

**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 SISP APPROVAL ORDER AND FURTHER ARIQ)**

September 16, 2024

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**TO: THE SERVICE LIST**

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## **PART I – OVERVIEW**

1. 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**”).
2. On August 28, 2024, the Applicants sought and obtained an initial order (the “**Initial Order**”) under the *Companies Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the “**CCAA**”). Pursuant to the Initial Order, the Applicants were granted certain first day relief including the appointment of Alvarez & Marsal Canada Inc. as monitor of the Applicants (“**Monitor**”), the approval of an initial advance under the DIP Term Sheet (as defined herein), and the granting of certain priority charges.
3. On September 6, 2024, the Applicants obtained an amended and restated initial order (the “**ARIO**”) that, among other things,
  - a. extended the stay of proceedings over the Applicants up to and including December 6, 2024;
  - b. authorized the Applicants to increase the amounts which may be borrowed by the Applicants pursuant to an interim financing term sheet entered into among TS Investments Corp. as lender (“**TS Investments**”) and the Applicants dated August 27, 2024 (“**DIP Term Sheet**”) from \$3.3 million to \$8 million and expanded the corresponding DIP Lender’s Charge to the maximum principal amount of \$8 million plus interest, fees and costs;
  - c. permitted the Applicants to pay pre-filing amounts to certain key suppliers, with the consent of the Monitor and in accordance with the terms of the DIP Term Sheet and Cash Flow Projection (as defined in the ARIO);

- d. increased the Administration Charge from \$400,000 to \$850,000;
- e. increased the Directors' Charge from \$2.25 million to \$3 million;
- f. extended the stay of proceedings to certain of the Applicants' affiliated subsidiaries ("**Non-Filing Entities**");
- g. approved the key employee retention plan ("**KERP**") and granted a Court-ordered priority charge against the property of the Applicants to secure payments under the KERP up to the maximum amount of \$218,500; and
- h. sealed Schedule 'A' of the KERP.<sup>1</sup>

4. The purpose of these proceedings under the CCAA ("**CCAA Proceedings**") is to undertake an operational restructuring of the Business, as well as to conduct a sale process to canvass for a potential sale, investment or refinancing transaction that would benefit the Applicants' creditors and stakeholders.

5. The Applicants have developed a sale and investment solicitation process ("**SISP**") with the assistance of the Monitor and in consultation with its key stakeholders, including the Bank of Montreal ("**BMO**"). In connection with the SISP, the Applicants negotiated and executed a share subscription agreement ("**Stalking Horse Agreement**") with TS Investments (in such capacity, the "**Stalking Horse Bidder**").

6. The Applicants seek approval of the proposed SISP and Stalking Horse Agreement, as well as certain amendments to the ARIO to extend the stay of proceedings to stay certain litigation proceedings that involve DAK Capital Inc. ("**DAK**"), a related party, and the Applicants.

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<sup>1</sup> A copy of [the ARIO](#) is attached as Exhibit "A" to the affidavit of Andrew Williams sworn September 12, 2024 [**Third Williams Affidavit**].

7. This factum is delivered in support of the Applicants' motion returnable on September 18, 2024 seeking, among other things,

- a. an order in the form appended at Tab 3 to the Applicants' motion record ("**SISP Approval Order**") that, among other things:
  - i. approves the SISP attached as Schedule "A" to the SISP Approval Order;
  - ii. authorizes and directs the Monitor, the Applicants, and their respective advisors to take any and all actions as may be necessary to implement and carry out the SISP in accordance with its terms and the SISP Approval Order; and
  - iii. approves the Stalking Horse Agreement solely for the purpose of constituting the "**Stalking Horse Bid**" under the SISP; and
- b. an order in the form appended at Tab 4 to the Applicants' motion record (the "**FARIO**"), that, among other things, amends the ARIO to stay all proceedings against or in respect of DAK, an entity related to the Applicants, that relate to or involve any of the Applicants or Non-Filing Entities ("**Related Proceeding**"), except with the written consent of DAK and the Monitor or with leave of the Court ("**Related Proceeding Stay**").

8. The proposed SISP is necessary to allow the Applicants to canvass the market for a transaction pursuant to a court-approved process with the intention of maximizing realizable value for stakeholders.

9. The extension of the stay of proceedings to stay litigation involving DAK and the Applicants is necessary to maintain stability in these proceedings while the operational

restructuring and SISP are under way, and will ensure the Applicants are not required to divert the attention of management and key personnel at a time when resources should be dedicated to the restructuring and the SISP.

## **PART II – FACTS**

### **A. Background**

10. The background to these CCAA Proceedings is set out in the Affidavit of Andrew Williams sworn August 28, 2024, the Affidavit of Andrew Williams sworn September 3, 2024, and the Affidavit of Andrew Williams sworn September 11, 2024 (the “**Third Williams Affidavit**”).

11. The Applicants initiated these CCAA Proceedings to allow the Applicants 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.<sup>2</sup>

12. The operational restructuring has commenced and the Applicants have determined that it is critical that they undertake a SISP, if so approved.<sup>3</sup>

### **B. The SISP**

13. The Applicants developed the SISP, in consultation with the Monitor, TS Investments, and BMO.<sup>4</sup> Capitalized terms used but not otherwise defined in this section have the meanings given to them in the SISP.<sup>5</sup>

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<sup>2</sup> Third Williams Affidavit at [para. 7](#).

<sup>3</sup> Third Williams Affidavit at [para. 12](#).

