

**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 October 15, 2021)**

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PART I – INTRODUCTION

1. McEwan Enterprises Inc. (the “**McEwan Group**” or the “**Company**”), one of Canada’s premier hospitality companies, 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 seeking to complete the sale and transfer of all of the McEwan Group’s assets and liabilities, with the exception of the Excluded Locations (as defined below), to the current owners of the McEwan Group (the “**Transaction**”), which Transaction represents the highest consideration available for all stakeholders in the circumstances.

3. As part of the Company’s process to seek to address its financial challenges and liquidity issues, the Company engaged advisors for assistance, reviewed in detail the potential options and

¹ Capitalized terms not defined herein have the meanings given to them in the Affidavit of Dennis Mark McEwan sworn October 1, 2021 (the “**McEwan Affidavit**”) or the Purchase Agreement (as defined in the McEwan Affidavit).

alternatives available to the Company in the circumstances, duly considered a potential third party sale process (including its benefits and risks), and determined after careful review and consideration that the proposed Transaction is the best result for all parties.

4. The Company believes that a third party sale process poses potential risks to the Business, and would ultimately not provide a better result that would benefit the Company's stakeholders. Meanwhile, the proposed Transaction assumes and leaves unaffected all claims against the Company and otherwise provides for the highest potential recovery in respect of the Landlord Preferred Claim (as defined below) in all circumstances.

5. There is only one creditor that opposes the Transaction, First Capital Holdings (Ontario) Corporation (the "**Y&B Landlord**"), which is taking into account solely its own interests, and not the interests of the many other stakeholders of the McEwan Group that the Company is taking into account. The Y&B Landlord is a sophisticated party, with legal counsel and a financial advisor in these proceedings. The Y&B Landlord has not filed any evidence, other than an affidavit from its financial advisor that is inadmissible and not relevant.² It has refused all requests for an examination of its key executive who has dealt directly with the Company (in respect of which refusals the Court is permitted to draw adverse inference), and has attempted to mischaracterize the Transaction and the facts before the Court.

6. The Y&B Landlord objects to the proposed Transaction on the basis that it is "illegal" and in "contravention of section 36(4)" of the CCAA. At the Comeback Hearing, the Y&B Landlord made these assertions without referencing applicable Court decisions pursuant to which related

² See Rules [39.01\(7\)](#) and [53.03\(1\)](#) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

party sale transactions have been approved absent a sale process. The good faith efforts requirement under Section 36(4) depends on the facts and circumstances of each individual case, and does not require a third party sale process in every circumstance. The proposed Transaction meets the requirements of Section 36 and is in the best interests of the Company's stakeholders.

7. The Company understands that the Y&B Landlord recently provided to the Monitor a new position, inconsistent with its prior positions, without evidence, without support, and based on highly conditional terms. The Company understands that information in respect thereof is to be included in a report of the Monitor to be filed in respect of this motion (the "**Monitor's Report**").

8. As an interested party in these CCAA proceedings, the Y&B Landlord has a duty to act in good faith. The Company has concerns around the motivation of the Y&B Landlord based on the foregoing conduct in these proceedings.

CCAA, Section [18.6](#).

9. The Company has been unable to achieve a consensual arrangement with the Y&B Landlord. With no consensual arrangement, and no possibility of a CCAA plan of arrangement (as the sole opposing creditor would have a veto), there are only three ways to complete a going concern value maximizing transaction in these circumstances:

Options		Implications
1.	Completion of the proposed Transaction in a CCAA proceeding.	<ul style="list-style-type: none">• All creditor claims (except the Landlord Preferred Claim) are assumed in full at 100% of the amounts owed to such creditors.• Landlord Preferred Claim receives a cash payment in the maximum amount of such claim as calculated under the <i>Bankruptcy and Insolvency Act</i> (the "BIA") and is paid in full at 100% of such claim.• The proposed Transaction is superior in all respects including certainty and cost to complete, timing, continued operation of most locations, continued employment for all employees, continuation of experienced management and leadership with the Business, stability and continuation of long-standing stakeholder relationships, and strong

