

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

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF 2675970 ONTARIO INC., 2733181 ONTARIO
INC., 2385816 ALBERTA LTD., 2161907 ALBERTA LTD., 2733182
ONTARIO INC., 2737503 ONTARIO INC., 2826475 ONTARIO INC.,
14284585 CANADA INC., 2197130 ALBERTA LTD., 2699078
ONTARIO INC., 2708540 ONTARIO CORPORATION, 2734082
ONTARIO INC., TS WELLINGTON INC., 2742591 ONTARIO INC.,
2796279 ONTARIO INC., 10006215 MANITOBA LTD., AND 80694
NEWFOUNDLAND & LABRADOR INC. (individually, an
"Applicant" and collectively, the "Applicants")**

**FACTUM OF THE APPLICANTS
(Re FARIO re Extend Stay)**

October 8, 2024

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PART I – OVERVIEW

1. On August 28, 2024, the Applicants commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the "**CCAA**") to restructure their business and preserve it as a going concern in the best interests of those companies' countless stakeholders. On August 28, 2024, the Court granted an initial order that among other things granted a stay of proceedings as against the Applicants and certain of their affiliates.
2. The key focus of the restructuring proceeding is a sale and investment solicitation process ("**SISP**"), that is intended to broadly canvass sale, investment, and other opportunities for the business and assets of the Applicants. Pursuant to the court-approved SISP milestone, the Phase 2 Bid Deadline (as defined in the SISP) is November 11, 2024. The closing of the Successful Bid (as defined in the SISP) is expected to occur by December 6, 2024.
3. Certain of the Applicants and DAK Capital Inc. ("**DAK**") were named as defendants in a Notice of Arbitration filed by Canopy Growth Corporation ("**Canopy**") prior to the CCAA proceeding (the "**Canopy Arbitration**"). The Canopy Arbitration relates to alleged breaches of a Share Purchase Agreement dated September 23, 2022, as amended by an Amendment to Share Purchase Agreement dated December 30, 2022 (the "**SPA**"). As a result of the stay of proceedings, the Canopy Arbitration is stayed as against all of the defendants except DAK.
4. Despite the breaches claimed by Canopy having allegedly begun in March 2023, Canopy only now takes steps to advance the arbitration on a purportedly urgent basis—just as the Applicants' attentions are focused on the SISP and the critical work of the restructuring.
5. Canopy purports to proceed only as against DAK in respect of certain claims against it under the SPA. Canopy asserts those claims are purely guarantee claims and cannot be stayed.
6. The claims against DAK require evidence and information from the Applicants, which share a central management team. This management team would be needed to support the Canopy

Arbitration were it to push ahead. This would create a significant burden on the Applicants' already thin and over-burdened management team, who are fully engaged with continuing to run the business while managing the SISP and restructuring. Diverting their attention now would jeopardize the successful conclusion of the SISP and risk significant consequences for the Applicants and their stakeholders.

7. Against this, the Canopy Claimants have led no cogent evidence of prejudice they will suffer if the stay is extended to DAK for its remaining seven weeks. There is no urgency to the Canopy Arbitration. There is no injunctive relief being sought. Canopy seeks retrospective damages from DAK. There is no evidence to indicate that DAK will be in a worse position to pay any damages ordered after a further seven-week delay.

8. This Court has the discretion to grant the order sought. The factors applicable to exercising that discretion point clearly in favour of granting the order.

PART II – FACTS

A. The Parties

9. The Applicants own, operate, and franchise retail dispensaries in Canada selling premium cannabis products and accessories directly to consumers under the corporate banner "Tokyo Smoke". In addition to retail dispensaries, the Applicants maintain an online platform for direct-to-consumer cannabis sales and deliveries (together with the retail dispensaries, the "**Business**").¹

10. DAK is a corporate affiliate of the Applicants.² DAK provides two of the Applicants, 2161907 Alberta Ltd. ("**216 Alberta**") and 26775970 Ontario Inc. ("**267 Ontario**"), with management

¹ Affidavit of Andrew Williams Sworn September 12, 2024 ("**First Williams Affidavit**") at para. 3, Applicants' Motion Record dated September 12, 2024 ("**MR**") Tab 2, [p. 27](#).

² Affidavit of Andrew Williams sworn September 26, 2024 ("**Second Williams Affidavit**") at para. 5, Applicants' Supplementary and Reply Motion Record dated September 26, 2024 ("**SMR**") Tab 1, [p. 6](#).; Transcript from Cross-Examination of Andrew Williams dated October 4, 2024 ("**Williams Cross**") Q. 123, Transcript Brief, Tab 2 [p. 68](#).

services pursuant to certain management services agreements.³

11. Canopy is a cannabis retail company and is a vendor pursuant to the SPA.

12. Tweed Inc. ("**Tweed**") is a subsidiary of Canopy and is also a vendor pursuant to the SPA.

B. The SPA

i. Negotiation of the SPA

13. 267 Ontario purchased Canopy and Tweed's Canadian retail cannabis business pursuant to the SPA. The SPA is comprised of a Share Purchase Agreement dated September 23, 2022, as amended by an Amendment to Share Purchase Agreement dated December 30, 2022.⁴ DAK is a party to the SPA as a guarantor for certain of 267 Ontario's obligations under the SPA.