<sup>4</sup> Third Williams Affidavit at [para. 12](#).

<sup>5</sup> [Proposed Sale Investment Solicitation Process](#), Schedule “A” to the Draft SISP Approval Order, Applicants’ Motion Record at Tab 3.

14. The SISP was designed to be broad and flexible to widely expose the Applicants' Business and Property and to provide a structured and orderly process for interested parties to perform due diligence and submit offers.<sup>6</sup> The SISP is intended to solicit a broad range of potential transactions, including a sale or recapitalization.<sup>7</sup>

15. The SISP is designed as a stalking horse sale process and the Applicants have executed the Stalking Horse Agreement in connection with the process.<sup>8</sup> The purchase price set out in the Stalking Horse Agreement shall be the floor price to be met by any other bidder, subject to the terms of the SISP.<sup>9</sup>

16. The SISP provides for a two-phase sale process to be administered by the Monitor over approximately 50 days.<sup>10</sup> Phase 1 of the SISP calls for non-binding LOIs; Phase 2 of the SISP calls for unconditional Binding Offers which are irrevocable and capable of acceptance until the earlier of (a) two business days after the date of closing of the Successful Bid; and (b) the Outside Date, December 6, 2024.<sup>11</sup>

17. The Monitor, in consultation with the Applicants, will determine which Phase 1 Qualified Bidders shall proceed to Phase 2 of the SISP. In the event that no Phase 1 Qualified Bid is selected (other than the bid made by the Stalking Horse Bidder), the Applicants will promptly proceed to seek Court approval of the Stalking Horse Agreement and the SISP will be terminated at the end of Phase 1.<sup>12</sup>

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<sup>6</sup> Third Williams Affidavit at [para. 13](#).

<sup>7</sup> Third Williams Affidavit at [para. 13](#).

<sup>8</sup> Third Williams Affidavit at [para. 14](#).

<sup>9</sup> Third Williams Affidavit at [para. 14](#).

<sup>10</sup> Third Williams Affidavit at [para. 17](#).

<sup>11</sup> Third Williams Affidavit at [paras. 18-22](#).

<sup>12</sup> Third Williams Affidavit at [para. 33](#).



18. A summary of the key dates pursuant to the proposed SISP are as follows:

<u><b>Milestone</b></u>	<u><b>Deadline</b></u>
Commencement of marketing and solicitation of interest	As soon as reasonably practicable but no later than September 20, 2024
Deadline to submit a LOI (the “ <b>Phase 1 Bid Deadline</b> ”)	5:00 p.m. (Eastern Time) on October 21, 2024
Deadline to submit a Binding Offer (the “ <b>Phase 2 Bid Deadline</b> ”)	5:00 p.m. (Eastern Time) on November 11, 2024
Selection of Successful Bid(s)	No later than 5:00 p.m. (Eastern Time) on November 13, 2024
Motion for Court Approval of Successful Bid(s)	As soon as reasonably practicable following the selection of the Successful Bid, but by no later than November 22, 2024
Closing of Successful Bid(s)	No later than December 6, 2024 (“ <b>Outside Date</b> ”)

19. If a Binding Offer other than the Stalking Horse Agreement is received, the Monitor, in consultation with the Applicants, will direct the bidders to participate in an auction (the “**Auction**”).<sup>13</sup> The Auction will be administered by the Monitor and governed by an auction procedures letter to be prepared by the Monitor and sent to all applicable Binding Bidders setting out, among other things, (a) the date, time and location of the Auction (including whether in person or by videoconference); (b) the amount of the starting bid; and (c) the initial minimum overbid.<sup>14</sup>

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<sup>13</sup> Third Williams Affidavit at [para. 37](#).

<sup>14</sup> Third Williams Affidavit at [para. 37](#).

20. The highest bid at the Auction will be deemed the Successful Bid.<sup>15</sup> Upon the selection of a Successful Bid, the SISP contemplates that:

- (a) on the earliest possible date after the selection of the Successful Bid, the Applicants shall apply to the Court for one or more orders approving such Successful Bid, vesting title to the purchased assets in the name of the successful bidder, and/or vesting unwanted liabilities out of one or more of the Applicants (the “**Approval Order**”); and
- (b) the parties will close the transaction contemplated in the Successful Bid by the Outside Date, being December 6, 2024.

21. On the closing of the transaction contemplated in the Successful Bid, all Binding Offers other than the Successful Bid will be deemed rejected.<sup>16</sup>

22. The Applicants, the Monitor, TS Investments and BMO are supportive of the SISP and believe the timelines and terms of the SISP are fair and reasonable.<sup>17</sup>

### **C. Stalking Horse Agreement**

23. The SISP contemplates a Stalking Horse Bid designed to set a “floor” price for the sale process and provide a base valuation of the Applicants’ assets that, accordingly, other potential bidders must bid against.<sup>18</sup> The Stalking Horse Bidder is TS Investments (which is also the lender under the DIP Term Sheet).<sup>19</sup> The Stalking Horse Agreement was negotiated extensively

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<sup>15</sup> Third Williams Affidavit at [para. 38](#).

<sup>16</sup> Third Williams Affidavit at [para. 40](#).

<sup>17</sup> Third Williams Affidavit at [para. 15](#).

<sup>18</sup> Third Williams Affidavit at [para. 41](#).