		shareholder support with financial ability to fund the Business going forward through the continued COVID-19 related challenges.
2.	A receivership and a concurrent or subsequent no asset bankruptcy process to complete the proposed Transaction.	<ul style="list-style-type: none"> • Same treatment as above for all creditors. • Bankruptcy proceeding statutorily limits an affected landlord's claim to a preferred landlord claim pursuant to the BIA. Such landlord can recover no further amounts beyond its BIA preferred landlord claim. • Potential increased risk to the Business given additional time to complete, more costs for additional process, and potential impact on the stability of the Business and stakeholder support in the interim. • Same treatment for all parties and same result achievable as pursuant to #1 above, with no additional benefit to any stakeholders.
3.	A sale to a third party (by the Company or by a Receiver).	<ul style="list-style-type: none"> • Higher costs to complete and may result in discounted proceeds. • Risk that creditors do not receive payment in full, and creates a pool of unsecured claims (in respect of any excluded/non-assumed employee claims, trade obligations, additional lease claims, and outstanding debt obligations) to share in any remaining proceeds following payment of secured claims in priority. • All secured claims, interim financing to fund the Business until closing and professional fees incurred as part of the proceedings and transaction would be satisfied in priority to any unsecured pool. • Once assets are sold (or before), there would be a bankruptcy proceeding as unsecured creditors or the Company would not allow landlord claims to dilute the recovery to unsecured creditors where in a bankruptcy proceeding claims are limited to a preferred landlord claim. • Best possible result for an affected landlord is receiving the maximum amount of its BIA preferred landlord claim. • Many additional risks and uncertainty, including additional time and cost to complete, additional priority funding of operations, potential jobs losses, closure of additional stores, loss of founder as part of the go-forward business, and potentially less support of management, employees, landlords and trade creditors. • No third party can successfully acquire the Business without the termination of certain leases and amendments to other leases.

10. As summarized in the table above, under all circumstances, the maximum recovery in respect of an affected landlord's claim is the maximum amount of a preferred landlord claim calculated under the BIA, and the proposed Transaction guarantees the payment of such maximum claim amount to the Y&B Landlord, as well as the assumption of all other claims in full. Any additional amounts beyond creditors being satisfied in full (including the payment of the Landlord Preferred Claim) would be for the benefit of the existing shareholders, and they do not support a sale process or risk to the Business.

11. At the Comeback Hearing, the Y&B Landlord submitted that in the event all parties reached consensus, the Transaction would require a plan of arrangement in order to be implemented. That assertion is incorrect at law. The Court has the jurisdiction under the CCAA to approve such a transaction absent a plan of arrangement.

12. The proposed Transaction is by all accounts fair and reasonable. There is no prejudice to parties, and only significant benefits for the McEwan Group's many stakeholders, including its employees, suppliers, customers and other key stakeholders.

13. The ongoing involvement of the founder and leader of the Business is a key benefit of the Transaction. It provides certainty and stability for the Business going forward, and builds on long standing and strong relationships with landlords, employees and suppliers. In addition, the existing ownership group, with strong financial ability and business expertise, is willing to support the future funding requirements of the restructured company while the ongoing COVID-19 related impacts continue to challenge the Business. The Transaction is not subject to any financing or due diligence conditions, has the support of the Cadillac Fairview Entities and RBC, and can be completed efficiently to protect the Business for the benefit of the Company's stakeholders.

14. No other transaction can result in better recovery for stakeholders. No sale process will produce a better result. The highest consideration, from a financial and social point of view, is the proposed Transaction. The Company supports and recommends approval of the Transaction for the benefit of a broad group of stakeholders. The proposed Transaction complies with the CCAA in all respects and meets the requirements of Sections 36(3) and 36(4) of the CCAA.

15. This factum is being filed in advance of the filing of the Monitor's Report, which the Company expects will provide additional information in respect of this motion.

PART II – SUMMARY OF THE FACTS

16. The terms of the proposed Transaction are set forth in the Purchase Agreement and are summarized in the McEwan Affidavit. The proposed Transaction includes, among other things:

- (a) the sale and transfer of all of the Company's assets and liabilities, excluding certain locations not being assumed by the Purchaser (the "**Excluded Locations**"), being Fabbrika Don Mills and McEwan Yonge & Bloor at this time, subject to certain potential additional leases being excluded to the extent not amended to the satisfaction of the Purchaser;
- (b) aggregate consideration for the Purchased Assets consisting of: (a) the assumption of the Assumed Liabilities, which are estimated to be approximately \$11 million; and (b) a cash payment in an amount equal to the sum of (i) \$520,000 (the "**Base Purchase Price**"), and (ii) an amount equal to the Cure Costs;
- (c) a Transaction Deposit of up to \$2.25 million to fund the liquidity needs of the Company until the closing of the Transaction; and
- (d) an offer of employment to all of the Company's employees and the assumption of all employee obligations by the Purchaser.

McEwan Affidavit at paras. 39-43, 45; Motion Record, Tab 4.

17. Completion of the Transaction is not subject to any due diligence or financing conditions, and is subject to certain limited closing conditions customary for a transaction of this nature.

McEwan Affidavit at para. 45; Motion Record, Tab 4.

18. The proposed 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 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 Transaction also provides certainty, stability and funding for the Business at this critical time.

McEwan Affidavit at paras. 30, 37, 47, 57; Motion Record, Tab 4.

PART III – ISSUES AND THE LAW

19. The issues to be considered on this motion are whether the Court should: (a) approve the Transaction; (b) grant certain related relief pursuant to the proposed Approval and Vesting Order; and (c) approve the Transaction Deposit and grant the Transaction Deposit Charge.

