

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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 1000156489 ONTARIO INC.

Applicant

FACTUM OF THE MONITOR

January 24, 2025

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1000156489 Ontario Inc. (f/k/a DCL
Corporation) and not in its personal or
corporate capacity

TO: SERVICE LIST

PART I - NATURE OF THE MOTION

1. This factum is filed in support of a motion by Alvarez & Marsal Canada Inc. (“**A&M**”), in its capacity as the monitor (in such capacity, the “**Monitor**”) of 1000156489 Ontario Inc. (f/k/a DCL Corporation) (the “**Applicant**”) in its proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**” and the within proceedings, the “**CCAA Proceedings**”).¹

2. On this motion, the Monitor seeks (a) an order (the “**Representative Counsel Order**”) appointing Ursel Phillips Fellows Hopkinson LLP (“**Ursel Phillips**”) as representative counsel (“**Representative Counsel**”) for the Represented Parties (as defined herein); and (b) an order (the “**Stay Extension Order**”) extending the period of the CCAA stay of proceedings (the “**Stay Period**”) until and including August 29, 2025.

3. The Applicant and its affiliated Chapter 11 Debtors underwent a sale process in spring 2023 which cumulated in a going-concern sale of substantially all of the business and assets of the Applicant and the Chapter 11 Debtors. The Applicant no longer has any business, operations, or employees. On May 8, 2023, this Court granted the Monitor the expanded powers necessary to conduct an orderly wind-down of the Applicant. Most recently, this Court issued an order, which, among other things, extended the Stay Period to and including January 31, 2025.

4. The Monitor remains engaged with the following activities in relation to the wind-down of the Applicant at this time:

¹ Unless otherwise stated, all monetary amounts referred to in this factum are expressed in Canadian dollars. Capitalized terms used in this factum but not otherwise defined herein have the meanings accorded to them in the Ninth Report of the Monitor dated January 21, 2025 (the “**Ninth Report**”) or the Fifth Report of the Monitor dated May 3, 2023 (the “**Fifth Report**”).

- (a) continuing to engage in ongoing discussions to resolve one outstanding claim filed against the Applicant pursuant to the claims procedure established in accordance with this Court's Order of June 20, 2023 (the "**Claims Procedure**" and the "**Claims Procedure Order**");
- (b) working with the Applicant to pursue a potential recovery in respect of the surplus balances remaining after the wind-down of certain of the registered pension plans – the Hourly DB Plan and the Salaried DB Plan – for which the Applicant is sponsor; and
- (c) administering the USD\$750,000 CCAA Cash Pool.

5. The Monitor seeks to extend the Stay Period in order to continue the orderly wind-down of the Applicant as outlined above. The Monitor submits that the Stay Extension Order is fair and reasonable in the circumstances and should be granted.

6. The Monitor also seeks the proposed Representative Counsel Order to facilitate and streamline negotiations with respect to entitlement to the surplus balances in the Hourly DB Plan and Salaried DB Plan. The Monitor submits that the Representative Counsel will represent the Represented Parties in such negotiations and at the proposed subsequent surplus pension entitlement motion and protect the interests of the Represented Parties in the CCAA Proceedings.

PART II - SUMMARY OF FACTS

A. Background and Update on the CCAA Proceedings

7. The Applicant is a subsidiary of its U.S. parent, H.I.G. Colors Inc. (“**Holdings**”). Holdings is a direct wholly-owned subsidiary of the ultimate corporate parent, H.I.G. Colors Holdings, Inc. (“**HIG Colors Holdings**” and, together with Holdings and its direct and indirect subsidiaries, including the Applicant and its subsidiaries, the “**DCL Group**”).²

8. On December 20, 2022, the Applicant obtained an initial order from this Court under the CCAA, pursuant to which the Monitor was appointed.³

9. The CCAA Proceedings were commenced as part of a larger coordinated restructuring of the DCL Group, and on the Petition Date, HIG Colors Holdings and certain of its U.S.-based subsidiaries (the “**Chapter 11 Debtors**”) each filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (such proceedings, the “**Chapter 11 Proceedings**”, and together with the CCAA Proceedings, the “**Restructuring Proceedings**”).⁴

10. The DCL Group conducted a sales process in the Restructuring Proceedings that culminated in a transaction (the “**Transaction**”) with Pigments Services, Inc. (including any permitted assignees, “**Pigments**”) which included the sale of substantially all the business and

² Ninth Report at para. 1.3.

