

**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. (the "Applicants")**

**FACTUM OF THE APPLICANTS**  
(Approval and Reverse Vesting Order)  
(returnable November 28, 2024)

November 25, 2024

**RECONSTRUCT LLP**  
120 Adelaide Street West  
Suite 2500  
Toronto, ON M5H 1T1

**Caitlin Fell** LSO No. 60091H  
Tel: 416.613.8282  
Email: cfell@reconllp.com

**Sharon Kour** LSO No. 58328D  
Tel: 416.613.8288  
Email: skour@reconllp.com

**Jessica Wuthmann** LSO No. 72442W  
Tel: 416.613.8288  
Email: jwuthmann@reconllp.com

Fax: 416.613.8290

**Lawyers for the Applicants**

**TO: THE SERVICE LIST**

## TABLE OF CONTENTS

<b>TABLE OF CONTENTS</b> .....	1
<b>PART I – OVERVIEW</b> .....	1
<b>A. Background</b> .....	5
<b>B. The SISP</b> .....	5
<b>C. The Subscription Agreement</b> .....	8
<b>D. The Reverse Vesting Structure is Necessary</b> .....	9
<b>PART III – ISSUES</b> .....	10
<b>PART IV – LAW AND ARGUMENT</b> .....	10
<b>A. The Reverse Vesting Transactions and Subscription Agreement Should be Approved</b> .....	10
i. The SISP was fair, transparent, and reasonable .....	13
ii. The Transactions are in the best interests of stakeholders .....	14
iii. The Consideration given by the Purchaser is fair and reasonable .....	15
iv. The Monitor approves of the SISP, Subscription Agreement, and the Transactions .....	15
v. Related Party Considerations .....	16
vi. The Reverse Vesting Structure is Necessary .....	16
<b>B. The Court Should Authorize the Restructuring Steps Required to Implement the Proposed Transactions</b> .....	18
<b>C. The Court Should Grant the Releases</b> .....	19
<b>D. Extension of Stay Period, Termination of CCAA Proceedings and Discharge of Monitor</b> .....	22
<b>E. The Relief With Respect to WEPPA Should be Granted</b> .....	23
<b>PART V – RELIEF REQUESTED</b> .....	24
<b>SCHEDULE A – LIST OF AUTHORITIES</b> .....	25
<b>SCHEDULE B – RELEVANT STATUTES</b> .....	27

## PART I – OVERVIEW

1. On August 28, 2024, the Applicants sought and obtained an initial order (“**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”), which Initial Order was amended and restated on September 6, 2024 and September 18, 2024 (the “**ARIO**”). Pursuant to the ARIO, the Ontario Super Court of Justice (Commercial List) (the “**Court**”) granted various forms of relief including appointing Alvarez & Marsal Canada Inc. (“**A&M**”) as monitor of the Applicants (in such capacity, the “**Monitor**”).
2. On September 18, 2024, this Court granted an Order (the “**Sale Process Approval Order**”) approving a sale and investment solicitation process (the “**SISP**”) to be conducted by the Monitor with the assistance of the Applicants. The SISP included the approval of a stalking horse bid (“**Stalking Horse Bid**”) – a share subscription agreement (the “**Subscription Agreement**”) between 2675970 Ontario Inc. (“**267 Ontario**”), as issuer, and TS Investments Corp., as purchaser (“**TS Investments**” or the “**Purchaser**”) – in order to set the “floor” price for all other bids to be submitted in the SISP.
3. The deadline for bidders to submit a letter of interest (“**LOI**”) in the SISP was October 21, 2024. No Phase 1 Qualified Bids (as defined below) other than the Stalking Horse Bid were received. Accordingly, the Monitor, in its reasonable business judgment, declared the Stalking Horse Bid as the successful bid under the SISP (the “**Successful Bid**”).
4. The Applicants now seek an approval and reverse vesting order in the form of the draft order included at tab 3 of the Applicants’ motion record (the “**RVO**”), which, among other things:
  - (a) approves the Subscription Agreement between 267 Ontario and TS Investments;
  - (b) approves the transactions contemplated in the Subscription Agreement (collectively, the “**Transactions**”), and authorizes the Applicants to take such

additional steps and execute such additional documents as necessary or desirable for the completion of the Transactions;

- (c) declares 1001065113 Ontario Inc. ("**ResidualCo**") to be an applicant in these CCAA proceedings;
- (d) approves certain Restructuring Steps<sup>1</sup> and declares that such Restructuring Steps shall be deemed to have occurred upon delivery of a closing certificate by A&M in its capacity as Monitor, which time is referred to as the "**Closing Time**";
- (e) approves the release of all claims arising in connection with or relating to these CCAA proceedings, the Subscription Agreement, the consummation of the Transactions, and/or any closing document, agreement, document, instrument, matter or transaction involving the Applicants arising in connection with or pursuant to any of the foregoing (collectively, the "**Released Claims**") as against: (a) the current directors, officers, shareholders, employees, consultants, legal counsel and advisors of the Applicants; (b) the current directors, officers, shareholders, consultants, legal counsel and advisors to ResidualCo; (c) TS Investments and its legal counsel and their respective current directors, officers, partners, employees, and advisors; and (d) the Monitor and its legal counsel and their respective affiliates, directors, officers, partners, employees, and advisors (the persons listed in (a), (b), (c) and (d) being collectively, the "**Released Parties**"); provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim for gross negligence, fraud or willful misconduct or any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA, or any obligations of the

---

<sup>1</sup> The Restructuring Steps are contained in [para 5 of the draft RVO, Tab 3](#), Applicants' Motion Record.