A. THE TRANSACTION IS IN THE BEST INTERESTS OF STAKEHOLDERS GENERALLY AND SHOULD BE APPROVED

(i) Factors for Court approval of a sale transaction

20. 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 1.

Brainhunter Inc., Re, (2009) O.J. No. 5207 (Ont. Sup. Ct. J. [Commercial List]) at paras. [12-13](#), [15-16](#); BOA, Tab 2.

9354-9186 Quebec Inc v Callidus Capital Corp, 2020 SCC 10 at paras. [40-43](#), [45](#) [*Callidus*]; BOA, Tab 3.

CCAA, Section [36\(1\)](#).

21. 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 *Royal Bank v. Soundair Corp.* 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 4.

[Target Canada Co., Re](#), 2015 ONSC 2066 at paras. 4, 15 [*Target*]; BOA, Tab 5.

22. 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 5.

[White Birch Paper Holding Co., Re](#), 2010 QCCS 4915 at paras. [47-49](#) [*White Birch*]; BOA, Tab 6.

23. 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\(4\)](#).

[Target](#), *supra* at para. 4; BOA, Tab 5.

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

24. The Company submits that the proposed 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 proposed 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*

25. With significant pre-existing financial challenges, the ongoing COVID-19 pandemic continuing to negatively impact the Business, and significant uncertainty around the continued impact of the COVID-19 pandemic going forward, the Company understood that its financial situation was not sustainable and, notwithstanding extensive efforts to manage its liquidity over an extended period of time, it would be facing a liquidity crisis in the near term. In the summer of 2021, the Company engaged legal counsel to assist the McEwan Group.

McEwan Affidavit at paras. 12-16, 24; Motion Record, Tab 4.

26. With the assistance of its legal counsel, the Company reviewed the various McEwan Locations, including their respective operating costs and their past and current financial performance, the ongoing COVID-19 impacts on the various McEwan Locations, and the ongoing additional funding that would be required to sustain the Business for an extended period of time while the Company continues to try to manage through the COVID-19 related impacts, and reviewed its potential options and alternatives based on its circumstances. The Company determined that the go-forward viability of the Business would require a right-sizing of the

Business with a reduced number of McEwan Locations, together with significant lease amendments to a number of the remaining McEwan Locations.

McEwan Affidavit at paras. 16, 24-25, 30, 32, 33, 35, 41, 46; Motion Record, Tab 4.

27. The McEwan Group's lease obligations are one of its primary operating expenses and uses of cash, and certain of the McEwan Locations are simply not sustainable. The Company, with the assistance of its advisors, engaged in good faith efforts to seek consensual arrangements and amendments with its landlords in respect of its leases and to exit the non-viable locations.

McEwan Affidavit at paras. 17-22; Motion Record, Tab 4.

28. The Company, with the assistance of its advisors, evaluated and duly considered numerous key factors, including, the nature of the Business, the existing secured and unsecured obligations of the Company, the challenges around its non-viable locations and their impacts on the rest of the Business, the progress (or lack thereof) with respect to certain of its landlord discussions, the ongoing uncertainty around the Business and future funding requirements, the potential benefits and risks of a third party sale process to the Business, the costs and time required for a sale process, the unique nature of the Business and Mr. McEwan as a fundamental aspect of the Business, and the potential impact that any restructuring or sale transaction would have on the McEwan Group's many stakeholders, including its secured lender, suppliers and employees, many of whom have supported the Business for decades.

McEwan Affidavit at paras. 21-22, 26- 30, 32-37; Motion Record, Tab 4.

29. The Company, with the assistance of its advisors, considered various potential transaction structures and alternatives, and determined that the proposed Transaction, which results in the assumption of all liabilities of the Company, with the exception of the Excluded Locations, and

the preservation of all existing jobs, was the best executable transaction that would be available to the Company and would protect the interests of the broadest group of stakeholders.

McEwan Affidavit at paras. 8, 24, 30-31, 33-34, 37, 55-57; Motion Record, Tab 4.

30. The leases in respect of the Excluded Locations are not economical and the closing of the Excluded Locations is a necessary part of any successful restructuring or a sale of the Business. The uncontested evidence of Mr. McEwan is that the Yonge & Bloor 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”. Mr. McEwan states that the location “is an obvious loser for us and was not the property we thought we signed up for, and I don’t believe it’s the property that First Capital signed up for either.” Mr. McEwan further states “I think First Capital made a mistake as well anticipating that this property would perform to the degree that they thought it would, and I made a mistake – the biggest mistake of my career was signing that lease with First Capital.” Terminating the Y&B Lease “seems the only obvious action that makes any sense.” The Y&B Landlord has not refuted this evidence. It understands this location is not viable.

McEwan Affidavit at paras. 32, 40-41; Motion Record, Tab 4.