<sup>19</sup> Third Williams Affidavit at [para. 14](#).

between counsel for each of the Applicants and the Stalking Horse Bidder, with the oversight of the Monitor.<sup>20</sup>

24. On this motion, approval of the Stalking Horse Agreement is only for the purpose of permitting the Stalking Horse Agreement to constitute the Stalking Horse Bid under the SISP.<sup>21</sup> Further approval will be sought from the Court if the Stalking Horse Bid is ultimately designated as the Successful Bid in the SISP.<sup>22</sup>

25. The principal terms of the Stalking Horse Agreement are summarized below:<sup>23</sup>

<b>Seller</b>	267 Ontario, as the Company
<b>Purchaser</b>	TS Investments Corp., as Purchaser (the existing parent company of the Seller)
<b>Transaction Structure</b>	Reverse vesting structure share subscription agreement. Prior to closing, the Company will incorporate a new company (" <b>Residual Co.</b> ") to which all the Excluded Assets, Excluded Contracts, and Excluded Liabilities will be transferred as part of the Closing Sequence. Residual Co. shall have no issued or outstanding shares.
<b>Purchased Assets</b>	The Company shall issue to the Purchaser, and the Purchaser shall subscribe for that number and class of shares in the share capital of the Company from treasury, to be specified by the Purchaser at least two Business Days prior to the Closing Date, which shares shall be free and clear of all Encumbrances, except for any Encumbrances under any BMO Post-Closing Loan Documents (" <b>Purchased Shares</b> "). In addition to the Purchased Shares, the Retained Assets and Retained Liabilities will remain with the Purchased Entities.
<b>Purchase Price</b>	The total aggregate consideration payable by TS Investments for the Purchased Shares is equal to approximately \$77 million representing: (a) the outstanding obligations payable by the Applicants pursuant to the DIP Term Sheet, plus all accrued and unpaid interest, fees, and costs; (b) all amounts owing by the Purchased Entities to BMO; (c) an amount equal to the Retained Liabilities

<sup>20</sup> Third Williams Affidavit at [para. 45](#).

<sup>21</sup> Third Williams Affidavit at [para. 42](#).

<sup>22</sup> Third Williams Affidavit at [para. 43](#).

<sup>23</sup> [Stalking Horse Agreement](#), attached as Exhibit "D" to the Third Williams Affidavit. Capitalized terms not otherwise defined in this section have the meaning given to them in the Stalking Horse Agreement.

	(other than the amount of indebtedness owing to BMO) that have accrued as of the Closing Date, (d) the amount of \$31 million, representing a portion of the outstanding secured obligations payable by the Applicants pursuant to the TS Investments Grid Note including the principal amount of such claims and interest, fees and interest accrued as of the Closing Date; as well as certain cash consideration, namely (e) the Cure Costs, (f) the Priority Payment Amount; and (e) the Administrative Expense Amount.
<b>Excluded Assets and Excluded Liabilities</b>	<p>The Excluded Assets include the Cash Consideration, certain Tax matters related to the Excluded Liabilities and Excluded Assets, Excluded Contracts and Excluded Leases and certain other ancillary assets.</p> <p>The Stalking Horse Bidder may also exclude any other assets or liabilities five (5) days prior to the hearing for the Approval Order.</p>
<b>Closing Date</b>	<p>No later than five (5) Business Days after the conditions to closing have been satisfied or waived (the “<b>Closing Date</b>”).</p> <p>The Closing Date shall be no later than the Outside Date of December 6, 2024 or such later date agreed to by each of the Company and the Purchaser in writing in consultation with the Monitor.</p>
<b>Retained Liabilities</b>	<ul style="list-style-type: none"> <li>• Wages, vacation pay, and benefit plans owing to any employee that continues employment with the Applicants after the Closing Time.</li> <li>• Cure Costs and liabilities of the Purchased Entities under any Retained Contracts or Retained Leases being retained by the Purchaser.</li> <li>• Post-Filing Claims that remain outstanding as at the Closing Time.</li> <li>• Outstanding indebtedness under the BMO Post-Closing Loan Documents unless the Purchaser elects to pay such outstanding indebtedness in cash, or other consideration, in accordance with Section 3.2 of the Stalking Horse Agreement.</li> <li>• Liabilities relating to Gift Cards and The High Roller Club Rewards Program accruing to and after the Closing Time.</li> <li>• Intercompany Liabilities payables and all Claims, Encumbrances relating thereto.</li> <li>• Tax liabilities of the Purchased Entities for any period, or the portion thereof, beginning on or after the Closing Date.</li> <li>• Any Retained Liabilities and any other Retained Liabilities added pursuant to Section 2.8 of the Stalking Horse Agreement.</li> </ul>
<b>As is, Where</b>	The Stalking Horse Bidder acquires the Purchased Shares on an “as is, where is basis”, subject to representations and warranties of the Applicants contained

<b>is</b>	in Article 4 of the Stalking Horse Agreement. The representations and warranties contained in the Stalking Horse Agreement are typical for share subscription agreements in the CCAA including due authorization to execute the agreement, the existence of the Applicants, and an absence of conflicts/actions that would prevent the consummation of the transaction.
<b>Employees</b>	The Stalking Horse Bidder will determine which employees it will assume and continue to employ prior to Closing.
<b>Key Conditions to Closing</b>	<p>The key conditions for closing include:</p> <ul style="list-style-type: none"> <li>• The Stalking Horse Agreement shall be the Successful Bid (as determined pursuant to the SISP).</li> <li>• The SISP Approval Order and the Approval Order shall have been issued and entered and not subject to appeal.</li> <li>• No provision of law prevents the consummation of the transaction.</li> <li>• The parties shall receive certain transaction regulatory approvals and all licenses will be in good standing.</li> <li>• Employees that the Stalking Horse Bidder does not wish to retain are terminated prior to closing.</li> </ul>