14. The Applicants share a centralized management team (the "**TS Management Team**") consisting of management employees employed by 2675970 Ontario Inc. ("**267 Ontario**"). DAK has no employees of its own and was therefore heavily reliant on the TS Management Team during the negotiation of the SPA and the commercial discussions that led to it.⁵ These discussions were principally led by Jurgen Schreiber, CEO, with assistance on the commercial operations side from Andrew Williams, President, and Greg Bedford, Assistant Treasurer.⁶

15. Messrs. Schreiber, Williams, and Bedford are the only members of the TS Management Team who were involved in the negotiation of the SPA who remain with the Applicants.⁷

ii. Canopy Beaches the SPA

16. On or about December 30, 2022 (the "**Closing Date**"), 267 Ontario closed the transaction as

³ First Williams Affidavit at para. 34, MR [p. 35](#).

⁴ First Williams Affidavit at para. 34 and 52. MR [p. 35](#) and [44](#).

⁵ Second Williams Affidavit at para. 5, SMR [p. 6](#).

⁶ *Ibid.*

⁷ Williams Cross at Q. 230, Transcript Brief [p. 96](#).

set out in the SPA and took possession of Canopy's Canadian retail stores.⁸

17. Following the Closing Date, 267 Ontario became aware that Canopy and Tweed (the “Vendors”) had breached the SPA. The breaches included:

- (a) **Inadequate inventory levels:** As of the Closing Date, the value of the inventory and prepaid inventory balance were substantially lower than what had been represented by the Vendors and agreed in the SPA;
- (b) **Canopy price reductions:** The Vendors had not conducted Business (defined in the SPA) in the ordinary course during the Interim Period (defined in the SPA). This included impermissible drastic price reductions on Canopy products without the knowledge or consent of 267 Ontario; and
- (c) **Irregular discounts:** Following the Closing date, 267 Ontario discovered instances of discounts that had been applied to inventory outside the ordinary course of the Business. This included discounts of up to 60% on full-price products (together, the “Canopy Breaches”).⁹

18. On January 10, 2023, 267 Ontario gave notice to Canopy and Tweed of their concerns regarding the state of inventory on closing.¹⁰

19. On January 16, 2023, 267 Ontario gave notice to Canopy and Tweed that a Direct Claim Notice (as defined in the SPA) regarding the Canopy Breaches was forthcoming.¹¹

20. On April 28, 2023, 267 Ontario provided Canopy and Tweed with a Direct Claim Notice pursuant to section 8.9 of the SPA.¹²

⁸ Second Williams Affidavit at para. 6, SMR [p. 7](#).

⁹ *Ibid*, at para. 7, SMR [p. 7](#).

¹⁰ Second Williams Affidavit at paras. 8-12, SMR p. [7-8](#)

¹¹ Second Williams Affidavit at paras. 8-12, SMR p. [7-8](#)

¹² Second Williams Affidavit at paras. 8-12, SMR p. [7-8](#).

21. On June 27, 2023, Canopy and Tweed provided a Response to the Direct Claim Notice.¹³
22. On July 18, 2023, 267 Ontario and DAK provided a Reply to the response to the Direct Claim Notice.¹⁴
23. The parties agreed that no payments would be made by any party while the issues raised by 267 Ontario were discussed and negotiated.¹⁵
24. Messrs. Williams and Bedford, are the only management employees still employed by 267 Ontario with direct knowledge of the details of the Canopy Breaches.¹⁶

iii. Canopy Responds with Complaints Regarding Payments

25. On November 7, 2023, Canopy and Tweed wrote to Mr. Schreiber alleging overdue payments, including among other things, the Deferred Consideration (defined and discussed below).¹⁷
26. On December 1, 2023, Mr. Schreiber responded to Canopy's November 7, 2023, letter addressing the alleged overdue payments.¹⁸

C. The Arbitration

27. On March 8, 2024, Canopy, Tweed, and Tweed Leasing Corporation (collectively, the "**Canopy Claimants**") issued a Notice of Arbitration against four of the Applicants: 267 Ontario, 216 Alberta, 2733181 Ontario Inc., and 14284585 Canada Inc. (collectively, the "**TS Respondents**"), as well as DAK.¹⁹
28. The Canopy Arbitration relates to alleged breaches of several agreements between the

¹³ Second Williams Affidavit at paras. 8-12, SMR p. [7-8](#).

¹⁴ Second Williams Affidavit at paras. 8-12, SMR p. [7-8](#).

¹⁵ December 1, 2023 Letter, Exhibit H to Second Williams Affidavit, SMR [p. 145](#).

¹⁶ Williams Cross at QQ. 231-239, Transcript Brief [p. 96-97](#).