Released Parties under, or in connection with, the Subscription Agreement (the **“Post-Filing Release”**);

- (f) approves the release of the current directors and officers of the Applicants (the **“Released D&Os”**) from any and all claims that any person may have or be entitled to assert against the Released D&Os based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to commencement of these CCAA proceedings in respect of the Applicants, the Business, operations, assets, property and affairs of the Applicants and/or these CCAA proceedings; provided that, such release shall not waive, discharge, release, cancel or bar any claim or liability (a) arising out of any gross negligence or willful misconduct on the part of the applicable Released D&O; (b) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, or (c) that is an Insured Claim (as defined below) (the **“Pre-Filing D&O Release”**);
- (g) authorizes the Monitor or the director of ResidualCo to assign ResidualCo into bankruptcy, and authorizes A&M (or another licensed trustee at A&M’s direction) to act as trustee to the bankrupt estate of ResidualCo, pursuant to the *Bankruptcy and Insolvency Act*;
- (h) extends the Stay Period (as defined herein) to the date of the bankruptcy of ResidualCo (the **“CCAA Termination Date”**);
- (i) terminates the Related Party Stay (as defined herein) at the Closing Time;
- (j) declares that pursuant to subsections 5(1)(b)(iv) and 5(5) of the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s.1 (**“WEPPA”**), the Applicants meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program*

*Regulations*, SOR/2008-222 and their former employees are eligible to receive payments in accordance with WEPPA;

- (k) approves the Pre-Filing Report of the Monitor dated August 27, 2024, the First Report of the Monitor dated September 4, 2024, the Second Report of the Monitor dated September 16, 2024, the Supplement to the Second Report of the Monitor dated October 16, 2024, and the Third Report of the Monitor, to be filed (the “**Third Report**”), and the activities of the Monitor and its counsel described therein;
- (l) approves the fees and disbursements of the Monitor and its counsel as set out in the Affidavits of Joshua Nevsky and Lee Nicholson (the “**Fee Affidavits**”), each attached to the Third Report; and
- (m) provides for the discharge of the Monitor upon the occurrence of the CCAA Termination Date.

5. The Applicants submit that it is appropriate to grant the requested relief including the approval of the Subscription Agreement. The SISP thoroughly canvassed the market for a sale and/or investment of the Applicants and their assets. The Subscription Agreement represents the best available outcome that permits the Applicants to continue as a going-concern for the benefit of their 328 employees, landlords, franchisees, and suppliers.

6. The reverse vesting structure of the Transactions is necessary to preserve the licences needed to operate within the highly regulated cannabis industry. Stakeholders are no worse off under the proposed reverse vesting structure than they would be under a traditional vesting structure. There is no viable alternative that would produce a more favourable economic result.

7. The Monitor and the Applicants' senior secured lender, Bank of Montreal ("**BMO**"), support the within motion and the Applicants' request for the RVO.

## PART II – FACTS

8. Capitalized terms not otherwise defined herein have the meanings given to them in the Affidavit of Andrew Williams sworn November 21, 2024 (the "**Williams Affidavit**") and the Subscription Agreement.<sup>2</sup>

### A. Background

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 (the "**Business**").<sup>3</sup>

10. Since the granting of the Initial Order, the Applicants implemented an operational restructuring that has resulted in significant cost savings for the Applicants' Business. Specifically, the Applicants reduced their annual rent costs by 60%, annual payroll by 25%, and their non-labour operating costs by 15%.<sup>4</sup>

### B. The SISP

11. As noted above, on September 18, 2024, the Court granted the Sale Process Approval Order approving the SISP. The SISP was developed in consultation with the Monitor and the Applicants' senior secured lender, BMO. The purpose of the SISP was to maximize value for the

---

<sup>2</sup> Affidavit of Andrew Williams sworn November 21, 2024, [Tab 2](#), Motion Record of the Applicants [**Williams Affidavit**].

<sup>3</sup> Williams Affidavit, *ibid*, [para 4](#).

<sup>4</sup> Williams Affidavit, *ibid*, [para 16](#).

Applicants' stakeholders by widely exposing the Applicants' Business and property to the market.<sup>5</sup>

12. As part of the SISP, the Court also approved the Stalking Horse Bid submitted by TS Investments in the form of the Subscription Agreement.

13. The SISP was designed as a two-phase sale process to be administered by the Court-appointed Monitor over a period up to approximately 50 days. Phase 1 of the SISP ("**Phase 1**") called for non-binding letters of interest ("**LOIs**"). The Monitor, in consultation with the Applicants, were required to assess all LOIs in order to determine which bids constituted a "**Phase 1 Qualified Bid**" and which bidders could participate in the second phase of the SISP ("**Phase 2**"). If there was at least one Phase 2 Qualified Bidder (other than the Stalking Horse Bid), the SISP would proceed to Phase 2, which would permit bidders to conduct further due diligence and submit an unconditional binding offer.<sup>6</sup>

14. The Monitor administered the SISP, with the assistance of the Applicants, in accordance with the terms of the Sale Process Approval Order. The Applicants' extensive solicitation efforts are more fully described in the Williams Affidavit and the Monitor's Third Report delivered in connection with this motion. In particular, among other things:

- (a) the Monitor solicited more than 65 parties to participate in the SISP, which included a combination of strategic parties, financial parties, and international parties;
- (b) the Monitor published a notice of the SISP on the Monitor's Website;
- (c) the Applicants issued a press release about the SISP;
- (d) the Monitor granted access to a data room to ten parties that signed non-disclosure

---

<sup>5</sup> Williams Affidavit, *ibid*, [paras 17-18](#).

<sup>6</sup> Williams Affidavit, *ibid*, [paras 20-24](#).

agreements; and

- (e) the Applicants dedicated significant time and resources answering any due diligence questions posed to it.<sup>7</sup>

15. On the Phase 1 Bid Deadline, one LOI was received from a bidder (the “**Submitted LOI**”). The Submitted LOI was not compliant with certain criteria required for an LOI in the SISP. Specifically, the Submitted LOI contained unacceptable closing conditions, material holdback provisions with respect to the cash portion of the purchase price, and non-cash consideration comprising of equity of the publicly traded equity in the Other Bidder, which consideration was not going to be feasible or appropriate in these circumstances.<sup>8</sup>

16. In response, the Other Bidder submitted a revised LOI to address the above concerns. However, the Other Bidder was not able to demonstrate to the Monitor that it had the cash consideration nor the available capital to consummate a transaction within the timeline of the SISP. Accordingly, on October 28, 2024, after consultation with the Applicants and BMO, the Monitor declared the Stalking Horse Bid – in the form of the Subscription Agreement - as the Successful Bid and served a Notice of Successful Bidder on the service list. On that basis, the SISP did not proceed to Phase 2.<sup>9</sup>

---

<sup>7</sup> Williams Affidavit, *ibid*, [paras 26-34](#); Third Report of the Monitor [Third Report].