³ Ninth Report at para. 1.1.

⁴ Ninth Report at para. 1.4.

assets of the Applicant. On March 29, 2023, this Court issued an order approving the Transaction. The Transaction closed on April 14, 2023.⁵

11. On May 8, 2023, this Court issued an order, which granted the Monitor expanded powers to, among other things, oversee the wind-down activities of the Applicant.⁶

12. On June 21, 2024, this Court issued an order, which extended the Stay Period until and including January 31, 2025.⁷

(a) Update on the Claims Procedure

13. On June 20, 2023, the Court granted the Claims Procedure Order approving the Claims Procedure for the identification, quantification, and resolution of claims of certain creditors of the Applicant and the Applicant's current and former Directors and Officers as at the date of the Initial Order.⁸

14. Pursuant to the Claims Procedure Order, the deadlines for filing claims were: (i) in respect of Pre-Filing Claims and Director/Officers Claims, August 18, 2023 (the "**Claims Bar Date**"); and (ii) in respect of Restructuring Period Claims, the later of 30 days after the date on which the Monitor sent a Claims Package with respect to a Restructuring Period Claim, or the Claims Bar Date.⁹

⁵ Ninth Report at para. 1.6.

⁶ Ninth Report at para. 1.7.

⁷ Ninth Report at para. 1.10.

⁸ Ninth Report at para. 4.2.

⁹ Ninth Report at para. 4.3. A summary of filed Claims as of the applicable deadlines is included in the Seventh Report of the Monitor dated December 1, 2023.

15. On August 9, 2024, the CRA filed a proof of claim with the Monitor for a total of \$2,648.44 for an unsecured claim related to penalties and interest in respect to the Applicant's failure to file an Annual Information Return for the 2022 period, which has been reviewed and accepted by the Monitor.¹⁰

16. One Pre-filing Claim, in the amount of approximately \$3.75 million for wrongful termination filed by a former employee, was subject to a NORD which was issued by the Monitor on December 20, 2023. The Monitor subsequently received a Notice of Dispute of Revision or Disallowance from the respective Claimant on January 3, 2024. The Monitor and the Claimant have continued to engage in ongoing discussions to resolve the claim (the "**Unresolved Claim**").¹¹

17. The Monitor continues to hold the balance of the CCAA Cash Pool (described further below), which has been reduced by an estimated \$50,000 in order to administer and complete the Claims Procedure. Based on its current analysis, the Monitor expects that Claimants with accepted claims will receive a recovery of approximately 3.4%. This estimated recovery is subject to change as the Unresolved Claim continues to be reviewed and assessed.¹² Further, any recovery obtained from the surplus balance after the wind-down of the Hourly DB Plan and Salaried DB Plan may potentially increase the recovery to unsecured creditors.¹³

(b) Registered Pension Plans

18. The Applicant is the sponsor of the following registered pension plans: (i) the Salaried DC Plan; (ii) the Hourly DC Plan; (iii) the Hourly DB Plan; (iv) the Salaried DB Plan; and (v) the

¹⁰ Ninth Report at para. 4.5.

¹¹ Ninth Report at para. 4.6.

¹² Ninth Report at para. 4.8.

¹³ Ninth Report at para. 4.4.

Pension Plan for the Employees of Monteith Inc. registered under the *Pension Benefits Act* (Ontario) (“**PBA**”) and the *Income Tax Act* (Canada) with registration number 1046994 (the “**Canadian Pension Plans**”). The Canadian Pension Plans were not assumed by Pigments as part of the Transaction.¹⁴

19. On October 18, 2023, Wind-Up Orders were issued by the Financial Services Regulatory Authority of Ontario (“**FSRA**”) in respect of the Hourly DB Plan and Salaried DB Plan, effective April 14, 2023. Wind-up reports filed with FSRA dated December 11, 2023 for the Hourly DB Plan and Salaried DB Plan (the “**Wind-Up Reports**”) show that as of April 14, 2023, being the wind-up date for both plans, the Salaried DB Plan had an estimated wind-up surplus of approximately \$2,770,900, and the Hourly DB Plan had an estimated wind-up surplus of approximately \$1,580,300. On February 11, 2024, FSRA approved the Wind-Up Reports.¹⁵

20. The Monitor understands that both the Hourly DB Plan and Salaried DB Plan liabilities have been paid out or secured via a purchase of annuities. As a result, there is a crystalized surplus of approximately \$1.8 million in the Hourly DB Plan and approximately \$2.6 million in the Salaried DB Plan. The appointed administrator for both plans intends to file updates to the Wind-Up Reports as of December 31, 2024 reflecting the foregoing.¹⁶

21. It is the current intention of the Monitor to bring a motion requesting orders and/or declarations from the Court regarding surplus entitlement in the Hourly DB Plan and Salaried DB Plan. As described further below, in addition to engaging in discussions with counsel to Teamsters

¹⁴ Ninth Report at para. 3.1. As described in prior reports, there are no remaining issues to be dealt with in the CCAA Proceedings with respect to the DC plans or the Monteith plan.