26. The Applicants will continue to operate in the normal course while the SISP is underway.<sup>24</sup> The Stalking Horse Bid also provides comfort and assurance to current stakeholders, including employees, vendors, suppliers, customers, franchisees, and landlords, that the SISP will inevitably end in a successful transaction, whether with the Stalking Horse Bidder or any other bidder, that will result in the continuation of the Business as a going concern.<sup>25</sup>

27. In the instant case, the Stalking Horse Bidder's function as a backstop for the sales process is particularly significant given the size of the group of potential bidders in the Canadian market who will have both the capability and interest in bidding on a cannabis retail business,

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<sup>24</sup> Third Williams Affidavit at [para. 13](#).

<sup>25</sup> Third Williams Affidavit at [para. 41](#).

and maintaining it as a going concern.<sup>26</sup> The Applicants are regulated by the *Cannabis Act* (Canada) and applicable provincial and municipal cannabis legislation.<sup>27</sup> Each province and territory has established its own rules and regulations governing cannabis retail activities and requires that retailers be licensed before any cannabis can be sold. In some instances, more than one license is necessary to operate a cannabis retail operation.<sup>28</sup>

28. The Monitor and the key creditors of the Applicants, TS Investments and BMO, support the approval of the Stalking Horse Agreement for the purpose of constituting the Stalking Horse Bid under the SISP.<sup>29</sup>

#### **D. The Break Fee**

29. The Stalking Horse Agreement entitles the Stalking Horse Bidder to receive a break fee equal to 1% of the Credit Bid Consideration (as defined in the Stalking Horse Agreement), which amounts to \$390,000, in the circumstances where the Stalking Horse Agreement is not selected as the Successful Bid under the SISP (the “**Break Fee**”). If the Stalking Horse Agreement is chosen as the Successful Bid, then no Break Fee will be payable to the Stalking Horse Bidder.<sup>30</sup>

30. The quantum of the Break Fee was negotiated amongst the parties with the assistance of the Monitor. The Applicants and the Monitor are of the view that the quantum of the Break Fee is reasonable given that the Stalking Horse Agreement was the product of good faith negotiations amongst counsel for the parties, and it is on the low-end of break fees that have been accepted by the Court in similar circumstances where the Stalking Horse Bidder is related to the Applicants.<sup>31</sup>

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<sup>26</sup> Third Williams Affidavit at [para. 47](#).

<sup>27</sup> Third Williams Affidavit at [para. 47](#).

<sup>28</sup> Third Williams Affidavit at [para. 47](#).

<sup>29</sup> Third Williams Affidavit at [para. 48](#).

<sup>30</sup> Third Williams Affidavit at [para. 44](#).

<sup>31</sup> Third Williams Affidavit at [para. 46](#).

## E. The FARIO

31. The Applicants seek an amendment to the ARIO to grant the Related Proceeding Stay, which will stay any Related Proceeding against or in respect of DAK except with the written consent of DAK and the Monitor, or with leave of this Court. The Related Proceeding Stay being sought is until December 6, 2024, which is less than three months from the date of this motion.<sup>32</sup>

32. DAK is a related party corporation which provides two of the Applicants, 2161907 Alberta Ltd. ("**216 Alberta**") and 26775970 Ontario Inc. ("**267 Ontario**"), with management services pursuant to Management Services Agreements.<sup>33</sup>

33. As part of the management services it provides, DAK is a party to a Share Purchase Agreement between Canopy Growth Corporation ("**Canopy Growth**") and Tweed Inc. ("**Tweed**"), as vendors, 267 Ontario, as purchaser, and DAK, as payment guarantor, dated September 23, 2022, as amended by the Amendment to Share Purchase Agreement dated December 30, 2022 (the "**SPA**").<sup>34</sup> Pursuant to the SPA, 267 Ontario purchased Canopy Growth's Canadian retail cannabis business.<sup>35</sup>

34. On March 8, 2024, Canopy Growth, 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 (the "**Canopy Arbitration**").<sup>36</sup>

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<sup>32</sup> Third Williams Affidavit at [para. 49](#).

<sup>33</sup> Third Williams Affidavit at [para. 50](#).

<sup>34</sup> Third Williams Affidavit at [para. 51](#).

<sup>35</sup> Third Williams Affidavit at [para. 52](#).

<sup>36</sup> Third Williams Affidavit at [para. 53](#).

35. The Canopy Arbitration relates to alleged breaches of several agreements between the 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.<sup>37</sup>

36. No procedural steps have been taken in the Canopy Arbitration since its commencement in March 2024, except that the parties agreed on an arbitrator.<sup>38</sup> Despite that the Canopy Arbitration is stayed against the TS Respondents, the Canopy Claimants have advised they wish to continue with the Canopy Arbitration against DAK. If a stay is not granted as requested in the FARIO, the TS Respondents will inevitably be required to participate in, and divert resources to, the Canopy Arbitration.<sup>39</sup>

### **PART III – ISSUES**

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

- (a) whether to approve the SISP and the Stalking Horse Agreement; and
- (b) whether to extend the stay of proceedings to DAK in respect of any Related Proceeding.

### **PART IV – LAW & ARGUMENT**

#### **A. The SISP Should be Approved by the Court**

38. The remedial nature of the CCAA confers broad powers to the Court to facilitate restructurings, including the power to approve a sale and investment solicitation process in

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<sup>37</sup> Third Williams Affidavit at [para. 54](#).