Transcript of the Cross-Examination of Dennis Mark McEwan conducted on October 4, 2021 (the “**Transcript**”) at questions 155-159.

31. The Company’s review 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 review process included due consideration of a potential third party sale process (including its benefits and risks). The Company’s preference would have been to not have had to commence CCAA proceedings and to have resolved its financial and business challenges through a consensual out-of-court solution. However, it was unable to reach

satisfactory agreements with its landlords that would allow the Business to continue on a sustainable basis going forward and determined that commencing these CCAA proceedings and pursuing the proposed Transaction was in the best interests of the Company and its stakeholders.

McEwan Affidavit at paras. 20-22, 24-25, 38; Motion Record, Tab 4.

32. As discussed above, there is no prejudice to stakeholders from not having completed a third party sale process and no sale process will produce a better result than the proposed Transaction. The proposed Transaction offers the highest consideration available, the greatest certainty and stability, and the additional go-forward benefits of the continued involvement of the founder of the Business and the existing shareholder group that will continue to support and fund the go-forward needs of the Business in the continuing challenging times. Under the proposed Transaction, all creditor claims are being assumed in full, with the exception of the claim of the Y&B Landlord in respect of the lease relating to McEwan Yonge & Bloor (the “**Y&B Lease**”). The purchase price under the proposed Transaction provides an amount equal to the preferred landlord claim amount in respect of the Y&B Lease based on the formula under Section 136(1)(f) of the BIA (the “**Landlord Preferred Claim**”). The Company and the Cadillac Fairview Entities are continuing their ongoing discussions to reach mutually satisfactory arrangements in respect of the Cadillac Fairview Leases, and thus at this time there are no claims amount included in respect of any Cadillac Fairview Leases as part of the purchase price under the proposed Transaction.

McEwan Affidavit at paras. 26-31, 34; Motion Record, Tab 4.

33. The Company spent many months diligently reviewing and considering its various options and alternatives with respect to protecting the Business and putting it in the best position to protect and provide the greatest benefits to its stakeholders, and obtained the advice of legal counsel in respect thereof. The Company, with the assistance of its advisors and in the exercise of its business

judgement, determined that the Transaction is the best available option in the circumstances and in the best interests of its stakeholders. The Company respectfully submits that its process leading to the proposed Transaction has been fair and reasonable in the circumstances.

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

34. The Court has broad jurisdiction under the CCAA to approve transactions that are fair and reasonable and that advance the purposes of the CCAA to restructure debtor companies and avoid the detrimental social and economic consequences of liquidation. This includes the authority to approve a related party transaction in the absence of a sale process in appropriate circumstances.

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 5.

Clearbeach Resources Inc. and Forbes Resources Corp., Re, 2021 ONSC 5564 at paras. 27(a), (b); BOA, Tab 7.

Tool-Plas Systems Inc., Re, (2008), 48 C.B.R. (5th) 91 (Ont. Sup. Ct. J. [Commercial List]) at paras. 10, 15-18; BOA, Tab 8.

36. In *Target*, the Court found that the risk associated with the related party transaction in question had been addressed through the efforts of the debtors and the Court-appointed monitor to evaluate the salability of the purchased assets to an unrelated party.

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

37. In considering the provisions of Section 36 in connection with certain related party transactions in *Canwest Global*, the Court considered, among other factors, that the transaction facilitated a restructuring and allowed the businesses operated by the debtor company to continue as a going concern, preserved value, maintained significant employment, involved negotiations and support from secured creditors and benefited a broad range of stakeholders, including employees, suppliers and customers.

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 9.

38. In connection with the approval of a related-party sale transaction under the analogous provisions of the BIA in *OEL Projects*, the Court found that it has the jurisdiction to approve a related party sale absent a sale process. The Court stated:

While section 65.13(5) refers to good faith efforts being made to sell, it does not actually mandate a particular sales process, or for that matter, any sales process at all. For instance, it does not say that the Court must be satisfied that there was a good faith sales process. Rather, the wording of the provision focuses on the efforts that were made. In most cases, I expect that the efforts would have to involve some actual approaches to other purchasers. However, I am not convinced that these are strictly required in every case in a proper interpretation of the provision.

OEL Projects Ltd., Re. 2020 ABQB 365 at paras. 28-29, 34 [*OEL Projects*]; BOA, Tab 10.

39. The Company submits that the foregoing interpretation of the related party sale provision is correct and consistent with the purpose of the CCAA and the liberal interpretation that ought to be afforded to the CCAA to facilitate restructurings.

Lehndorff General Partner Ltd., Re. (1993), 17 C.B.R. (3d) 24 (Ont. Sup. Ct. J. [Commercial List]) at para. 5; BOA, Tab 11.