<sup>8</sup> Williams Affidavit, *ibid*, [paras 36-37](#).

<sup>9</sup> Williams Affidavit, *ibid*, [paras 37-38](#).

### C. The Subscription Agreement

17. The principal terms of the Subscription Agreement are as follows:<sup>10</sup>

- (a) **The Purchaser:** TS Investments, the existing parent company and secured creditor of the Applicants;
- (b) **Purchased Shares:** 267 Ontario shall issue shares in the share capital of 267 Ontario to the Purchaser, which shares shall be free and clear of all Encumbrances, except for any Permitted Encumbrances (“**Purchased Shares**”). In addition to the Purchased Shares, the Retained Assets and Retained Liabilities will remain with the Applicants;
- (c) **Purchase Price:** The total aggregate consideration payable by the Purchaser for the Purchased Shares is equal to approximately \$77 million representing: (a) an assumption of the outstanding obligations payable by the Applicants pursuant to the DIP Term Sheet; (b) the “assumption” or retention of all amounts owing by the Applicants to BMO; (c) a credit bid in the amount of \$31 million, representing a portion of the outstanding secured obligations payable by the Applicants pursuant to the TS Investments Grid Note; and (d) payment in cash of the Cure Costs, if any, the Priority Payment Amount; and the Administrative Expense Amount;
- (d) **Excluded Assets:** The Excluded Assets include the Cash Consideration, certain Tax matters related to the Excluded Liabilities and Excluded Assets, Excluded Contracts, Excluded Leases, and certain other ancillary assets;

---

<sup>10</sup> Williams Affidavit, *ibid*, [para 40](#). The Subscription Agreement is at [Exhibit “K”](#) of the Williams Affidavit.

- (e) **Excluded Liabilities:** All Claims and all debts, obligations and liabilities of the Applicants or any predecessors thereof except for the Retained Liabilities;
- (f) **Retained Liabilities:** Certain liabilities articulated in section 2.4 of the Subscription Agreement including (i) wages, vacation pay and benefit plans owing to any employee that continues employment with the Applicants after the Closing Time; (ii) Cure Costs; (iii) Post-Filing Claims; (iv) the outstanding indebtedness under the BMO Post-Closing Loan Documents; (v) Intercompany Liabilities; and (vi) liabilities relating to Gift Cards and The High Roller Club Rewards Program;
- (g) **Closing Conditions:** There are only standard closing conditions including the granting of the RVO; and
- (h) **Closing Date:** Five Business Days after the conditions to closing have been satisfied.

18. If the Subscription Agreement is approved and the RVO is granted, the Transactions will result in, among other things, the Business continuing as a going concern for the benefit of its stakeholders including their 328 employees, customers, franchisees, landlords, and suppliers.<sup>11</sup>

#### **D. The Reverse Vesting Structure is Necessary**

19. The Transactions contemplated in the Subscription Agreement have been structured as a “reverse vesting” transaction. In consultation with the Applicants and the Monitor, the Purchaser concluded that a reverse vesting structure was necessary and appropriate to preserve and maximize value in the circumstances.

---

<sup>11</sup> Williams Affidavit, *ibid*, [para 41](#).

20. Under a traditional asset sale transaction structure, operating licences and tax losses can be impossible or difficult to transfer to a purchaser. Specifically, the Newfoundland and Ontario cannabis licences and authorizations are not transferable. As such, in a traditional asset purchase structure, a purchaser would need to apply for new licences and authorizations before taking over an existing authorized store.<sup>12</sup>

21. If the Purchaser was required to get new licences, there would be additional delays, costs, and uncertainty. In particular, each license costs thousands of dollars and takes an average of two to four months to receive. Accordingly, the reverse vesting structure permits the most cost-effective, efficient, and certain method of preserving the licences in Tokyo Smoke.<sup>13</sup>

### **PART III – ISSUES**

22. The issues to be determined by this Court are whether to:

- (a) approve the Subscription Agreement and approve the Transactions described therein;
- (b) extend the Stay Period, terminate these CCAA proceedings, and discharge the Monitor;
- (c) grant the requested releases; and
- (d) grant the relief with respect to WEPPA.

### **PART IV – LAW AND ARGUMENT**

#### **A. The Reverse Vesting Transactions and Subscription Agreement Should be Approved**

23. The proposed Transactions are structured as a reverse vesting transaction in order to

---

<sup>12</sup> Williams Affidavit, *ibid*, [paras 48-49](#).

<sup>13</sup> Williams Affidavit, *ibid*, [para 50](#).

preserve value of the Business for the benefit of the Purchaser.

24. A reverse vesting transaction typically involves a series of steps whereby: (a) the purchaser becomes the sole shareholder of the debtor company; (b) the debtor company retains its assets, including contracts and permits; and (c) the liabilities not assumed by the purchaser or related to the purchased assets are vested out and transferred, together with any excluded assets, to a newly incorporated entity. The assets and liabilities vested in the newly incorporated entity (in this case, ResidualCo) are then addressed through a bankruptcy or similar process.<sup>14</sup>

25. The Court has broad jurisdiction under section 11 of the CCAA to grant reverse vesting orders.<sup>15</sup> Reverse vesting orders have been recognized by the Court on a number of occasions where the court is satisfied that on the balance, the reverse vesting structure is appropriate and warranted.<sup>16</sup>

26. When exercising its jurisdiction under section 11 of the CCAA to approve a reverse vesting transaction, this Court will first consider whether the non-exhaustive factors enumerated under section 36(3) of the CCAA<sup>17</sup> and the factors articulated by the Court of Appeal for Ontario in *Royal Bank of Canada v. Soundair Corp* for approval of a sale of the business have been met.<sup>18</sup> Together, these factors include: (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; (c) whether the monitor filed with the court a report stating that in

---

<sup>14</sup> *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 [**Just Energy**] [McEwen J.], [para 27](#) citing *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828 [**Blackrock**] (original English version) [Paquette C.J.], [para 85](#), leave to appeal ref'd [2022 QCCA 1073](#), leave to appeal ref'd [2023 CanLII 36969](#) (SCC).