<sup>38</sup> Third Williams Affidavit at [para. 55](#).

<sup>39</sup> Third Williams Affidavit at [para. 57](#).



relation to a CCAA debtor and its business and assets, prior to or in the absence of a plan of compromise and arrangement.<sup>40</sup>

39. In *Nortel*, the Court identified several factors to be considered in determining whether to approve a sales process, which have since been consistently applied:

- (a) Is a sale warranted at this time?
- (b) Will the sale be of benefit to the whole "economic community"?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?<sup>41</sup>

40. These criteria have also been applied recently by this Court in *Fresh City Farms and Mama Earth Organics*.<sup>42</sup>

41. This Court has noted that Section 36 of the CCAA directly applies only in the context of the approval of a sale, not of a sales process.<sup>43</sup> Nevertheless, the *Nortel* criteria for approving a sales process should be evaluated in light of the considerations that may ultimately apply when seeking approval for a concluded sale under Section 36 of the CCAA.<sup>44</sup>

42. As such, this Court is entitled to consider whether the proposed SISF is likely to satisfy the requirement that the process be fair and that the best price has been obtained, whether the

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<sup>40</sup> *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ONSC) at [paras. 47-48](#) [**Nortel**]; CCAA at [ss. 11](#) and [36](#).

<sup>41</sup> *Nortel*, *supra* at [para. 49](#).

<sup>42</sup> *Fresh City Farms and Mama Earth Organics*, 2024 ONSC 2016 at [para. 29](#).

<sup>43</sup> *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ONSC) at [para. 17](#) [**Brainhunter**].

<sup>44</sup> *Brainhunter*, *supra* at [para. 16](#).

Monitor supports the SISP, as well as the extent to which creditors were consulted and other relevant factors.

43. In other CCAA cases, courts have also considered the following factors:

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances; and
- (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.<sup>45</sup>

44. In consideration of the above criteria and factors, the SISP should be approved as:

- (a) the Applicants are insolvent, unable to indefinitely continue operations in their current state without interim financing and must restructure to maintain the viability of the Business. The sale process will canvass interest with the intention of soliciting a bid to continue the Business on a going concern basis;
- (b) the SISP is designed as a stalking horse bid process that provides a floor price representing the minimum recovery to creditors, thereby maximizing value and reducing the risk of low bids;
- (c) the broad flexibility afforded by the SISP is designed to solicit the highest value available for the Property and Business, suggesting that the value that results from any sale transaction will benefit the Applicants' stakeholders. The SISP will canvass the market for a variety of potential transaction structures including one

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<sup>45</sup> *Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107 at [paras. 20-21](#); *CCM Master Qualified Fund v. bluetip Power Technologies*, 2012 ONSC 1750 at [para. 6](#) [**CCM Master**].

or more of a restructuring, recapitalization, or some other form of reorganization of the Business and affairs of the Applicants as a going concern or a sale of all, substantially all or one or more components of the Property and Business of the Applicants;

- (d) the DIP Term Sheet requires a sales process to be commenced;
- (e) the SISP was developed by the Applicants, with the assistance of the Monitor, and in consultation with its key creditors, TS Investments and BMO;
- (f) the Applicants and the Monitor believe that the milestones of the proposed SISP will provide sufficient time to canvass the market in a fair and transparent manner;
- (g) the SISP will cause minimal interruption to ongoing operations; and
- (h) the Monitor, BMO, and TS Investments are supportive of the proposed SISP.

## **B. The Stalking Horse Agreement Should be Approved by the Court**

45. The Applicants are seeking approval of the Stalking Horse Agreement, solely for the purpose of approving it as the Stalking Horse Bid under the SISP.

46. Stalking horse agreements have been recognized by CCAA courts as reasonable and useful elements of sales processes in insolvency proceedings.<sup>46</sup> The benefits of including a stalking horse bid in a sale process are well established:

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<sup>46</sup> *CCM Master*, *supra* at [para. 7](#); *Danier Leather Inc. Re*, 2016 ONSC 1044 at [para. 20](#) [*Danier Leather*].

- a. stalking horse bids facilitate sales by establishing a baseline price and deal structure for superior bids from interested parties, and accordingly, the “use of a sales process that includes a stalking horse agreement maximizes the value of a business for the benefit of its stakeholders and enhances the fairness of the sales process”;<sup>47</sup>
- b. stalking horse bids establish deal structure by providing a template for competing bidders to use for the submission of competing offers;<sup>48</sup> and
- c. stalking horse bids providing certainty that a going concern solution for the business has already been identified.<sup>49</sup>

47. As observed by this Court recently in *Validus Power Corp.*, the execution of a stalking horse agreement can provide an important degree of certainty to the employees of the company and other stakeholders who may take some comfort that there is a possible going concern solution for the business.<sup>50</sup>

48. The desirable nature of a stalking horse process in this case is, in part, due to the highly regulated nature of the cannabis retail industry. The Stalking Horse Bidder is one of a relatively exclusive group of persons with both the capability and interest in bidding on a cannabis retail business and maintaining it as a going concern. Notwithstanding that all reasonable efforts outlined in the proposed SISP will be made to solicit interest amongst industry members, the Stalking Horse Bid is key to providing reassurance to stakeholders that the Applicants will emerge as a going concern given the relatively small size of the market for potential bidders.<sup>51</sup>

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<sup>47</sup> *CCM Master*, *supra* at [para. 7](#); *Danier Leather*, *supra* at [para. 20](#).