[Ted Leroy Trucking \[Century Services\] Ltd., Re](#), 2010 SCC 60 at paras. [19](#), [24](#), [57-59](#), [65-66](#), [68](#) [Century Services]; BOA, Tab 12.

[Elan Corp. v. Comiskey \(C.A.\)](#), (1990), 1 O.R. (3d) 289 (C.A.) at paras. 56-61; BOA, Tab 13.

[Callidus](#), *supra* at paras. [72-74](#); BOA, Tab 3.

40. The Court in *OEL Projects* also noted the absurd result that would occur from a more restrictive interpretation of the related party sale provision, pursuant to which “a party could make one call to a potential purchaser, and that would bring the party’s efforts at least into consideration under section 65.13(5), but that coming to a reasoned conclusion that such a call would actually harm the value that could be achieved for stakeholders, would disqualify the insolvent person from even having the transaction considered under section 65.13(5).”

[OEL Projects](#), *supra* at para. [33](#); BOA, Tab 10.

41. The *Hypnotic* case cited in the Y&B Landlord’s factum filed October 5, 2021, does not come to the finding that a debtor company is required to run a third party sale process in order to satisfy the statutory requirements for a related party transaction. What constitutes good faith efforts depends on the facts and circumstances of each individual case. A third party sale process is not required in every circumstance.

[OEL Projects](#), *supra* at para. [37](#); BOA, Tab 10.

42. Based on the Company’s process leading up to the ultimate determination to proceed with the proposed Transaction, discussed above, and other factors discussed further below, the Company has satisfied the good faith efforts requirement under the CCAA. The evidence is clear that the Company turned its mind to and made good faith efforts to consider the disposition of its assets and the Business to persons unrelated to the Company. The Company determined in good faith, considering all of the facts and circumstances, that a third party sale process would not be

beneficial, and could be harmful to the Company, and does not believe such a process would result in a better transaction for stakeholders.

McEwan Affidavit at paras. 24-26, 33-34, 36-38; Motion Record, Tab 4.

43. The Company considered the potential disruption to the Business caused by, and the costs and potential length of, 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.

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

44. The Company made significant efforts to ensure that stakeholders are not prejudiced by the Transaction. All of the liabilities of the Company are being assumed as part of the Transaction, with the exception of the Excluded Locations, and the Transaction provides a guaranteed result of the highest amount payable in respect of the Landlord Preferred Claim available under any alternative implementation of the proposed Transaction or any other potential transaction.

McEwan Affidavit at paras. 30-31; Motion Record, Tab 4.

45. The Company does not believe that there is prejudice to stakeholders from not having completed a third-party 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 be in a position to acquire the assets of the Business, without the continued involvement of Mr. McEwan in the Business, for consideration superior to the proposed Transaction, and determined that a sale process would not result in a better transaction but rather could have a negative effect on the Business.

McEwan Affidavit at paras. 5, 25-29, 31, 36; Motion Record, Tab 4.

46. Thus, 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).

(c) The Company consulted with the Monitor

47. The Company and its counsel consulted with the Monitor in connection with the process to review and consider the Company's available options and alternatives, and the various factors and circumstances considered by the Company as part of its process leading up to the proposed Transaction. The Company understands the Monitor's Report will discuss this in further detail.

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

48. The proposed Transaction, which provides for 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 in respect of the Landlord Preferred Claim, represents the best available alternative for the Company's stakeholders in the circumstances and results in treatment for all creditors that is equal to or better than treatment that would be available in a bankruptcy or liquidation scenario.

McEwan Affidavit at paras. 8, 25, 30-31, 37-38, 42; Motion Record, Tab 4.

49. The Transaction guarantees the Y&B Landlord cash consideration in an amount equal to its Landlord Preferred Claim. If the Transaction does not proceed on the terms of the Purchase Agreement, there is significant risk that the Landlord Preferred Claim would receive no or significantly less consideration than the amount provided for under the proposed Transaction, including giving consideration to the following key factors: (a) the overall value of the Business, (b) the amount of the Company's secured debt, (c) the amount of obligations to be assumed pursuant to the Transaction, (d) the estimated professional fees relating to the Transaction, and (e)

the anticipated ongoing funding requirements of the Business until the impacts of the COVID-19 pandemic ultimately pass and normalized operations return, which remains uncertain at this time.

McEwan Affidavit at paras. 30, 33-34, 44; Motion Record, Tab 4.

50. Furthermore, as set out in paragraph 9 above, the end result of any sale transaction (pursuant to the proposed Transaction in these proceedings, a receivership/bankruptcy process to complete the proposed Transaction or a sale to a third party), the Landlord Preferred Claim of the Y&B Landlord would be determined based on the BIA formula, and thus in all circumstances there is no prejudice to the Y&B Landlord based on the treatment of its claim under the Transaction.