¹⁵ Ninth Report at para. 3.2.

¹⁶ Ninth Report at para. 3.4.

Chemical, Energy and Allied Workers (Local Union NO. 1979) (the “**Union**”), the Monitor is seeking the proposed Representative Counsel Order to appoint Ursel Phillips as Representative Counsel for both the members of the Hourly DB Plan and members of the Salaried DB Plan for purposes of representing the members of those plans in any such motion and in any negotiations regarding surplus entitlement in order to achieve the members’ consent to such motion.¹⁷

(c) Amounts Received by the Monitor

22. Upon closing of the Transaction, Pigments paid the following amounts to the Monitor:

- (a) the Canadian Designated Amount Portion of USD\$575,000;
- (b) the CCAA Cash Pool of USD\$750,000; and
- (c) USD\$1,442,134.50 in respect of the amount of HST potentially exigible on the Transaction, to be held by the Monitor in trust.¹⁸

23. The Canadian Designated Amount Portion was established to pay all remaining costs, professional fees and other amounts incurred in connection with the CCAA Proceedings and the wind-down of the Applicant.¹⁹ Approximately \$6,900 remains in the Monitor’s trust account, which is currently reserved to fund remaining professional fees anticipated to be incurred for final

¹⁷ Ninth Report at para. 3.6.

¹⁸ Ninth Report at para. 3.8.

¹⁹ Ninth Report at para. 3.9. As further described in prior reports of the Monitor, such HST amount was returned by the Monitor to Pigments following the parties agreeing on arrangements satisfactory to the Monitor to allow for same.

tax related and pension related work by the Monitor, the Monitor's legal counsel, and the Applicant's legal counsel (the "**Remaining Canadian Designated Amount Portion**").²⁰

24. As of the date of the Ninth Report, the Monitor is also holding approximately USD\$767,000 in the CCAA Cash Pool (including accrued interest, net of the \$48,400 transferred to the Canadian Designated Amount Portion) for the benefit of the Applicant's estate in the CCAA Proceedings, including any costs to administer the CCAA Proceedings. A small portion of this balance will be used to administer and complete the Claims Procedure.²¹

PART III - THE ISSUES AND THE LAW

25. The issues now before this Court are (a) whether the proposed Representative Counsel Order should be granted; and (b) whether the Stay Period should be extended until August 29, 2025.

A. The Representative Counsel Order Should be Granted

26. The Monitor proposes that this Court grant the proposed Representative Counsel Order, appointing Ursel Phillips as Representative Counsel for all members of both the Hourly DB Plan and the Salaried DB Plan (save and except those that opt-out of such representation) (the "**Represented Parties**") for purposes of representing the Represented Parties' rights in any entitlement to surplus under the Hourly DB Plan and the Salaried DB Plan.

27. The proposed Representative Counsel Order provides for the appointment of up to three representatives to, among other things, instruct Representative Counsel on behalf of the members

²⁰ Ninth Report at para. 3.12.

²¹ Ninth Report at para. 3.13.

of the Salaried DB Plan (the “**Salaried Plan Representatives**”) and one representative, being a representative of the Union (collectively with the Salaried Plan Representatives, the “**Representatives**”) to, among other things, instruct Representative Counsel on behalf of the members of the Hourly DB Plan.²²

28. As discussed above, if the proposed Representative Counsel Order is granted by this Court and the parties reach agreement regarding surplus entitlement under the Hourly DB Plan and the Salaried DB Plan, the Monitor intends to seek orders and/or declarations from the Court regarding pension surplus entitlement, with the support of Representative Counsel, which will then be submitted to FSRA, in accordance with the PBA.²³ If agreement cannot be reached, the options then open to the Monitor would be to nevertheless seek orders and/or declarations from this Court regarding the Applicant’s entitlement to surplus in one or both Plans, apply to FSRA for a determination of same, or seek a surplus sharing agreement with members directly through the process established under the PBA.²⁴

29. Section 11 of the CCAA confers broad jurisdiction on the Court to appoint representative counsel for vulnerable stakeholder groups. Representative Counsel should be appointed to enable vulnerable stakeholders (in this case, pension plan members) to meaningfully participate in CCAA proceedings that directly affect them.²⁵

30. The two primary rationales for the appointment of representative counsel in CCAA proceedings are (a) to provide effective communication with stakeholders and ensure that their

²² Ninth Report at para. 5.1.