<sup>48</sup> *CCM Master*, *supra* at [para. 7](#); *Danier Leather*, *supra* at [para. 20](#).

<sup>49</sup> *Cannapiece Group Inc. v Marzili*, 2022 ONSC 6379 at [para. 4](#). [**Cannapiece**]

<sup>50</sup> *Validus Power Corp. et al. and Macquarie Equipment Finance Limited*, 2023 ONSC 6367 at [para. 53](#) [**Validus**].

<sup>51</sup> Third Affidavit at [para. 47](#).

49. While the Applicants and the Monitor are optimistic that the SISP will result in a competitive bidding process in furtherance of a value maximizing transaction, the Stalking Horse Agreement assures the Applicants' stakeholders of the preservation and continuity of the core Business of the Applicants as a going concern, the employment of many of the Applicants' employees, and the important relationships with the Applicants' suppliers, customers, and other stakeholders.

50. The transaction described in the Stalking Horse Agreement includes a credit bid of the obligations owed by the Applicants to TS Investments. In *CCM Master*, Justice Brown, as he then was, noted the following observations of credit bids as stalking horse bids:

To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.<sup>52</sup>

51. In the instant case, the proposed SISP provides sufficient opportunity for interested parties to come forward with a superior offer. At the same time, the Stalking Horse Bid is designed to expedite and assist the sales process by providing a benchmark valuation of the Applicants' assets from the outset of the SISP and a form of agreement for consideration and use by all potential bidders, thereby saving time, money, and other resources while moving the sales process forward in a meaningful way that benefits all stakeholders.

### **C. The Break Fee is Reasonable Under the Circumstances**

52. The Stalking Horse Agreement contemplates payment of a Break Fee to the Stalking Horse Bidder if its bid is not selected as the Successful Bid.

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<sup>52</sup> *CCM Master*, *supra* at [para. 8](#).

53. Bid protections are often granted to stalking horse bidders to recognize the risk and costs of the stalking horse bidder if its bid is not ultimately successful. A stalking horse bidder's bid is not confidential, but instead is disclosed to all other potential bidders. It is therefore reasonable to allow a stalking horse bidder certain protections in consideration for its involvement in the process, and the benefits resulting from a stalking horse bid in a sale process. As this Court recently noted, "... fees, in addition to compensating the Stalking Horse purchasers for the time, resources and risk taken in developing the agreement, also represent the price of stability".<sup>53</sup>

54. In *CCM Master*, this Court held that a reasonable range for break fees is between 1.8% and 5% of the value of the bid.<sup>54</sup> Here, the maximum amount of the bid protections represents 1% of the credit bid consideration (i.e. the portion of the purchase price comprised of a credit bid of TS Investments' debt).

55. The Monitor has reviewed comparable bids and considered the range of acceptable bid protections in the context of stalking horse bids by related parties.<sup>55</sup> The proposed Break Fee of 1% is on the low end of the range of break fees considered by the Monitor. The Monitor has determined that the proposed Break Fee is reasonable under the circumstances.<sup>56</sup>

56. In *Validus Power Corp.*, this Court gave due consideration to the Monitor's recommendation in approving a break fee as part of the stalking horse agreement, noting certain considerations that contribute to the reasonableness of a break fee for a proposed stalking horse bidder, stating, *inter alia*,

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<sup>53</sup> *In The Matter of A Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565 at [para. 52](#); *Danier Leather*, *supra* at [para. 46](#).

<sup>54</sup> *CCM Master*, *supra* at [para. 13](#).

<sup>55</sup> Second Report of the Monitor, [s. 3.12\(iv\)](#).

<sup>56</sup> *Ibid*, [s. 3.12\(iv\)](#).

In the particular circumstances of this matter, I am prepared to accept the strong recommendations of the Monitor and Receiver, and approve the Bid Protections. I am doing so given my conclusions about the stability that the Stalking Horse Offer brings to the process which is particularly critical given the upcoming IESO auction.

That should not be taken as any statement as to the appropriateness generally of a break fee in the context of a credit bid, or at least a break fee that goes beyond the reasonable costs and expenses incurred in preparing a bid. It may be that a break fee over and above an expense reimbursement, which is effectively a premium, could be appropriate in some circumstances. However, the onus will be on the proposed stalking horse bidder seeking that break fee to demonstrate why it is appropriate in the circumstances and what additional value it brings to the particular situation, given that there is no new capital or funding being exposed or made available as part of the bid.<sup>57</sup>

57. In the instant case, the Break Fee is a fair reflection of the value the Stalking Horse Bidder brings to the sale process. The terms of the Stalking Horse Agreement were negotiated extensively between the Applicants and the Stalking Horse Bidder, with oversight of the Monitor.<sup>58</sup> Accordingly, the consideration provided under the Stalking Horse Agreement is both fair and reasonable in the circumstances, and reflects the product of extensive, good faith negotiations.

#### **D. The Related Proceeding Stay Should be Granted**

58. The Applicants seek the Related Proceeding Stay, which will stay all Related Proceedings against or in respect of DAK, a corporation related to the Applicants, 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.<sup>59</sup> The Related Proceeding Stay will apply to the Canopy Arbitration, which is an arbitration proceeding brought by the Canopy Claimants against

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<sup>57</sup> *Validus*, *supra* at [paras. 113-114](#).

<sup>58</sup> Third Williams Affidavit at [paras. 45-46](#).