51. Courts have on various occasions permitted CCAA debtors to assign themselves into bankruptcy or have a receiver appointed. Courts have also held that it is not improper to seek a bankruptcy order for the purpose of reversing a statutory priority, and have held that the BIA is an appropriate mechanism for making distributions to creditors according to the applicable priorities.

Bank of Nova Scotia v. Huronia Precision Plastics Inc., [2009] O.J. No. 312 (Ont. Sup. Ct. J. [Commercial List]) at paras. [13](#), [19-20](#); BOA, Tab 14.

Ivaco Inc., Re, [2006] O.J. No. 4152 (Ont. C.A.) at paras. [70](#), [76-77](#); BOA, Tab 15.

General Chemical Canada Ltd., Re, [2005] O.J. No. 5436 (Ont. Sup. Ct. J.) at paras. [28](#), [35](#), [43-45](#), [49](#); BOA, Tab 16.

Century Services, *supra* at para. [15](#); BOA, Tab 12.

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

52. The McEwan Group has considered the interests of all stakeholders throughout its strategic review efforts, and has 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. 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 proposed 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; (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 Landlord Preferred Claim; and (g) no prejudice to any stakeholders.

McEwan Affidavit at paras. 8, 17-22, 24-25, 30-31, 37-38, 42-44; 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 be achieved in the circumstances and is superior than consideration that would be received under any other transaction*

53. The proposed Transaction offers the highest consideration and is the best available Transaction. The Purchase Agreement provides for: (a) the assumption of the Assumed Liabilities, estimated at approximately \$11 million; and (b) a cash payment in an amount equal to the sum of (i) the Base Purchase Price (calculated based on an amount equal to the preferred landlord claim in respect of the Y&B Lease pursuant to the BIA formula), and (ii) an amount equal to the Cure Costs. The consideration under the proposed Transaction also includes the assumption of numerous go forward obligations, including all supplier and service provider arrangements, most of the existing lease obligations (subject to certain consensual arrangements to be finalized with the Cadillac Fairview Entities), all equipment lease obligations and all employee obligations. The

required right-sizing of the Business together with the go-forward support from the existing owners will enable the Company to be able to satisfy those obligations following implementation of the Transaction. Absent the restructuring of the Business, it will not be viable going forward. The Transaction also provides funding to the Company by way of the Transaction Deposit at no cost or fees to the Company, provides go-forward stability based on the continuation of the founder and key management with the Business, and essential amendments to the Cadillac Fairview Leases which the Cadillac Fairview Entities are only providing in respect of the proposed Transaction.

McEwan Affidavit at paras. 30-32, 34, 37, 40-44, 47; Motion Record, Tab 4.

54. As discussed above, under all circumstances involving a going concern sale of the Business, the maximum recovery in respect of a landlord claim would be the maximum amount of a preferred landlord claim calculated under the BIA, and the proposed Transaction guarantees the payment of such maximum claim amount as well as the assumption in full of all other claims. Any additional amounts beyond creditors being satisfied in full (including the payment of the Landlord Preferred Claim) would be for the benefit of the existing shareholders, and they do not support a sale process or risk to the Business. There is no superior transaction available.

McEwan Affidavit at paras. 36, 44; Motion Record, Tab 4.

55. There is a risk that if the Transaction does not proceed on the terms set forth in the Purchase Agreement, the Business could be further fragmented with fewer locations continuing to the detriment of many stakeholders and that the Landlord Preferred Claim would receive no or significantly less consideration than the amount provided for under the proposed Transaction.

McEwan Affidavit at paras. 33-34, 44; Motion Record, Tab 4.

56. The Company's decision to enter into the Transaction was made on an informed basis, with the benefit of advice from the Company's advisors following the completion of extensive review

and consideration of the Company's circumstances and its options and alternatives, and efforts to reach consensual arrangements with its landlords. The Company, in consultation with its advisors, has determined that the Transaction is the best available alternative given that, among other things, the Transaction involves the assumption of substantially all of the Company's obligations, offers employment to all 268 employees of the Company, the consideration being provided is the highest available consideration, and the Transaction is supported by key stakeholders.

McEwan Affidavit at paras. 8, 24-25, 37-38, 42, 56-57; Motion Record, Tab 4.

(iii) *Additional Relevant Factors in connection with Approval of the Transaction*

(a) Creditors are not required to be treated equally

57. There is no requirement under the CCAA for all creditors to be treated equally under a sale transaction. Creditors' interests should be taken into consideration as a factor for approval of a transaction; however, those interests should be considered as part of the broader review of all key factors and impacts of a potential transaction, and be balanced against such other factors.

[*Grafton-Fraser Inc. v. Cadillac Fairview Corp.*](#), 2017 ONSC 2496 at paras. 4, 23-25; BOA, Tab 17.

[*White Birch*](#), *supra* at paras. 50-52; BOA, Tab 6.