¹⁷ Second Williams Affidavit at para. 13, [p. 8](#); November 7, 2023 Letter, Exhibit G to Second Williams Affidavit, SMR [p. 141](#).

¹⁸ December 1, 2023 Letter, Exhibit H to Second Williams Affidavit, SMR [p. 145](#).

¹⁹ First Williams Affidavit at para. 53, MR [p. 44](#).

Canopy Claimants, the TS Respondents, and DAK. The Canopy Claimants claim, among other things, breach of contract for unpaid amounts under the SPA, non-payment of invoices, and certain unpaid rents.²⁰

29. The Canopy Claimants' claims include claims under the SPA for (i) the Anniversary Cash Consideration; and (ii) Deferred Consideration payments. The Canopy Claimants allege that the Anniversary Cash Consideration is an amount payable under the SPA twelve months following the Transaction's (as defined in the SPA) closing.²¹ The Deferred Consideration is a series of payments over the Calculation Period (as defined in the SPA), calculated on a quarterly basis using various aggregate and store level financial and operational inputs. There are five sub-amounts that comprise the overall Deferred Consideration.²²

30. The Canopy Claimants advance their claims for the Anniversary Cash Consideration and Deferred Consideration against 267 Ontario and DAK on a joint and several basis, notwithstanding the fact that DAK is only a guarantor for certain aspects of the Deferred Consideration.²³ The SPA requires that **267 Ontario** deliver to Canopy reports showing its calculation of the Deferred Consideration payments for each applicable period.²⁴ The Canopy Claimants seek an order against 267 Ontario only for copies of these reports.²⁵

31. No procedural steps have been taken in the Canopy Arbitration since its commencement in March 2024.²⁶ Following the issuance of the Notice of Arbitration, the parties engaged in without prejudice settlement discussions which did not result in a resolution.²⁷ To date:

(a) No Statement of Defence has been delivered;

²⁰ First Williams Affidavit at para. 54, MR [p. 44](#).

²¹ Paterson Affidavit at para. 13, Responding Motion Record dated September 20, 2024 ("**RMR**"), Tab 1 [p. 5](#).

²² SPA, s. 2.7(a)(i)-(v), Exhibit A to Second Williams Affidavit, SMR [p. 45](#).

²³ *Ibid*; Notice of Arbitration at para. 2, Confidential Exhibit I to Second Williams Affidavit.

²⁴ SPA, s. 2.7(b), Exhibit A to Second Williams Affidavit, SMR [p. 45](#).

²⁵ Notice of Arbitration at para. 26, Confidential Exhibit I to Second Williams Affidavit.

²⁶ Second Williams Affidavit at para. 34, SMR [p. 13](#).

²⁷ Second Williams Affidavit at para. 35, SMR [p. 13](#).

- (b) No discovery plan has been set, or even proposed;
- (c) No timetable for the arbitration has been set, or even proposed;
- (d) No arbitration procedure has been agreed; and
- (e) No Arbitrator has been appointed.²⁸

D. CCAA Proceeding

32. The Applicants initiated these CCAA proceedings to obtain the breathing room and stability to undertake an operational restructuring to streamline the Business, and to conduct a court-approved SISP to canvass transactions for the sale, investment, or refinancing of the Business.

33. On August 28, 2024, the Applicants obtained an Initial Order under the CCAA. On September 6, 2024, the Applicants obtained an amended and restated initial order (the “**ARIO**”) that, among other things, extended the stay of proceedings over the Applicants up to and including December 6, 2024. On September 18, 2024, the Applicants obtained an order that, among other things, approved the SISP and a stalking horse agreement (the “**SISP Approval Order**”).

34. The SISP is now well underway and is demanding the full engagement of the TS Management Team.²⁹ The anticipated closing date for a successful transaction under the SISP is December 6, 2024.³⁰

35. In addition to the SISP, the TS Management Team also focused on the continuing operation restructuring of the Applicants and streamlining of the Business.³¹

36. The Business emerging as a going-concern is critical to the success of the restructuring.³² If the SISP is not successful, the Applicants’ commercial partners, suppliers, approximately 350

²⁸ Second Williams Affidavit at para. 34, SMR [p. 13](#).

²⁹ Second Williams Affidavit at para. 28, SMR [p. 11](#).

³⁰ First Williams Affidavit at para. 39, MR [p. 38](#).

³¹ Second Williams Affidavit at paras. 27-30, SMR [p. 11](#).

³² First Williams Affidavit at para. 31, MR [p. 33](#).

employees, customers and financial stakeholders will be negatively impacted.³³

PART III – ISSUES

37. The issues to be determined by this Court are:

- (a) Does the Court have jurisdiction to extend the stay of proceedings to DAK pursuant to section 11 of the CCAA; and
- (b) Whether the Court should exercise its discretion under section 11 to extend the stay.