<sup>59</sup> Third Williams Affidavit at [para. 50](#).

DAK and certain of the Applicants regarding alleged breaches of the SPA between Canopy Growth, Tweed, 267 Ontario, and DAK.<sup>60</sup>

59. At this juncture, the Canopy Arbitration is stayed against the TS Respondents pursuant to the ARIO. However, counsel for the Canopy Claimants have advised they intend to proceed with the arbitration against DAK with the TS Respondents *in absentia*.<sup>61</sup>

60. By virtue of its role in the SPA, DAK's liability, if any, is derivative of the primary liability of the TS Respondents and cannot be extricated from them. Any finding of liability on the part of the TS Respondents and correspondingly, DAK, will depend on a finding that the SPA has been breached.<sup>62</sup>

61. Progress in the arbitration that is both fair and meaningful will require participation of the TS Respondents. The TS Respondents, as the purchasing parties to the SPA and defendants in the Canopy Arbitration, have certain management employees who may be witnesses to the impugned transaction under the SPA and/or document custodians who will be required to provide evidence in the arbitration. If the TS Respondents do not participate in the Canopy Arbitration, the Applicants risk findings being made in the Canopy Arbitration that could impugn their conduct, prejudice their defence, and be devoid of crucial facts.<sup>63</sup>

62. Accordingly, unless the arbitration proceeding is stayed in its entirety, the Applicants will inevitably be forced to participate in the Canopy Arbitration in order to safeguard their defence and mitigate findings of liability against them in the absence of evidence to the contrary.

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<sup>60</sup> Third Williams Affidavit at [paras. 50-54](#).

<sup>61</sup> Third Williams Affidavit at [para. 56](#).

<sup>62</sup> Third Williams Affidavit at [para. 57](#).

<sup>63</sup> Third Williams Affidavit at [para. 57](#).



63. This Court has the jurisdiction to grant the Related Proceeding Stay under section 11 of the CCAA, which states that the court may make any order that it considers appropriate in the circumstances.<sup>64</sup>

64. Courts may exercise their broad judicial discretion under section 11 in furtherance of the CCAA's remedial objectives of facilitating restructurings and avoiding the devastating impact of bankruptcy.<sup>65</sup> The Related Proceeding Stay is consistent with the "single-proceeding model" that favours the resolution of claims within a CCAA process and avoids the "inefficiencies and chaos" that could otherwise result from uncoordinated attempts at recovery.<sup>66</sup>

65. The following factors have been considered by the Court in 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;
- (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

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<sup>64</sup> CCAA, [s. 11](#).

<sup>65</sup> *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at [para 59](#).

<sup>66</sup> *Ibid*, at [para. 22](#).

- (g) Whether the balance of convenience favours extending the stay to the third party.<sup>67</sup>

66. Further, this Court has often stayed entire litigation proceedings where CCAA applicants are involved as defendants. For example, in the tobacco and opioid CCAA proceedings, courts stayed entire actions where the debtor applicant was named as a defendant in those proceedings. In concluding that a stay should be granted, the Court noted it was reasonable to extend the stay to these entities, as failure to do so would undermine the intent of the CCAA stay.<sup>68</sup> Moreover, 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”.<sup>69</sup> As in the tobacco and opioid CCAA proceedings, allowing the Canopy Arbitration to proceed against DAK without the participation of the Applicants could cause significant economic harm to the Applicants’ stakeholders.<sup>70</sup>

67. CCAA courts have applied their broad power under section 11 of the CCAA to grant stays in favour of third-party guarantors, notwithstanding section 11.04,<sup>71</sup> which provides that a stay pursuant to section 11.02 will not affect claims against third party guarantors of an applicant company.<sup>72</sup> Section 11.04 has often been construed narrowly.<sup>73</sup> In both *Bed Bath* and *Nordstrom*, Chief Justice Morawetz granted a stay in favour of certain non-applicant guarantors on an initial CCAA application, notwithstanding the language of section 11.04.<sup>74</sup>

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<sup>67</sup> *McEwan Enterprises Inc.*, 2021 ONSC 6453 at [para. 43](#) [**McEwan**].

<sup>68</sup> *Imperial Tobacco Canada Limited, et al (Re)*, 2019 ONSC 1684 at [para. 12](#).

<sup>69</sup> *Paladin Labs Canadian Holding Inc.*, 2022 ONSC 4748 at [paras. 22-27](#).

<sup>70</sup> *JTI-Macdonald Corp., Re*, 2019 ONSC 1625, *supra* at [para. 15](#).

<sup>71</sup> CCAA, *supra*, [s. 11](#); *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422 at [paras. 40-42](#) [**Nordstrom**]; *BBB Canada Ltd.*, 2023 ONSC 1014 at [paras. 32-34](#) [**Bed Bath**]; *McEwan*, *supra* at [para 45](#).

<sup>72</sup> CCAA, [s. 11.04](#).

<sup>73</sup> *Nordstrom*, *supra* at [paras. 40-42](#); *Bed Bath.*, *supra* at [paras 32-34](#).

<sup>74</sup> *Ibid.*

68. In *Balboa Inc. et al. (Re)*, the Court granted a stay in favour of non-applicant parties who were all indirect shareholders, as well as directors and officers, of the CCAA applicants.<sup>75</sup> In *Balboa*, the non-applicant parties had provided guarantees in respect of certain of the CCAA applicants' loans. The Court in *Balboa* noted in its reasons that, "it is not in the best interests of the Applicants' stakeholders or the administration of justice for the Additional Stay Parties to be forced to respond to uncoordinated actions in respect of their purported guarantees of the very indebtedness that the Applicants are attempting to restructure under the CCAA."<sup>76</sup> This aversion to "uncoordinated actions" is consistent with the purpose of a CCAA proceeding, being to provide stability and breathing room for the applicants' restructuring efforts.