58. Under the proposed Transaction, nearly all creditors of the Company will remain unaffected and their claims will be assumed by the Purchaser. The Excluded Locations will not be assumed as part of the Transaction, with the expectation that the Fabbrica Don Mills Excluded Location will be addressed by way of an agreement with the applicable Cadillac Fairview Entity, and the McEwan Yonge & Bloor Excluded Location will receive the Base Purchase Price under the proposed Transaction as consideration for its Landlord Preferred Claim.

McEwan Affidavit at paras. 30, 37, 40-41, 44; Motion Record, Tab 4.

59. Based on the terms of the leases in respect of the Excluded Locations and the financial performance of such locations, no third-party purchaser would acquire the Excluded Locations.

The leases in respect of the Excluded Locations are not economical and the closing of the Excluded Locations is a necessary part of any successful restructuring or sale of the Business.

McEwan Affidavit at paras. 32, 41; Motion Record, Tab 4.

Transcript at questions 155-159.

60. In reviewing the Transaction, and balancing its benefits to the Company's stakeholders, as compared to the effect of excluding the Excluded Locations that are not viable and prevent the sustainable operation of the Business, it is clear that the proposed Transaction is in the best interests of the Company's stakeholders generally and ought to be approved by the Court "for the greater good consistent with the purpose and spirit and within the confines of the legislation."

[Calpine Canada Energy Ltd. Re](#), 2007 ABCA 266 at para. 38 [*Calpine*]; BOA, Tab 18.

(b) Minority creditors should not be given veto power

61. While the Company is not proposing a CCAA plan of arrangement as part of this proposed Transaction, the CCAA principle of not granting minority creditors veto power over a restructuring is equally applicable. The proposed Transaction results in substantially all of the Company's obligations being unaffected as part of these CCAA proceedings, with the exception of the Excluded Locations. The Company would have preferred to not commence CCAA proceedings and address its business and financial challenges pursuant to an out-of-court consensual solution. Unfortunately, the Company does not have the ability to fulfill its contractual obligations in respect of the long-term leases for its unprofitable locations and has been unable to reach satisfactory arrangements with its landlords to be able to avoid an insolvency process. The Company has made good faith efforts to achieve a transaction that provides a positive result for its stakeholders, and on balance, achieves a fair and reasonable result. The opposition of one minority creditor should be balanced against the significant benefits of the overall Transaction to numerous stakeholders.

Canadian Airlines Corp., Re, [2000] A.J. No. 1693 (Alta. Q.B.) at para. [14](#); BOA, Tab 19.

Calpine, *supra* at para. [38](#); BOA, Tab 18.

McEwan Affidavit at paras. 19-22, 30-31, 38, 40, 56; Motion Record, Tab 4.

(iv) *Compliance with Additional Requirements Under Section 36 of the CCAA*

62. Pursuant to Section 36(2) of the CCAA, the secured creditors who are likely to be affected by the relief requested in this application have been given notice of this application.

CCAA, Section [36\(2\)](#).

Affidavit of Service of Caroline Descours sworn October 4, 2021 and Affidavit of Service of Trish Barrett sworn October 4, 2021.

63. The Transaction also complies with Section 36(7) of the CCAA, as pursuant to the proposed Transaction all employee obligations referred to in Section 6(5)(a) of the CCAA will be assumed by the Purchaser, and the Company does not maintain any pension plans and thus the provisions of Section 6(6)(a) of the CCAA are inapplicable.

CCAA, Section [36\(7\)](#).

McEwan Affidavit at paras. 40, 42, 45; Motion Record, Tab 4.

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

64. The proposed Approval and Vesting Order provides 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 these CCAA proceedings by the Company, 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.

65. 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 these CCAA

proceedings and the proposed Transaction, and are necessary to ensure that the positive results that are to flow from the proposed Transaction (if found to be fair and reasonable and approved by this Court) are not jeopardized or subject to collateral attack following the implementation of the 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 20, 21, and 22.

C. THE TRANSACTION DEPOSIT AND TRANSACTION DEPOSIT CHARGE SHOULD BE APPROVED

66. The Company is seeking the approval of the Transaction Deposit and the granting of the Transaction Deposit Charge to secure the Transaction Deposit in the amount of up to \$2.25 million.

McEwan Affidavit at paras. 6, 35, 45, 47; Motion Record, Tab 4.

67. As set forth in the Company's Cash Flow Forecast, the Company will require additional liquidity in order to fund its operations and the costs of these CCAA proceedings, and the Transaction Deposit is the best source of funding available to the Company.

McEwan Affidavit at paras. 6, 46; Motion Record, Tab 4.

68. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant an interim financing charge to secure financing for a debtor company and sets out the factors to be considered by the Court in deciding whether to grant such a charge. Such factors are not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant an interim financing charge.

CCAA, Sections [11.2\(1\)](#) and [11.2\(4\)](#).