PART IV – LAW & ARGUMENT

A. The Remedial Objective and Broad Jurisdiction of the Court under the CCAA

38. This motion occurs within the CCAA proceeding. Its merits must be considered through the lens of the statute and the important remedial objectives the CCAA serves, as well as the broad jurisdiction Parliament has granted the courts to achieve those objectives.

39. The CCAA's remedial objectives recognize that companies retain more value as a going concern. As such, reorganization serves the public interest by facilitating the survival of companies for the good of the economy and the complex web or interdependent relationships, avoiding the harmful consequences of liquidation.³⁴

40. The Supreme Court of Canada has made clear that the CCAA confers "broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives".³⁵ By its amendments, Parliament has endorsed the broad reading of CCAA authority developed by the jurisprudence.³⁶

³³ Second Williams Affidavit at para. 31, SMR [p. 11](#).

³⁴ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at [para. 18](#) [**Century Services**].

³⁵ *Century Services*, *supra* at [para. 19](#).

³⁶ *Century Services*, *supra* at [paras. 66-68](#).

B. This Court has Jurisdiction Under Section 11 to Extend the Stay

41. Section 11 of the CCAA provides this Court with the jurisdiction to extend the stay.

42. Section 11 sets out the general powers of the Court in a CCAA process. It provides that, subject to the restrictions set out in the Act, the Court may make **any** order that it considers appropriate in the circumstances.³⁷

43. Courts have repeatedly used their broad powers under section 11 to extend stays of proceedings to non-parties, including guarantors.

44. In *Pride Group Holdings Inc.* (March 2024), Chief Justice Morawetz extended a stay of proceedings to include certain guarantors who had provided personal guarantees in respect of a CCAA applicant's obligations, and against whom certain lenders had threatened proceedings.³⁸

45. This same relief was granted by the Chief Justice in *Nordstrom Canada Retail Inc.* (March 2023), where the applicants sought a stay in favour of a third party parent company, including in respect of claims arising from or in connection with any indemnity, guarantee, or surety relating to various leases.³⁹

46. Similarly, in *Bed Bath & Beyond Canada Limited (Re)* (February 2023), the applicants sought to extend a stay of proceedings to the ultimate parent company of the Bed Bath & Beyond Group which had provided an indemnity to a non-applicant operating entity that was party to the debtor company's retail leases. Chief Justice Morawetz granted a stay of any proceedings arising out of or in connection with any indemnity, guarantee, or surety relating to a lease of real property by the

³⁷ CCAA, [s. 11](#) [**emphasis added**].

³⁸ *Pride Group Holdings Inc.*, 2024 ONSC 1830 at [para. 34](#) [*Pride*], as thereafter extended by order of the Court.

³⁹ *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422 at [paras. 36-42](#) [*Nordstrom*], as thereafter extended by order of the Court.

applicant or related parties subject to the existing stay of proceedings.⁴⁰

47. In *Re Balboa* (January 2024), Justice Kimmel granted a stay in favour of non-applicant parties who had provided guarantees in respect of certain of the Applicants' obligations.⁴¹ Justice Kimmel held:

This is an order that is within the discretion of the court to make when it is considered just and convenient to do so, and I find it to be so in this case. This jurisdiction is derived from s. 11 of the CCAA and further embodied in section 106 of the *Court of Justice Act*, R.S.O. 1990, c. C.43.⁴²

48. The Court has granted similar relief in a multitude of other cases.⁴³

49. The Applicants understand that the Canopy Claimants' primary ground for opposing the stay is that section 11.04 prevents the extending of stays to third party guarantors. As the above cases make clear, this is not correct.

50. Section 11.02(2) of the CCAA provides:

11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken **in respect of the company** under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding **against the company**; and

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

51. Section 11.02 sets out the Court's express jurisdiction to stay proceedings against **the company**. It does not speak to the Court's jurisdiction to grant stays in respect of any other entity.

⁴⁰ *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014 at [para. 34](#) [*Bed Bath*], as thereafter extended by order of the Court

⁴¹ *Balboa Inc. et al. (Re)*, Court File No. CV-24-00713254 at [para. 28](#) [*Balboa*].

⁴² *Balboa* at [para. 35](#), as thereafter extended by order of the Court.

⁴³ *McEwan Enterprises Inc.*, 2021 ONSC 6453 [*McEwan*], *Laurentian University of Sudbury*, [2021 ONSC 659](#); *Lydian International Limited*, [2019 ONSC 7473](#); *Re: Tamerlane Ventures Inc. and Pine Point Holding Corp.*, [2013 ONSC 5461](#).

52. Section 11.04 clarifies that orders under section 11.02 do not on their own affect guarantees in relation to the debtor company. Section 11.04 provides that:

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.⁴⁴

53. Section 11.04 simply states that any stay granted by the Court over the debtor company using its powers under Section 11.02 does not affect a guarantee in respect of that debtor company. In other words, Section 11.04 is a deeming provision intended to clarify the *scope and effect* of an order made under Section 11.02. Section 11.04 is not prohibitive. Contrasting the language of 11.04 with the language of a section like 11.08 (“**No order may be made under section 11.02 that...**”)⁴⁵, it is apparent that Parliament made a clear decision not to use such prohibitive language in section 11.04. Section 11.04 does not set out a bar to any relief under section 11.02, or speak to the Court’s authority generally to make an order staying a guarantee.