<sup>15</sup> *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [**CCAA**], [ss. 11](#) and [36](#). See, among other cases *Just Energy*, *ibid*, [paras 29-32](#); *Blackrock*, *ibid*, [para 87](#); and *Harte Gold Corp (Re)*, 2022 ONSC 653 [**Harte Gold**] [Penny J.], [paras 18-20](#) and [37](#).

<sup>16</sup> *Harte Gold*, *ibid*, [para 38](#). See *Validus Power Corp et al v Macquarie Equipment Finance Limited*, 2024 ONSC 250 [**Validus**], [paras 43-44](#); *Fresh City Farms and Mama Earth Organics*, 2024 ONSC 2016 [**Fresh City Farms**], [paras 34-35](#). *Atlas Global Brands Inc*, 2024 ONSC 5570 [**Atlas Global**], [paras 10-21](#).

<sup>17</sup> CCAA, *supra*, [s. 36\(3\)](#)

<sup>18</sup> *Re Canwest Publishing Inc*, 2010 ONSC 2870, [para 13](#) citing *Royal Bank of Canada v Soundair Corp*, (1991) 4 O.R. (3d) 1 (CA).

their opinion the sale 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 on the creditors and other interested parties; (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value; (g) whether sufficient effort has been made to obtain the best price and that the debtors have not acted improvidently; (h) the efficacy and integrity of the process by which offers have been obtained; (i) whether the interests of all parties have been considered; and (j) whether there has been unfairness in the working out of the process.<sup>19</sup>

27. In circumstances where there is a sale of a debtor company's assets to a related party, the sale must also meet the test contemplated by subsection 36(4) of the CCAA, which requires a debtor to establish whether (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.<sup>20</sup>

28. Unless a proposed transaction clearly offends section 36(3), 36(4), or the *Soundair* principles, the Court will generally uphold the business judgment of the parties and the court-appointed Monitor overseeing the sale where the marketing and sale process was fair, reasonable, transparent and efficient.<sup>21</sup>

29. Following an analysis of whether the sale should be approved generally under the CCAA, the Court is then required to address the specific considerations required to be met when approving a 'reverse vesting order' developed in *Harte Gold*: (a) why the reverse vesting order is necessary in this case; (b) whether the reverse vesting transaction structure produces an

---

<sup>19</sup> *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314, [paras 10-11](#).

<sup>20</sup> CCAA, *supra*, [s. 36\(4\)](#). *Fresh City Farms*, *supra*, [para 30](#).

<sup>21</sup> *Sanjel Corporation (Re)*, 2016 ABQB 257, [para 57](#). See also *Arrangement relatif à FormerXBC Inc (Xebex Adsorption Inc)*, 2023 QCCS 1818, [para 13](#).

economic result at least as favourable as any other viable alternative; (c) whether any stakeholder is worse off under the reverse vesting transaction structure than they would have been under any other viable alternative; and (d) whether the consideration being paid for the debtors' business reflects the importance and value of the licences and permits (or other intangible assets) being preserved under the reverse vesting transaction structure.<sup>22</sup>

30. As will be detailed further below, the Applicants submit that the SISP and resulting Transactions satisfy the test under section 36 of the CCAA, as well as the *Harte Gold* factors for approval of a reverse vesting transaction.

**i. The SISP was fair, transparent, and reasonable**

31. The SISP was developed by the Applicants, in consultation with the Monitor and BMO, to provide a broad and flexible process to canvass the market for the best possible result for all stakeholders. The SISP was approved by the Court.<sup>23</sup>

32. The SISP was conducted by the Monitor in an open and transparent manner in accordance with the Sale Process Approval Order. All known interested parties were invited to participate in the SISP and all potential bidders were treated in a fair and even-handed manner with equal access to due diligence materials. The Monitor consulted with BMO and the Applicants throughout the SISP and appropriately did not consult with TS Investments given its position as stalking horse bidder.<sup>24</sup>

33. The SISP thoroughly canvassed the market for a broad range of potential transactions (including a sale or recapitalization). Despite these sale efforts, no Phase 1 Qualified Bid, other than the Stalking Horse Bid, was received.<sup>25</sup>

---

<sup>22</sup> *Harte Gold*, *ibid*, [para 38](#).

<sup>23</sup> Williams Affidavit, *supra*, [paras 17-18](#) and [61](#).

<sup>24</sup> Williams Affidavit, *ibid*, [paras 35-37](#) and [60](#). Third Report, *supra*.

<sup>25</sup> Williams Affidavit, *ibid*, [para 59](#). Third Report, *ibid*.

**ii. The Transactions are in the best interests of stakeholders**

34. The Subscription Agreement is the only viable and best option for a going-concern exit from these proceedings. Specifically, the Transactions represent numerous tangible benefits to stakeholders, including:

- (a) preserving the going-concern value of the Business for the benefit of stakeholders;
- (b) retaining the employment of the Applicants' 328 employees;
- (c) maintaining the Applicants' relationships with its landlords, franchisees, suppliers and customers;
- (d) satisfying or assuming in full all secured claims and priority payables; and
- (e) assuming and paying in cash any Cure Costs under the Retained Contracts or Retained Leases.<sup>26</sup>

35. The Subscription Agreement produces an economic result that is more favourable to stakeholders than any other viable alternative. The only viable alternative is the Applicants ceasing operations and liquidating their assets in a bankruptcy, which would be a devastating outcome relative to the proposed Transactions.<sup>27</sup> In particular, the Monitor is of the view that the Transactions are more beneficial to creditors as a whole than a liquidation in bankruptcy.<sup>28</sup>

36. In addition, no stakeholder is materially worse off than they would be if the transaction was structured as an asset purchase. Any Cure Costs for Retained Contracts or Retained Leases will be assumed and paid by the Purchaser as if they were being assigned under section 11.2 of the

---

<sup>26</sup> Williams Affidavit, *ibid*, [para 41](#).

