results that are to flow from the Amended Transaction (if approved by this Court) are not jeopardized or subject to collateral attack following the implementation of the Amended Transaction. Courts have exercised their discretion to grant similar relief in a number of cases.

> See *Clearbeach Resources Inc., Re*, (14 July 2021), Toronto, Ont. Sup. Ct. [Commercial List] CV-21-00662483-00-CL (Approval and Vesting Order) at para. 16; *Cirque Du Soleil Canada Inc., Re*, (26 October 2020), Montreal, Que. Sup. Ct., 500-11-058415-205 (Approval and Vesting Order) at para. 21; *Wayland Group Corp., Re*, (21 April 2020), Toronto, Ont. Sup. Ct. J. [Commercial List] CV-19-00632079-00CL (Approval and Vesting Order) at para. 14; BOA, Tabs 16, 17, and 18.

D. THE INTERIM FUNDING AND COURT-ORDERED CHARGE SHOULD BE APPROVED

58. The Company is seeking the approval of additional interim funding from the Purchaser in the amount of up to $2.25 million in connection with the approval of the Amended Transaction pursuant to the CCAA Amended Transaction Alternative or the Receivership Transaction Alternative, and the granting of Court-ordered charge to secure such funding.

> November Affidavit at para. 31; Motion Record, Tab 4.

59. Section 11.2 of the CCAA provides the Court the jurisdiction to grant an interim financing charge to secure a debtor company's financing and sets out factors to be considered in connection therewith. These factors are not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant such charge.

> CCAA, Sections 11.2(1) and 11.2(4).
>
> *Callidus*, *supra* at paras. 84-88, 90-91; BOA, Tab 4.
>
> *Carillion Canada Holdings Inc., Re*, 2018 ONSC 1051 at para. 3; BOA, Tab 19.

60. The following factors support the approval of the proposed interim funding and Court-ordered charge: (a) the Company's cash flow forecast indicates the Company will need additional liquidity to continue to operate during these CCAA proceedings; (b) the proposed funding is being provided without any fees or interest; (c) the proposed charge will rank behind in priority to the security granted in favour of RBC and the Administration Charge and the Directors' Charge; (d) the proposed charge will not secure any pre-filing obligations; (e) the Company does not believe that any third party lender would provide financing to the Company on similar or better terms; (f) there will be no material prejudice to any of the Company's creditors as a result of the proposed funding or charge; and (e) the Monitor is supportive of the proposed funding and charge.

November Affidavit at paras. 30-34; Motion Record, Tab 4.

PART IV – CONCLUSION

61. For the reasons set out herein, the Amended Transaction satisfies the factors set out in Sections 36(3) and 36(4) of the CCAA, the principles expressed in *Soundair* and the other considerations relevant in the circumstances. The Amended Transaction is fair and reasonable, and the best transaction available in the circumstances. The Company is acting in good faith and in the best interests of the McEwan Group's many stakeholders. The Company respectfully submits that it is appropriate for this Court to approve the Amended Transaction pursuant to the CCAA, or, in the alternative, pursuant to the CJA and its inherent jurisdiction, and grant the related relief requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 24, 2021

Goodmans LLP

Goodmans LLP

SCHEDULE A
LIST OF AUTHORITIES

1. *McEwan Enterprises Inc.*, 2021 ONSC 6878
2. *Nortel Networks Corp., Re*, (2009), 55 C.B.R. (5th) 229 (Ont. Sup. Ct. J. [Commercial List])
3. *Brainhunter Inc., Re*, (2009) O.J. No. 5207 (Ont. Sup. Ct. J. [Commercial List])
4. *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10
5. *Royal Bank v. Soundair Corp*, (1991), 83 D.L.R. (4th) 76 (Ont. C.A.)
6. *Target Canada Co., Re*, 2015 ONSC 2066
7. *White Birch Paper Holding Co., Re*, 2010 QCCS 4915
8. *Clearbeach Resources Inc. and Forbes Resources Corp., Re*, 2021 ONSC 5564
9. *Tool-Plas Systems Inc., Re*, (2008), 48 C.B.R. (5th) 91 (Ont. Sup. Ct. J. [Commercial List])
10. *Canwest Global Communications Corp., Re*, (2009), 183 A.C.W.S. (3d) 325 (Ont. Sup. Ct. J. [Commercial List])
11. *OEL Projects Ltd,, Re*, 2020 ABQB 365
12. *Abbey Resources Corp. Re*, (13 August 2021), Saskatoon, Sask. Q.B., QBG 733 of 2021 (Fiat of Meschishnick J.)
13. *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, 2013 ONSC 7009
14. *The Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004
15. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60
16. *Clearbeach Resources Inc., Re*, (14 July 2021), Toronto, Ont. Sup. Ct. [Commercial List] CV-21-00662483-00-CL (Approval and Vesting Order)
17. *Cirque Du Soleil Canada Inc., Re*, (26 October 2020), Montreal, Que. Sup. Ct., 500-11-058415-205 (Approval and Vesting Order)
18. *Wayland Group Corp., Re*, (21 April 2020), Toronto, Ont. Sup. Ct. J. [Commercial List] CV-19-00632079-00CL (Approval and Vesting Order)
19. *Carillion Canada Holdings Inc., Re*, 2018 ONSC 1051

SCHEDULE B
STATUTORY REFERENCES

COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, c C-36, as amended

s. 6 (5)

Restriction – employees, etc. – The court may sanction a compromise or an arrangement only if:

(a) (a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of:

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

s. 6 (6)

Restriction – pension plan. – If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(c) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(d) the court is satisfied that the company can and will make the payments as required under paragraph (a).

s. 11

General power of court – Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up 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 an order that it considers appropriate in the circumstances.

s. 11.02 (2)

Stays, etc. — other than initial application – 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

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

s. 11.02 (3)

Burden of proof on application – 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.

s. 11.2 (1)

Interim financing – 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.

s. 11.2 (2)

Priority – secured creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

s. 11.2 (3)

Priority — other orders – 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.

s. 11.2 (4)

Factors to be considered – 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.

s. 11.2 (5)

Additional factor — initial application – 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.

11.3 (1)

Assignment of agreements – 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.

11.3 (2)

Exceptions – 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.

11.3 (3)

Factors to be considered – 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.

11.3 (4)

Restriction – 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.

11.3 (5)

Copy of order – The applicant is to send a copy of the order to every party to the agreement.

s. 18.6 (1)

Duty of Good Faith – Good faith – Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

s. 18.6 (2)

Good faith — powers of court – If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

s. 36 (1)

Restriction on disposition of business assets. – A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

s. 36 (2)

Notice to Creditors - A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

s. 36 (3)

Factors to be considered. – In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

s. 36 (4)

Additional Factors – Related Persons - If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

s. 36 (5)

Related persons – For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

s. 36 (6)

Assets may be disposed of free and clear – The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

s. 36 (7)

Restriction – employers. – The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and 5(a) if the court had sanctioned the compromise or arrangement.

BANKRUPTCY AND INSOLVENCY ACT
R.S.C. 1985, c. B-3, as amended

s. 136 (1)

Priority of claims -Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(c) the levy payable under section 147;

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;

(d.01) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;

(d.02) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease,

and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(g) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;

(h) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the Income Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(i) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

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.

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

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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