54. Further, section 11.04 does not purport to limit, or even clarify, the relief that may be granted under the general powers of section 11. Contrasting the language of 11.04 with that of 11.01 (“No order made under **section 11 or 11.02** has the effect of...”)⁴⁶, it is apparent that Parliament made a decision not to modify, or even clarify, section 11 by section 11.04.

55. Consistent with this interpretation, Section 11.04 has read by the Court so as not to frustrate the remedial effect of the CCAA by restricting the Court’s broad powers under Section 11. As Chief Justice Morawetz held this year in *Pride*:

Notwithstanding sections 11.04 and 11.03(2) of the CCAA, this Court has found that it has broad inherent jurisdiction under section 11 to grant stays in favour of third-party guarantors, including director guarantors, to ensure that the intent and purpose of the

⁴⁴ CCAA, [s. 11.04](#) **[emphasis added]**.

⁴⁵ CCAA, [s. 11.08](#) **[emphasis added]**.

⁴⁶ CCAA, [s. 11.01](#) **[emphasis added]**.

CCAA proceedings are not frustrated.⁴⁷

C. This Court Should Grant the Related Proceeding Stay

i. Relevant Case Law

56. As discussed above, stays have been extended to third party guarantors and indemnifiers in a number of recent decisions of this Court, including *Pride Group Holdings Inc.* (March 2024), *Nordstrom Canada Retail Inc.* (March 2023), *Bed Bath & Beyond Canada Limited (Re)* (February 2023), and *Re Balboa* (January 2024).

57. In addition, in *McEwan Enterprises Inc.*, this Court was asked to grant a stay of proceedings to stay personal guarantees, indemnities and security granted by Mr. McEwan in his personal capacity in connection with certain of the CCAA debtors' obligations, as well as in favour of a subsidiary entity.⁴⁸ In concluding that the stay of proceedings should be granted, the Court considered that any enforcement proceeding against the guarantor would be disruptive and detrimental to the applicants' restructuring efforts, potentially cause an erosion of value to the business, and the obligations that had been guaranteed would not be impacted by the CCAA proceedings.⁴⁹

58. This Court articulated in *McEwan*, as well as numerous other decisions, a number of factors to consider when determining whether to extend a stay of proceedings to non-applicant parties:

- (a) Whether the business and operations of the third party are significantly intertwined and integrated with those of the debtor company;
- (b) Whether extending the stay to the third party would help maintain stability and value during the CCAA process;

⁴⁷ *Pride*, *supra* at [para. 34](#), citing *Balboa Inc. et al. (Re)* Court File No. CV-24-00713254 at para. 32 and *Nordstrom* at paras. 40-42.

⁴⁸ *McEwan*, *supra* at [para. 19](#).

⁴⁹ *McEwan*, *supra* at [para. 44](#).

- (c) Whether not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;
- (d) If the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;
- (e) Whether failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;
- (f) If the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and
- (g) Whether the balance of convenience favours extending the stay to the third party.⁵⁰

59. As discussed below, these factors weigh heavily in favour of granting the stay in the present case.

60. This Court has often stayed entire litigation proceedings where CCAA applicants are involved as defendants to avoid disruption to the defendants' CCAA proceeding. For example, in the tobacco and opioid CCAA proceedings, the Court exercised jurisdiction to stay entire actions where the debtor applicant was named as a defendant in those proceedings.

61. For example, in *Paladin Labs Canadian Holdings Inc.*, the Court granted a stay of proceedings in favour of defendants in a separate action related to opioid litigation in which the

⁵⁰ *McEwan*, *supra* at [para. 43](#); *JTI-Macdonald Corp., Re*, 2019 ONSC 1625 at [para. 15](#) [*JTI-MacDonald*]; *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429 at [para. 26](#); *Laurentian University of Sudbury*, 2022 ONSC 5645 at [para. 40](#).

applicant was also a defendant. In concluding that the stay of proceedings should be granted, the Court noted that it would be “prejudicial to permit the litigation to continue against other defendants when the underlying claims closely related to the claims against the applicant”.⁵¹

62. Similarly, in *Imperial Tobacco Canada Limited, et al (Re)*, the Court granted a stay of proceedings where outstanding litigation against the applicants also named the non-applicant parties as co-defendants. Further, certain of the non-applicant parties (in this case, affiliates and subsidiaries), held assets of applicant, provided services to the applicant, shared the cash management system with the applicant, and /or had guaranteed the applicant’s debts from time to time. The Court held it was reasonable to extend the stay to these entities, as failure to do so would undermine the intent of the stay. The Court also noted that, given the stay of proceedings granted with respect to the applicants, there was no prejudice to claimants in existing and potential proceedings if the stay was extended.⁵²