<sup>27</sup> Williams Affidavit, *ibid*, [paras 61-62](#).

<sup>28</sup> Third Report, *supra*.

CCAA. Although the Purchase Price will not permit any recovery for unsecured creditors other than with respect to Cure Costs (if any), unsecured creditors would be in the same position in an asset sale implemented through a traditional vesting order given the value of the Business.

37. The Applicants have served the Service List and all contractual counterparties to any Retained Lease or Retained Contract.<sup>29</sup> As of the date hereof, the Applicants have not been made aware of any stakeholder concerns with the Subscription Agreement and Transactions.

**iii. The consideration given by the Purchaser is fair and reasonable**

38. The consideration to be received under the Subscription Agreement is fair and reasonable in the circumstances.

39. As evidenced by the results of the SISP, no other Phase 1 Qualified Bid was received.<sup>30</sup> If there was any other transaction available in the market that offered a higher purchase price, and therefore greater recoveries for creditors, the SISP provided a sufficient opportunity for such a superior transaction to emerge.

**iv. The Monitor approves of the SISP, Subscription Agreement, and the Transactions**

40. The Monitor was involved in the development of the SISP and consulted in the negotiation of the Subscription Agreement.

41. In its Third Report, the Monitor concludes that it is supportive of the Subscription Agreement and the Transactions for various reasons including that it provides substantial benefits to the significant stakeholders of the Applicants, no stakeholder is materially prejudiced by the structure of the Transactions, the structure is necessary to retain the Applicants' licences and allow for an expedited closing, good faith efforts were made to find bidders not related to the

---

<sup>29</sup> Affidavit of Levi Rivers dated November 25, 2024 [**Levi Affidavit**]. *Payslate Inc (Re)*, 2023 BCSC 608, [para 77](#).

<sup>30</sup> Williams Affidavit, *supra*, [para 59](#).

Applicants, the Transactions are more beneficial to creditors than a liquidation, and the purchase price is fair and reasonable given the industry challenges facing cannabis retailers.<sup>31</sup>

**v. Related party considerations**

42. If the proposed sale or disposition is to a person who is related to the Applicants, the court may approve the sale if it is satisfied that good faith efforts were made to sell the business/assets and the consideration received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the sale.<sup>32</sup>

43. The Applicants canvassed all restructuring alternatives in good faith. The Subscription Agreement presents the only viable option capable of assuring a going-concern result given the Applicants' liquidity constraints. Further, the proposed consideration under the Subscription Agreement of \$77 million is superior than any other bid received under the SISP.<sup>33</sup> The test set out in section 36(4) of the CCAA in respect of acquisitions to related persons is therefore met.

**vi. The Reverse Vesting structure is necessary**

44. In *Just Energy*, Justice McEwan noted that RVOs have been deemed appropriate in circumstances where:

- (a) the debtor operates in a highly regulated environment in which its existing permits, licences or other rights are difficult or impossible to reassign to a purchaser;
- (b) the debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and
- (c) where maintaining the existing legal entities would preserve certain tax attributes

---

<sup>31</sup> Third Report, *supra*.

<sup>32</sup> CCAA, *supra*, s. 36(4).

<sup>33</sup> Williams Affidavit, *supra*, [paras 59 and 61](#).

that would otherwise be lost in a traditional vesting order transaction.<sup>34</sup>

45. In the recent case of *Atlas Global*, the Honourable Justice Black made the following observation in his decision granting a reverse vesting order for a cannabis retail company:

It is fair to observe that the setbacks besetting the cannabis industry have in fact in large measure provided the impetus for the recently increased use of the reverse vesting structure. **That is because in a highly regulated industry, like the cannabis industry, there are significant implications, for the transfer of a business, if a purchaser would have to start “from scratch” to obtain regulatory approval to operate the business in question rather than assuming the relevant licenses as part of the transaction.**<sup>35</sup>

46. As in *Atlas Global* and *Just Energy*, the reverse vesting structure is necessary and appropriate in these circumstances as the reverse vesting structure:

- (a) preserves the Applicants significant amount of accrued tax losses net of any debt forgiveness amounts for the benefit of the Purchaser. The tax losses total over \$40 million. The tax losses are non-transferable assets that cannot be preserved within a traditional asset purchase transaction. Further, the tax losses have no value in bankruptcy as there would be no income against which they could be applied;<sup>36</sup>
- (b) permits the Applicants to preserve their 64 retail licences and certifications, authorizations, and permits (collectively, the “**Licences**”) that are critical to the business given the highly regulated nature of the cannabis industry. Specifically, the Applicants’ Licences are not transferrable.<sup>37</sup> The process for the Purchaser to get new Licences would be riddled with uncertainty, cost, and delay that cannot be sustained given the Applicants’ liquidity constraints. The loss or disruption of the Company’s current Licences, even on a temporary basis, would disrupt the

---

<sup>34</sup> *Just Energy*, *supra*, [para. 34](#).

<sup>35</sup> *Atlas Global*, *supra*, [para. 36](#). [emphasis added.]

<sup>36</sup> Williams Affidavit, *ibid*, [para 51](#).

<sup>37</sup> Williams Affidavit, *ibid*, [paras 48-49](#).