69. Similarly, in *McEwan Enterprises Inc.*, this Court granted a stay of proceedings in favour of a non-applicant party who was a director/guarantor of the applicant.<sup>77</sup> In concluding that the stay of proceedings should be granted, the Court considered that the non-applicant party had granted personal guarantees, indemnities and/or security in respect of certain obligations that were an important part of the overall business of the applicant. The Court also considered that if proceedings were commenced against the non-applicant party, it would cause significant disruption to the applicant, have a detrimental effect on restructuring efforts, and could cause significant erosion of value to the business of the applicant to the detriment of all stakeholders. Lastly, the Court considered that the obligations guaranteed, indemnified and/or secured by the non-applicant party were not anticipated to be impacted by the CCAA proceedings and would be assumed as part of the proposed transaction, resulting in no prejudice to affected parties.<sup>78</sup>

70. In *Nordstrom Canada Retail, Inc.*, the Court granted a stay of proceedings in favour of a non-applicant party (in this case, a parent company) in relation to claims derivative of the

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<sup>75</sup> *Balboa Inc. et al. (Re)*, Court File No. CV-24-00713254 at [para. 32](#) [*Balboa*].

<sup>76</sup> *Ibid*, at [para. 34](#).

<sup>77</sup> *McEwan*, *supra* at [para. 45](#).

<sup>78</sup> *McEwan*, *supra* at [para. 44](#).

primary liability of or related to the applicant. The stay of proceedings applied to claims arising from or in connection with any indemnity or guarantee in relation to certain of the applicants' leases. The Court noted that the stay was requested as a temporary measure designed to preserve the *status quo* and create breathing space during the initial stay period and was intended to prevent a multitude of proceedings being commenced in several different jurisdictions against the non-applicant party with possibly inconsistent outcomes.<sup>79</sup> The same principles, namely preserving the *status quo* and mitigating unfavourable outcomes, is present in the instant case.

71. In consideration of the above, this Court should grant the Related Proceeding Stay so that the Applicants are not required to divert the attention of management and key personnel at a time when resources should be dedicated to the restructuring and the SISP.

#### **PART V – RELIEF REQUESTED**

72. The Applicants therefore seek the SISP Approval Order in the form appended at Tab 3 and the FARIO in the form appended at Tab 4 to the Applicants' Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS SEPTEMBER 16, 2024**

/s Reconstruct LLP

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<sup>79</sup> *Nordstrom*, *supra* at [para. 37](#).

**SCHEDULE "A"****List of Authorities**

<b>TAB</b>	<b>JURISPRUDENCE</b>
1.	<a href="#"><i>Nortel Networks Corporation (Re)</i>, 2009 CanLII 39492 (ONSC)</a>
2.	<a href="#"><i>Fresh City Farms and Mama Earth Organics</i>, 2024 ONSC 2016</a>
3.	<a href="#"><i>Brainhunter Inc. (Re)</i>, 2009 CanLII 72333 (ONSC)</a>
4.	<a href="#"><i>Walter Energy Canada Holdings, Inc.</i>, 2016 BCSC 107</a>
5.	<a href="#"><i>CCM Master Qualified Fund v. bluetip Power Technologies</i>, 2012 ONSC 1750</a>
6.	<a href="#"><i>Danier Leather Inc. Re</i>, 2016 ONSC 1044</a>
7.	<a href="#"><i>Cannapiece Group Inc. v Marzili</i>, 2022 ONSC 6379</a>
8.	<a href="#"><i>Validus Power Corp. et al. and Macquarie Equipment Finance Limited</i>, 2023 ONSC 6367</a>
9.	<a href="#"><i>In The Matter of A Plan of Compromise or Arrangement of Green Growth Brands Inc.</i>, 2020 ONSC 3565</a>
10.	<a href="#"><i>Century Services Inc. v. Canada (Attorney General)</i>, 2010 SCC 60</a>
11.	<a href="#"><i>McEwan Enterprises Inc.</i>, 2021 ONSC 6453</a>
12.	<a href="#"><i>Imperial Tobacco Canada Limited, et al (Re)</i>, 2019 ONSC 1684</a>
13.	<a href="#"><i>Paladin Labs Canadian Holding Inc.</i>, 2022 ONSC 4748</a>
14.	<a href="#"><i>JTI-Macdonald Corp., Re</i>, 2019 ONSC 1625</a>
15.	<a href="#"><i>Nordstrom Canada Retail, Inc.</i>, 2023 ONSC 1422</a>
16.	<a href="#"><i>BBB Canada Ltd.</i>, 2023 ONSC 1014</a>
17.	<a href="#"><i>Balboa Inc. et al. (Re)</i>, Court File No. CV-24-00713254</a>

**SCHEDULE "B"****Statutory Authorities**

**[Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended](#)**

**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. — 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.

### **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 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.

### **Related persons**

- (5) For the purpose of subsection (4), a person who is related to the company includes
- (a) a director or officer of the company;
  - (b) a person who has or has had, directly or indirectly, control in fact of the company; and



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

**Assets may be disposed of free and clear**

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

**Restriction — employers**

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

**Restriction — intellectual property**

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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 SISP Approval Order and FARIO)**

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