63. In *JTI-MacDonald Corp., (Re)*, the Court granted a stay of proceedings in favour of the defendants in a separate action relating to tobacco claims in which the applicant was also a defendant. In *JTI- Macdonald*, this Court noted that allowing the separate actions to proceed against other defendants but not the applicant could cause significant economic harm to all of the applicant’s stakeholders. Ultimately, the Court determined that the balance of convenience favoured exercising discretion under section 11 of the CCAA to grant a stay of proceedings to the other defendants.⁵³

ii. The Court Should Stay the Canopy Arbitration

Evidence Will be Required from the TS Management Team

64. The uncontroverted evidence is that permitting the Canopy Arbitration to proceed during the Applicants’ restructuring and SISP processes would place an undue and unnecessary burden on the Applicants, which would negatively impact the process and its likelihood of success.

⁵¹ *Paladin Labs Canadian Holding Inc.*, 2022 ONSC 4748 at [paras. 22-27](#).

⁵² *Imperial Tobacco Canada Limited, et al (Re)*, 2019 ONSC 1684 at [para. 12](#).

⁵³ *JTI-MacDonald*, *supra* at [para. 15](#).

65. DAK is a corporate affiliate of the Applicants. It has no employees of its own. DAK was heavily reliant on management employees from 216 Alberta and 267 Ontario (the “**TS Management Team**”) for the negotiation of the SPA (defined below) and the commercial discussions that led to it.⁵⁴

66. DAK cannot effectively respond to the claims made against it without the assistance of the Applicants and their management. The Applicants and their management would have to support DAK in its defence of the litigation.

67. DAK intends to pursue all substantive avenues to defend the claims made against it, including but not limited to defences going to the enforceability of the alleged guarantees.⁵⁵ Such defences may involve evidence and argument regarding the Canopy Claimants’ actions and representations prior to the formation of the SPA, and alleged breaches of it.⁵⁶

68. DAK will also require information, documents, and support to calculate and litigate the amount of Deferred Consideration, if any, that is owed.⁵⁷ Those calculations require a significant amount of specific financial information that needs to be obtained from the TS Respondents.⁵⁸ DAK does not maintain information about the operations of the TS Respondents, or store-level sales.⁵⁹ The information needed to calculate Deferred Consideration is not readily available and must be compiled and analyzed by the TS Management Team.⁶⁰

69. DAK will need to obtain information, documents, and evidence from the TS Management Team as DAK does not have any separate internal sources for such information, documents, and evidence.⁶¹ Given that they are corporately affiliated, and DAK has always acted in respect of the

⁵⁴ Second Williams Affidavit at para. 5, SMR [p. 6](#); Williams Cross QQ, 123 and 130, Transcript Brief [pp. 68](#) and [70](#).

⁵⁵ Second Williams Affidavit at para. 18, SMR [p. 9](#)

⁵⁶ Second Williams Affidavit at para. 19, SMR [p. 9](#)

⁵⁷ Second Williams Affidavit at paras. 20-21, SMR [p. 9](#); Williams Cross Q. 164, Transcript Brief [p. 78](#).

⁵⁸ Williams Cross Q. 151, Transcript Brief [p. 75](#).

⁵⁹ Second Williams Affidavit at para. 22, SMR [p. 9](#).

⁶⁰ Second Williams Affidavit at para. 23, SMR [p. 10](#).

⁶¹ Second Williams Affidavit at para. 20, SMR [p. 9](#).

SPA in reliance on the Applicants, the Applicants will have to provide such support to DAK.⁶²

70. Andrew Williams, President of 267 Ontario, gave evidence in cross-examination that the work that would need to be done on the Deferred Consideration calculations alone would likely take “weeks” *in the absence of a CCAA process*.⁶³ Given the TS Management Team’s current dedication to the restructuring and SISP processes, this timeline would be even longer were the arbitration to proceed now.

The TS Respondents’ Position Will be Prejudiced

71. TS Respondents have to be involved in any arbitrating of the Canopy Claimants’ claims against DAK because of the close relationship between those claims and extant claims against the TS Respondents, and the risk of those claims being litigated *in absentia* against the TS Respondents.

72. The Canopy Claimants’ claims for the Anniversary Cash Consideration and the Deferred Consideration are both made jointly and severally against the TS Respondents and DAK. While the claims against the TS Respondents have been temporarily stayed, they remain extant in the Canopy Arbitration. DAK will contest the enforceability of the guarantees on grounds which may include litigating the actions and representations of the Canopy Claimants prior to contract formation and on closing or during the life of the SPA (i.e. alleged breaches). Allowing the evidentiary and discovery record to develop, and potentially even findings to be made, regarding these issues without input from the TS Respondents—the parties with all of the relevant personnel, information, and documents—creates a risk that the TS Respondents will have their position on the claims prejudiced *in absentia*.