Business and potentially cause a loss of value to intangible assets such as goodwill and brand reputation;<sup>38</sup> and

- (c) permits the continuation of the Retained Contracts, Retained Leases, and Restructured Leases while minimizing the time, risks and professional costs that would be associated with having to renegotiate or transfer on a logistical basis, all of the Retained Contracts, Retained Leases, and Restructured Leases to a new entity, whether through individual consents to assignment or assignment orders.<sup>39</sup>

**B. The Court Should Authorize the Restructuring Steps and Other Steps Required to Implement the Proposed Transactions**

47. The Applicants seek approval of the Restructuring Steps in the RVO. The Restructuring Steps are required in order to streamline operations and the general organizational structure of the Applicants.<sup>40</sup>

48. The Restructuring Steps include the cancellation of all Existing Shares in 267 Ontario other than the Purchased Shares for no consideration. The Purchaser requires that relief in order to acquire the Purchased Shares, which is central to the proposed Transactions. Courts have granted this relief in similar circumstances on the basis of the jurisdiction pursuant to section 11 of the CCAA and sections of the OBCA.<sup>41</sup> There will be no material prejudice to the shareholders given the CCAA expressly provides that equity interests rank after all creditor claims<sup>42</sup> and there is no available option that will provide the shareholders with any recovery.<sup>43</sup>

49. The RVO also seeks to add ResidualCo as an applicant in these proceedings. It is

---

<sup>38</sup> Williams Affidavit, *ibid*, [paras 50 and 55](#).

<sup>39</sup> Williams Affidavit, *ibid*, [para 52](#).

<sup>40</sup> Williams Affidavit, *ibid*, [para 71](#).

<sup>41</sup> CCAA, *supra*, [s. 11](#). *Just Energy*, *supra*, [paras 64-66](#); *Harte Gold*, *supra*, [paras 61-65](#). See *Business Corporations Act*, RSO 1990, c B.16, [s. 186\(2\)](#).

<sup>42</sup> CCAA, *ibid*, [s. 6\(7\)](#).

<sup>43</sup> Williams Affidavit, *supra*, [paras 69-70](#).

appropriate to add ResidualCo as an applicant in these proceedings in order to permit the vesting out of the Excluded Assets and Excluded Liabilities. ResidualCo is incorporated under the laws of Ontario as a wholly-owned subsidiary of 267 Ontario and is therefore an “affiliated debtor company” pursuant to subsections 3(2) and 3(4) of the CCAA.<sup>44</sup> Moreover, upon the transfer of all of the Excluded Assets and Excluded Liabilities to ResidualCo, ResidualCo will have minimal assets and at least \$5 million in debt. Therefore, it will also be a “debtor company” to which the CCAA applies pursuant to section 3(1).<sup>45</sup>

### C. The Court Should Grant the Releases

50. The RVO contains two types of third-party releases: the Post-Filing Releases and the Pre-Filing D&O Releases (together, the “**Releases**”).

51. Courts rely on their jurisdiction under section 11 of the CCAA to grant third-party releases in circumstances involving reverse vesting transactions.<sup>46</sup> As the Quebec Superior Court noted in *Blackrock Metals*, it “is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction”.<sup>47</sup>

52. The CCAA expressly contemplates that claims against the directors and officers of a debtor company can be compromised and released in a plan, subject to certain exceptions.<sup>48</sup> The same applies where a CCAA restructuring does not involve a plan but involves a reverse vesting transaction.<sup>49</sup>

---

<sup>44</sup> Williams Affidavit, *ibid*, [para 64](#). CCAA, *supra*, [s. 3\(2\) and 3\(4\)](#).

<sup>45</sup> CCAA, *ibid*, [s. 3](#).

<sup>46</sup> CCAA, *supra*, [s. 11](#).

<sup>47</sup> *Blackrock Metals*, *supra*, [para 128](#).

<sup>48</sup> CCAA, *supra*, [s. 5](#).

<sup>49</sup> *Re Green Relief Inc.*, 2020 ONSC 6837 [**Green Relief**] (Koehnen J), [para 76](#); *Atlas Global*, *supra*, [paras 101-102](#); *Re Atlas Global Brands Inc.* (29 October 2024), Toronto CV-24-00722386-00CL (ONSC)(Order and Endorsement) [Steele J] [**Atlas Global 2**], [para 30](#).

53. Releases in the form sought by the Applicants have been granted by CCAA Courts in recent decisions<sup>50</sup> and in other cannabis restructurings.<sup>51</sup> For example, in *Atlas Global* (2024), the Court approved releases for directors and officers, including pre-filing liabilities and liabilities for unpaid source deductions and excise taxes, in the context of a share purchase and subscription agreement over the opposition of the CRA. In his decision, Justice Black observed that the releases, which are substantially similar to the Releases in the within RVO, were “appropriately and rationally connected to relevant aspects of the restructuring, and appropriately limited to the extent necessary”.<sup>52</sup> In relying on *Atlas Global*, Justice Steele granted similar releases in a reverse vesting transaction in connection with the Atlas Global CCAA proceeding. She noted that the releases were sufficiently narrow as none of the releases waived rights or barred any claim or liability arising out of (1) gross negligence or wilful misconduct; (2) that was not permitted to be released under section 5.1(2) of the CCAA; or (3) that was identified as an insured claim.<sup>53</sup>

54. In assessing whether third-party releases are appropriate, courts have made reference to the *Metcalfe* and *Lydian* factors, recognizing that those factors are all part of a global analysis.<sup>54</sup> It is not necessary for each factor to be satisfied, nor is any single factor determinative.<sup>55</sup> The factors are reproduced below with their application to the facts of this case.

- **The released parties have significantly contributed to and were necessary for the restructuring.** There can be no question that the Released Parties and the

---

<sup>50</sup> See: *Re Aleafia Health Inc. et al* (1 March 2024), Toronto CV-23-00703350-00CL (ONSC) ([CCAA Termination Order](#) and [Endorsement](#)); *Green Relief, ibid*, [paras 58-73](#) and 76; *Atlas Global, supra*, [para 28](#); *MPX International Corporation (Re)*, [2022 ONSC 7152](#) (approving a [CCAA Termination Order](#)); *Nexii Building Solutions Inc et al (Re)* (28 June 2024), Vancouver 5240195 (BCSC) (Ancillary Order) at [para 14](#).

<sup>51</sup> *Atlas Global, supra*, [paras 101-102](#); *Atlas Global 2, supra*, [paras 24-30](#); *Plan of Arrangement of Fire & Flower Holdings Corp et al*, 2023 ONSC 4934, [paras 24-26](#); *Green Relief, supra*, [para 76](#).

<sup>52</sup> *Atlas Global, supra*, [paras 101-102](#).