[*Callidus*](#), *supra* at paras. [84-88](#), [90-91](#); BOA, Tab 3.

[*Carillion Canada Holdings Inc., Re*](#), 2018 ONSC 1051 at para. 3; BOA, Tab 23.

69. The following factors support the approval of the Transaction Deposit and the granting of the Transaction Deposit Charge: (a) the Cash Flow Forecast indicates the Company will need additional liquidity to continue to operate during these CCAA proceedings; (b) the Transaction Deposit is being provided without any fees or interest; (c) the Transaction Deposit Charge will rank behind in priority to the security granted in favour of RBC and the Administration Charge and the Directors' Charge; (d) the Transaction Deposit 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 Transaction Deposit or Transaction Deposit Charge; and (e) the Monitor is supportive of the Transaction Deposit and the Transaction Deposit Charge.

McEwan Affidavit at paras. 46-49; Motion Record, Tab 4.

PART IV – CONCLUSION

70. For the reasons set out herein, the proposed 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 Transaction is fair and reasonable, and the best transaction available in the circumstances. There is no superior transaction available, and a third party sale process would not produce an improved result for the Company or its stakeholders. The Company is acting in good faith and in the best interests of the McEwan Group's many stakeholders and long-term supporters. The Company respectfully submits that it is appropriate for this Court to approve the proposed Transaction and grant the relief requested in the Approval and Vesting Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 13, 2021

Goodmans LLP

Goodmans LLP

SCHEDULE A
LIST OF AUTHORITIES

1. [Nortel Networks Corp., Re](#), (2009), 55 C.B.R. (5th) 229 (Ont. Sup. Ct. J. [Commercial List])
2. [Brainhunter Inc., Re](#), (2009) O.J. No. 5207 (Ont. Sup. Ct. J. [Commercial List])
3. [9354-9186 Quebec Inc v Callidus Capital Corp](#), 2020 SCC 10
4. [Royal Bank v. Soundair Corp](#), (1991), 83 D.L.R. (4th) 76 (Ont. C.A.)
5. [Target Canada Co., Re](#), 2015 ONSC 2066
6. [White Birch Paper Holding Co., Re](#), 2010 QCCS 4915
7. [Clearbeach Resources Inc. and Forbes Resources Corp., Re](#), 2021 ONSC 5564
8. [Tool-Plas Systems Inc., Re](#), (2008), 48 C.B.R. (5th) 91 (Ont. Sup. Ct. J. [Commercial List])
9. [Canwest Global Communications Corp., Re](#), (2009), 183 A.C.W.S. (3d) 325 (Ont. Sup. Ct. J. [Commercial List])
10. [OEL Projects Ltd., Re](#), 2020 ABQB 365
11. [Lehndorff General Partner Ltd., Re](#), (1993), 17 C.B.R. (3d) 24 (Ont. Sup. Ct. J. [Commercial List])
12. [Ted Leroy Trucking \[Century Services\] Ltd., Re](#), 2010 SCC 60
13. [Elan Corp. v. Comiskey \(C.A.\)](#), (1990), 1 O.R. (3d) 289 (C.A.)
14. [Bank of Nova Scotia v. Huronia Precision Plastics Inc.](#), [2009] O.J. No. 312 (Ont. Sup. Ct. J. [Commercial List])
15. [Ivaco Inc., Re](#), [2006] O.J. No. 4152 (Ont C.A.)
16. [General Chemical Canada Ltd., Re](#), [2005] O.J. No. 5436 (Ont. Sup. Ct. J.)
17. [Grafton-Fraser Inc. v. Cadillac Fairview Corp.](#), 2017 ONSC 2496
18. [Calpine Canada Energy Ltd. Re](#), 2007 ABCA 266
19. [Canadian Airlines Corp. Re](#), [2000] A.J. No. 1693 (Alta. Q.B.)
20. [Clearbeach Resources Inc., Re](#), (14 July 2021), Toronto, Ont. Sup. Ct. [Commercial List] CV-21-00662483-00-CL (Approval and Vesting Order)
21. [Cirque Du Soleil Canada Inc., Re](#), (26 October 2020), Montreal, Que. Sup. Ct., 500-11-058415-205 (Approval and Vesting Order)
22. [Wayland Group Corp., Re](#), (21 April 2020), Toronto, Ont. Sup. Ct. J. [Commercial List] CV-19-00632079-00CL (Approval and Vesting Order)
23. [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.

[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.

RULES OF CIVIL PROCEDURE
R.R.O. 1990, Reg. 194, as amended

s. 39.01 (7)

Evidence by Affidavit – Expert Witness Evidence – Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1).

s. 53.03 (1)

Expert Witnesses – Experts' Reports – A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

s. 53.03 (2.1)

A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
 - iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

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

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MCEWAN
ENTERPRISES INC.**

Applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(Returnable October 15, 2021)**

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