73. To avoid the risk of such prejudice, the TS Respondents will have to support DAK in any litigating of the Canopy Arbitration, to make sure the right defences, evidence, and arguments are

⁶² Second Williams Affidavit at paras. 20-21, SMR [p. 9](#).

⁶³ Williams Cross Q. 72, Transcript Brief [p. 55](#).

being led on behalf of the respondents in that proceeding.⁶⁴

TS Management is Currently Fully Engaged with the CCAA Proceeding

74. The TS Respondents cannot meaningfully participate in the Canopy Arbitration, or work with DAK on its efforts to defend the Canopy Arbitration, and continue to devote due attention to the restructuring process.⁶⁵ The TS Management Team are presently fully engaged in:

- (a) Carrying out the TS Respondents' financial and operational restructuring effort;
- (b) Supporting the SISP being conducted by the TS Respondents. The SISP is of critical priority given the strict timelines and court ordered procedural steps to be taken; and
- (c) Overseeing ongoing day-to-day operations such as dealing with vendors, suppliers, and landlords, including the operations of more than 60 stores.⁶⁶

75. More specifically, Mr. Williams has provided evidence of the key roles being played in the SISP and restructuring processes by three key management personnel:

- (a) Jurgen Schreiber, Chief Executive Officer at 267 Ontario, who led the negotiation on behalf of 267 Ontario;
- (b) Andy Williams, President at 267 Ontario; and
- (c) Greg Bedford, Assistant Treasurer of 267 Ontario.

76. Mr. Williams' uncontroverted evidence is that these are the same individuals who would be required to assist with defending the Canopy Claimants' claims against DAK, as well as to attempt to calculate the Deferred Consideration.⁶⁷ Mr. Schreiber, Mr. Bedford, and Mr. Williams are focused on the requirements of the SISP and attempting to make the most of the opportunity to market the

⁶⁴ Second Williams Affidavit at paras. 25-26, SMR [p. 10-11](#).

⁶⁵ Second Williams Affidavit at para. 27, SMR [p. 11](#).

⁶⁶ Second Williams Affidavit at para. 28, SMR [p. 11](#).

⁶⁷ Second Williams Affidavit at para. 21, SMR [p. 9](#).

business. The SISP is critical to the restructuring effort.⁶⁸

77. The burden and distraction that would be placed on the TS Management Team by the litigating of the Canopy Arbitration would be exacerbated by the fact that a number of other employees with knowledge of the relevant issues have since left the company.⁶⁹ The current controller, who might otherwise have assisted Mr. Bedford with work on the Deferred Consideration analysis, is on maternity leave until March 2025. There is no other employee Mr. Bedford can delegate this work to.⁷⁰

78. If DAK were required to respond to the claims of the Canopy Claimants during the next seven weeks this would result in a significant burden to the management resources working on the SISP process and broader restructuring. Such resource drain would likely have a de-stabilizing effect on the process, and a negative impact on the Applicants' ability to successfully complete the restructuring and sale process.⁷¹

79. Even having to respond to the Canopy Claimants' opposition to this motion has diverted important resources from the restructuring effort and strained the capacity of the TS Management Team. The Canopy Arbitration, if it was permitted to proceed concurrently with the CCAA process, would only result in an even more significant drain on management's resources.⁷²

The Balance of Convenience Weighs in Favour of the Stay

80. The balance of convenience weighs heavily in favour of extending the stay to DAK for its remaining seven weeks. The milestone for the selection of a successful bid in the SISP is November 13, 2024. The deadline to close a successful transaction is December 6, 2024. Any stay of the Canopy Arbitration is *de facto* short and temporary.

⁶⁸ Second Williams Affidavit at para. 30, SMR [p. 12.](#)

⁶⁹ Williams Cross QQ. 231-232, Transcript Brief [pp. 96-97.](#)

⁷⁰ Williams Cross QQ. 62-64, Transcript Brief p. 19.

⁷¹ Second Williams Affidavit at para. 31, SMR [p. 12.](#)

⁷² Second Williams Affidavit at para. 32, SMR [p. 12.](#)

81. The significant prejudice that may be suffered by the TS Respondents, their management, and their employees, customers, suppliers, landlords, and other commercial partners as a result of the stay not being extended are set out above.

82. On the other hand, there is no cogent evidence to indicate that the Canopy Claimants will suffer any meaningful prejudice at all as a result of the stay being extended to DAK for a few weeks.

83. In their affidavit on this motion, the Canopy Claimants claim that Canopy would be prejudiced by the stay because that stay interferes with precisely what Canopy bargained for as part of the transaction: an enforceable guarantee obligation against a solvent entity that would not be **impaired** by the Purchaser's insolvency.⁷³

84. On cross-examination, Canopy's deponent Dave Paterson confirmed that the reference in the affidavit was to Article 9.2(a)(vii) of the SPA.⁷⁴ Article 9.2(a)(vii) does not provide for any right that the guarantee would not be ***impaired*** by an insolvency. Article 9.2(a)(vii) provides that the guarantee shall not be "***released or discharged***" notwithstanding an insolvency.⁷⁵ The Applicants do not seek to compromise, release or discharge the claim in respect of DAK. Mr. Paterson accepted this after being taken through the Applicants' Notice of Motion.⁷⁶ The sole form of prejudice that Canopy claims is objectively inaccurate.