<sup>53</sup> *Atlas Global 2, supra*, [para 29](#).

<sup>54</sup> *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, [para 70](#) (leave to appeal to SCC dismissed, [2008 CanLII 46997](#)); *Lydian International Limited (Re)*, 2020 ONSC 4006 [Morawetz C.J.(as he then was)], [para 54](#); *Green Relief, supra*, [para 27](#); *Atlas Global, supra*, [para 26](#).

<sup>55</sup> See *Green Relief, ibid*, [paras 27-28](#); *Harte Gold, supra*, [paras 79-80](#); *Just Energy, supra*, [para 67](#).

Released D&Os have made significant and material contributions to the CCAA proceedings including the implementation of the SISP and the negotiation of the Subscription Agreement. These individuals have been critical to the success of this restructuring, which has resulted in the Business emerging as a going-concern transaction that preserves value for stakeholders.<sup>56</sup>

- **The Releases are rationally connected to the restructuring and are fair, reasonable and not overly broad.** The Releases are limited to and directly connected to the CCAA proceedings, the proposed Transactions and the Restructuring Steps. The Releases ensure that the Released D&Os and the Released Parties will be able to implement the proposed Transactions with certainty and finality. The Releases are sufficiently narrow in the circumstances, as the Releases both preserve claims (a) arising out of any gross negligence or willful misconduct; and (b) that are not permitted to be released pursuant to section 5.1(2) of the CCAA. In addition, the Post-Filing Release preserves any obligations of any Released Party under, or in connection with, the Subscription Agreement and the Pre-Filing D&O Release preserves any claim or liability which is an insured claim under any insurance policy of the Applicants or ResidualCo (i.e. Insured Claims).<sup>57</sup>
- **The Transactions cannot succeed without the Releases.** The Released D&Os have indicated that they require the Releases to achieve finality as to their ongoing liabilities given they will remain in their current posts through the closing of the Transactions and thereafter. Without the Released D&Os continued involvement, the Transactions will not close to the detriment of its stakeholders.<sup>58</sup> The Post-Filing

---

<sup>56</sup> Williams Affidavit, *supra*, [para 85](#).

<sup>57</sup> Draft RVO, [para 34](#); Williams Affidavit, *supra*, [para 76](#) and [83](#).

<sup>58</sup> Williams Affidavit, *supra*, [para 84-85](#).

Release is also necessary to quantify the D&O Charge and the Administration Charge, which is a prerequisite to Closing of the Transactions.

- **The Releases will benefit the debtor as well as creditors.** The Releases aim to ensure the seamless transition of the Business to the Purchaser as a going concern, which is in the interest of all stakeholders, including the Applicants senior secured creditor - BMO. The Applicants are not aware of any claims against the Released Parties. The Applicants are not aware of any claims against the Released D&Os except for the Recission Claims. Whether the Pre-Filing D&O Release bars the Recission Claims will be a matter to be determined by the Court overseeing such claims if the Pre-Filing D&O Release is invoked.<sup>59</sup>
- **The Monitor's position:** The Monitor supports the granting of the Releases as part of the approval of the proposed Transactions.<sup>60</sup>
- **The stakeholders have knowledge of the nature and the effect of the Releases.** The Applicants served the parties on the Service List with the motion materials alerting them to the nature and effect of the Releases.<sup>61</sup>

#### **D. Extension of Stay Period, Termination of CCAA Proceedings and Discharge of Monitor**

55. The current Stay Period expires on December 6, 2024. The RVO provides that the Stay Period is extended until the CCAA Termination Date, being the date of the bankruptcy of ResidualCo. Pursuant to section 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor

---

<sup>59</sup> Williams Affidavit, *ibid*, paras [79](#) and [85-87](#). *Green Relief, supra*, [para 68](#).

<sup>60</sup> Third Report, *supra*; Williams Affidavit, *ibid*, [para 80](#).

<sup>61</sup> Levi Affidavit, *supra*.

company satisfies the court that it has acted, and is acting, in good faith and with due diligence.<sup>62</sup>

56. The Applicants satisfy the requirements for an extension of the stay under section 11.02 of the CCAA because the extension of the Stay Period is reasonable and appropriate to protect the *status quo* and allow the orderly implementation of the Transactions. The Applicants have also acted and continue to act in good faith and with due diligence.<sup>63</sup>

57. The Court may order the termination of a CCAA proceeding and discharge the Monitor where the restructuring is effected through a sale rather than a plan of arrangement.<sup>64</sup> After the Transactions close, the Applicants will be solvent going-concern companies under the Purchaser's ownership and will not require ongoing CCAA protection.<sup>65</sup>

#### **E. The Relief with Respect to WEPPA Should be Granted**

58. The Reverse Vesting Order provides that all former employees of the Applicants whose claims are transferred to the Canadian Residual Co. will be deemed to be meet the criteria prescribed by section 3.2 of the Wage Earner Protection Program Regulations. In light of the RVO structure, this language is designed to assist these employees in relation to their entitlements under WEPPA, such as termination and severance pay, if any are available. Similar relief was granted in *Just For Laughs* which involved an RVO.<sup>66</sup>

---

<sup>62</sup> CCAA, *supra*, [s. 11.02](#).

<sup>63</sup> Williams Affidavit, *supra*, [paras 91-94](#); Third Report, *supra*.

<sup>64</sup> CCAA, *supra*, [s. 11](#); see *Validus*, *supra*, [para 47](#).

<sup>65</sup> Williams Affidavit, *supra*, [para 88](#).

<sup>66</sup> *Attorney General of Canada c. Former Gestion Inc.*, [2024 QCCA 1441](#). See also *Just Energy*, *supra*, [para 67](#); *Quest University (Re)*, Order Made After Application – Expansion of Monitor's Powers and Stay Extension, Vancouver Registry, No. S-200586, dated December 17, 2020 at [para 4](#).

**PART V – RELIEF REQUESTED**

59. The Applicants therefore seek the RVO in the form appended at Tab 3 to the Applicants' motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 25<sup>th</sup> day of November, 2024.