²³ Ninth Report at para. 5.7.

²⁴ Ninth Report at para. 3.5.

²⁵ *Nortel Networks Corporation (Re)* (2009), [55 C.B.R. \(5th\) 114 \(Ont. S.C.\)](#) at [paras. 13-16](#).

interests are brought to the attention of the Court and other CCAA participants and (b) to bring increased efficiency and cost effectiveness to the proceeding as a whole.²⁶

31. The appropriate factors to be considered in a determination of whether a representation order is appropriate are set out in *CanWest Publishing Inc. (Re)*, as follows:²⁷

- (a) the vulnerability and resources of the group sought to be represented;
- (b) any benefit to the companies under CCAA protection;
- (c) any social benefit to be derived from representation of the group;
- (d) the facilitation of the administration of the proceeding and efficiency;
- (e) the avoidance of multiplicity of legal retainers;
- (f) the balance of convenience and whether it is fair and just including to the creditors of the estate;
- (g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- (h) the position of other stakeholders and the Monitor.

²⁶ *Quadriga Fintech Solutions Corp. (Re)*, [2019 NSSC 65](#) at [para. 9](#) [*Quadriga*].

²⁷ [2010 ONSC 1328](#) at [para. 21](#) [*CanWest*].

32. The factors enumerated by Pepall J. in *CanWest* are neither exhaustive nor mandatory. Rather, they are considerations in what is to be a holistic analysis informed by the particular circumstances of the case. The *CanWest* analysis is satisfied in this case, and it is the Monitor's view that the appointment of Representative Counsel is fair and appropriate in the circumstances.

33. Given the need to resolve the entitlement to the surplus balances in the Hourly DB Plan and Salaried DB Plan, the participation of the pension plan members – a vulnerable group of stakeholders, some of whom are retirees – is necessary in the CCAA Proceedings.

34. The appointment of Representative Counsel pursuant to the proposed Representative Counsel Order will facilitate and streamline negotiations with respect to entitlement to the surplus balances in the Hourly DB Plan and Salaried DB Plan. Representative Counsel will represent the Represented Parties in these negotiations and at any surplus pension entitlement motion and protect the interests of the Represented Parties in the CCAA Proceedings, which do not necessarily align with the interests of the Applicant. Representative Counsel's involvement will also assist in simplifying the surplus distribution process for the benefit of the Applicant and the Represented Parties, avoid the need for multiple counsel to represent the interests of pension plan members and allow this key outstanding matter in the CCAA Proceedings to progress efficiently and expeditiously to resolution.²⁸

²⁸ Ninth Report at para. 5.3.

35. To the extent that this process undertaken with the involvement of Representative Counsel results in a recovery to the Applicant from the surplus balances, such recovery may potentially increase the recovery available to the Applicant's unsecured creditors in the CCAA Proceedings.²⁹

36. Ursel Phillips has extensive experience acting as representative counsel for employees and retirees of major Canadian companies seeking to preserve their pensions, benefits and severance entitlements during CCAA proceedings, including Air Canada, Sears Canada and Essar Steel Algoma and, most recently, was appointed as employee representative counsel in the CCAA proceedings of Nordstrom Canada.³⁰

37. It is the Monitor's view that Ursel Phillips is best positioned to serve as Representative Counsel for the Represented Parties in the CCAA Proceedings. The Union has advised the Monitor that it is also supportive of the appointment of Ursel Phillips as Representative Counsel.

38. The proposed Representative Counsel Order provides that Representative Counsel's fees and disbursements will be paid in accordance with the terms of the engagement letter entered into between Ursel Phillips and the Monitor, on behalf of the Applicant (the "**Representative Counsel Letter**"). Among other things, the Representative Counsel Letter provides that Representative Counsel will issue monthly invoices to the Applicant and the Monitor, subject to a global cap of no more than 5% of the gross pension surplus amount (the "**Global Fee Cap**"), to be paid out of the pension surplus, on a *pro rata* basis between the pension surplus amounts for each of the Salaried DB Plan and Hourly DB Plan, following the Court's determination of the Monitor's intended motion regarding pension surplus entitlement and approval for such distribution by

²⁹ Ninth Report at para. 5.3.