85. The evidence is that:

(a) DAK is a solvent entity that has existed for a number of years;⁷⁷

(b) DAK was selected by Canopy as guarantor;⁷⁸ and

(c) Canopy was of the view that DAK had sufficient assets to cover the alleged

⁷³ Paterson Affidavit at para. 34, RMR [p. 11](#).

⁷⁴ Transcript from Cross-Examination of Dave Paterson dated October 3, 2024 ("**Paterson Cross**") QQ. 60-63, Transcript Brief [p. 18](#).

⁷⁵ Paterson Affidavit at para. 18, RMR [p. 6](#).

⁷⁶ Paterson Cross QQ. 66-75 and 77-78, Transcript Brief [pp. 19-20 and 22](#).

⁷⁷ Second Williams Affidavit at para. 37, SMR [p. 15](#).

⁷⁸ Paterson Cross Q. 26, Transcript Brief [p. 8](#).

guarantees.⁷⁹

86. Both affiants confirmed they had no reason to believe that DAK would be in a worse position to honour any guarantees it may be found to owe after a seven-week delay in proceedings.⁸⁰

87. This motion will be heard more than 18 months since the Canopy Claimants' claims purportedly arose, and more than seven months since they commenced the Canopy Arbitration. A further delay of seven weeks to give the Applicants' restructuring and SISP processes the best chance to succeed is not prejudicial to the Canopy Claimants.

PART V – RELIEF REQUESTED

88. The Applicants request an order in the form appended at Tab 4 to the Applicants' motion record that, among other things, stays proceedings against or in respect of DAK, that relate to or involve any of the Applicants or Non-Filing Entities, except with the written consent of DAK and the Monitor or with leave of the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS October 8, 2024

/s Reconstruct LLP

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Lawyers for the Applicants

⁷⁹ Paterson Cross Q. 27, Transcript Brief [p. 8](#).

⁸⁰ Second Williams Affidavit at para. 37, SMR [p. 15](#); Paterson Cross Q. 81, Transcript Brief [p. 23](#).

SCHEDULE "A"

List of Authorities

Tab	JURISPRUDENCE
1.	<i>Century Services Inc. v. Canada (Attorney General)</i>, 2010 SCC 60
2.	<i>Pride Group Holdings Inc.</i>, 2024 ONSC 1830
3.	<i>Nordstrom Canada Retail, Inc.</i>, 2023 ONSC 1422
4.	<i>Bed Bath & Beyond Canada Limited (Re)</i>, 2023 ONSC 1014
5.	<i>McEwan Enterprises Inc.</i>, 2021 ONSC 6453
6.	<i>Laurentian University of Sudbury</i>, 2021 ONSC 659
7.	<i>Lydian International Limited</i>, 2019 ONSC 7473
8.	<i>Target Canada Canada Co., Re</i>, 2015 ONSC 303
9.	<i>Balboa Inc. et al. (Re)</i>, Court File No. CV-24-00713254
10.	<i>Paladin Labs Canadian Holding Inc.</i>, 2022 ONSC 4748
11.	<i>Imperial Tobacco Canada Limited, et al (Re)</i>, 2019 ONSC 1684
12.	<i>JTI-Macdonald Corp., Re</i>, 2019 ONSC 1625
13.	<i>Pacific Exploration & Production Corp., Re</i>, 2016 ONSC 5429

SCHEDULE "B"

Statutory Authorities

[Companies Creditors Arrangement Act, RSC 1985, c. C-36](#)

General power of court

11 Despite anything in the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#), if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Rights of suppliers

11.01 No order made under [section 11](#) or [11.02](#) has the effect of

- **(a)** prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- **(b)** requiring the further advance of money or credit.

Stays, etc. — initial application

- **11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,
 - **(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#);
 - **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
 - **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

- **Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

- **Burden of proof on application**

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

- **Restriction**

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section

Stays — directors

- **11.03 (1)** An order made under [section 11.02](#) may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

- **Exception**

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

- **Persons deemed to be directors**

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

Persons obligated under letter of credit or guarantee

11.04 No order made under [section 11.02](#) has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

Restriction — certain powers, duties and functions

11.08 No order may be made under [section 11.02](#) that affects

- (a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the [Bank Act](#), the [Cooperative Credit Associations Act](#), the *Insurance Companies Act* or the *Trust and Loan Companies Act*;
- (b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the [Canada Deposit Insurance Corporation Act](#); or
- (c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the [Winding-up and Restructuring Act](#).

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF 2675970 ONTARIO INC. et al.

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

Proceedings commenced at Toronto

**FACTUM OF THE APPLICANTS
(Re FARIO re Extend Stay)**

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