*Jessica Wittmann*

---

**RECONSTRUCT LLP**  
Lawyers for the Applicants

### SCHEDULE A – LIST OF AUTHORITIES

1.	<i>Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al</i> , <u>2022 ONSC 6354</u>
2.	<i>Arrangement relatif à Blackrock Metals Inc</i> , <u>2022 QCCS 2828</u>
3.	<i>Harte Gold Corp (Re)</i> , <u>2022 ONSC 653</u>
4.	<i>Validus Power Corp et al v Macquarie Equipment Finance Limited</i> , <u>2024 ONSC 250</u>
5.	<i>Fresh City Farms and Mama Earth Organics</i> , <u>2024 ONSC 2016</u>
6.	<i>Atlas Global Brands Inc</i> , <u>2024 ONSC 5570</u>
7.	<i>Canwest Global Communications Corp</i> , <u>2010 ONSC 2870</u>
8.	<i>Royal Bank of Canada v Soundair Corp</i> , <u>(1991) 4 O.R. (3d) 1 (CA)</u>
9.	<i>Acerus Pharmaceuticals Corporation (Re)</i> , <u>2023 ONSC 3314</u>
10.	<i>Sanjel Corporation (Re)</i> , <u>2016 ABQB 257</u>
11.	<i>Arrangement relatif à FormerXBC Inc (Xebex Adsorption Inc)</i> , <u>2023 QCCS 1818</u>
12.	<i>Payslate Inc (Re)</i> , <u>2023 BCSC 608</u>
13.	<i>Re Green Relief Inc</i> , <u>2020 ONSC 6837</u>
14.	<i>Re Atlas Global Brands Inc</i> . (29 October 2024), Toronto CV-24-00722386-00CL (ONSC)(Order and Endorsement) [Steele J] ( <u>Endorsement</u> )
15.	<i>Re Aleafia Health Inc et al</i> (1 March 2024), Toronto CV-23-00703350-00CL (ONSC) ( <u>CCAA Termination Order and Endorsement</u> )
16.	<i>MPX International Corporation (Re)</i> , <u>2022 ONSC 7152</u> (approving a <u>CCAA Termination Order</u> )
17.	<i>Nexii Building Solutions Inc. et al (Re)</i> (28 June 2024), Vancouver 5240195 (BCSC) ( <u>Ancillary Order</u> )
18.	<i>Plan of Arrangement of Fire &amp; Flower Holdings Corp et al</i> , <u>2023 ONSC 4934</u>
19.	<i>Metcalfe &amp; Mansfield Alternative Investments II Corp, (Re)</i> , <u>2008 ONCA 587</u>
20.	<i>Lydian International Limited (Re)</i> , <u>2020 ONSC 4006</u>
21.	<i>Attorney General of Canada c. Former Gestion Inc.</i> , <u>2024 QCCA 1441</u>
22.	<i>Quest University (Re)</i> , <u>Order Made After Application – Expansion of Monitor's</u>

	<u>Powers and Stay Extension</u> , Vancouver Registry, No. S-200586, dated December 17, 2020
<b>23.</b>	<i>Laurentian University of Sudbury</i> , <u>2022 ONSC 2927</u>
<b>24.</b>	<i>Nortel Networks Inc.</i> , <u>2022 ONSC 6680</u>
<b>25.</b>	<i>Bank of Nova Scotia v Diemer</i> , <u>2014 ONCA 851</u>

## SCHEDULE B – RELEVANT STATUTES

### Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36:

#### **Application**

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

#### **Affiliated companies**

**(2)** For the purposes of this Act,

- (a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and
- (b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

#### **Company controlled**

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

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

#### **Subsidiary**

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

- (a) it is controlled by
  - (i) that other company,
  - (ii) that other company and one or more companies each of which is controlled by that other company, or
  - (iii) two or more companies each of which is controlled by that other company; or
- (b) it is a subsidiary of a company that is a subsidiary of that other company.

#### **Compromise with secured creditors**

**5** Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company,

order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

### **Claims against directors — compromise**

**5.1 (1)** A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

#### **Exception**

**(2)** A provision for the compromise of claims against directors may not include claims that

- (a) relate to contractual rights of one or more creditors; or
- (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

### **Compromises to be sanctioned by court**

**6 (1)** If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

- (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
- (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

#### **Court may order amendment**

**(2)** If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

#### **Restriction — certain Crown claims**

**(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

- (a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a *provincial pension plan* as defined in that subsection.

#### **Restriction — default of remittance to Crown**

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

#### **Restriction — employees, etc.**

(5) The court may sanction a compromise or an arrangement only if

(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).

### Restriction — pension plan

(6) 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

(a) 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

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the Pension Benefits Standards Regulations, 1985, that were required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the Bankruptcy and Insolvency Act to liquidate an unfunded liability or a solvency deficiency,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(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

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the Pension Benefits Standards Regulations, 1985, that would have been required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the Bankruptcy and Insolvency Act to liquidate an unfunded liability or a solvency deficiency if the prescribed plan were regulated by an Act of Parliament,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(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

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

### **Non-application of subsection (6)**

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

### **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.

### **Stays, etc. – other than initial application**

**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.

**(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.

### **Assignment of Agreements**

**11.3 (4)** The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

### **Restriction on disposition of business assets**

**36 (1)** 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.

### **Notice to creditors**

**(2)** 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.

### **Factors to be considered**

- (3)** 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.

### **Additional factors — related persons**

**(4)** 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.

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  
(Approval and Reverse Vesting Order)**

**RECONSTRUCT LLP**

Richmond-Adelaide Centre  
120 Adelaide Street West, Suite 2500  
Toronto, ON M5H 1T1

**Caitlin Fell** LSO No. 60091H  
cfell@reconllp.com  
Tel: 416.613.8282

**Sharon Kour** LSO No. 58328D  
skour@reconllp.com  
Tel: 416.613.8283

**Jessica Wuthmann** LSO No. 72442W  
jwuthmann@reconllp.com  
Tel: 416.613.8288

Fax: 416.613.8290

**Lawyers for the Applicants**