³⁰ Ninth Report at para. 5.4.

FSRA.³¹ In the Monitor's view, the fees payable to Representative Counsel pursuant to the Representative Counsel Letter and manner of payment thereof are reasonable and appropriate in the circumstances. The Representative Counsel's scope of work is appropriately limited pursuant to the proposed Representative Counsel Order, and CCAA courts have previously held that a cap is an appropriate method of limiting the fees of representative counsel.³²

39. Further, the proposed Representative Counsel Order requires that (i) notice of the Representative Counsel Order, if granted, will be provided to all Represented Parties; and (ii) any individual Represented Party who does not wish to be represented by Representative Counsel may opt out of representation by delivering an opt-out notice in the form attached as Schedule "A" to the proposed Representative Counsel Order (each, an "**Opt-Out Notice**").³³ Any Opt-Out Notice must be delivered to the Monitor within 30 days of the date of the letter provided by the appointed administrator of the Hourly DB Plan and Salaried DB Plan to the Represented Parties, explaining the terms of the Representative Counsel Order.

40. Therefore, the Monitor submits that the proposed Representative Counsel Order is appropriate in the circumstances.

B. The Stay Period Should be Extended

41. 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

³¹ Ninth Report at para. 5.5.

³² See *Quadriga* at [para. 49](#). Also see the [Amended and Restated Representative Counsel Order](#) issued in the CCAA proceedings of Essar Steel Algoma Inc. et al., where the fees of Ursel Phillips were subject to an initial maximum amount with any subsequent increases to be determined by the Applicants in consultation with representative counsel and with the consent of the Monitor.

³³ Ninth Report at para. 5.6.

company satisfies the Court that it has acted, and is acting, in good faith and with due diligence. There is no statutory time limit on how long a stay of proceedings can be extended.

42. The Stay Period currently expires on January 31, 2025. The Monitor asks that the Stay Period be extended to August 29, 2025. The Monitor submits that extending the Stay Period is warranted for the following reasons:³⁴

- (a) the stay of proceedings will provide additional time for the Monitor to resolve the Unresolved Claim and to administer the CCAA Cash Pool and for the Monitor and Applicant to continue to pursue the surplus balance from the Hourly DB Plan and Salaried DB Plan;³⁵
- (b) the stay of proceedings is required to provide the necessary stability and certainty to enable the Monitor to facilitate the wind-down of the CCAA Proceedings;
- (c) the Remaining Canadian Designated Amount Portion and approximately \$50,000 of the CCAA Cash Pool, together with any funds received by the Applicant in respect of the Hourly DB Plan and/or Salaried DB Plan surplus funds, are expected to provide sufficient liquidity to fund the remaining costs anticipated to be incurred to complete the wind-down of the CCAA Proceedings (and any related wind-down proceedings such as formal bankruptcies); and

³⁴ Ninth Report at para. 6.2.

³⁵ Counsel for the Monitor is engaged in discussions with Representative Counsel to set out a reasonable timetable for appointment of the Representatives, completion of the negotiations regarding pension surplus entitlement, and the subsequent proposed pension surplus entitlement motion: Ninth Report at para. 5.8.

- (d) the Applicant, with the assistance and oversight of the Monitor, continues to act in good faith and with due diligence.

43. Therefore, the Monitor submits that the proposed Stay Extension Order is appropriate in the circumstances.

PART IV - NATURE OF ORDER REQUESTED

44. For the reasons set out above, the Monitor requests that this Court grant the proposed Representative Counsel Order and Stay Extension Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of January, 2025.



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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *CanWest Publishing (Re)*, [2010 ONSC 1328](#)
2. *Nortel Networks Corporation (Re)* (2009), [55 C.B.R. \(5th\) 114 \(Ont. S.C.\)](#)
3. *Quadriga Fintech Solutions Corp. (Re)*, [2019 NSSC 65](#)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies’ Creditors Arrangement Act, RSC 1985, c C-36

General power of court

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

[...]

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.

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

Court File No: CV-22-00691990-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1000156489 ONTARIO INC.

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

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