Court File No. CV-25-738613-00CL

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 1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD., 1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C. UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.

(Applicants)

REPLY FACTUM OF THE APPLICANTS
(Re: CW Leases Assignment Motion)
(Returnable August 28/29, 2025)

August 27, 2025

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TO: THE SERVICE LIST

A. Overview[1]

1. The Objecting Landlords have inundated the Court and engaged in argument by repetition. Despite claiming coordination on a joint factum to "avoid duplication" the Objecting Landlords served seven separate factums, each adopting the others' submissions, amounting to approximately 175 pages (plus schedules and appendices). Far from focusing on different factual elements, the factums largely recycle similar bald assertions and unfounded attacks on the Purchaser, while offering little law.

2. Moreover, the Objecting Landlords' submissions are rife with misstatements of the evidence and contain material omissions. The Objecting Landlords' submissions are plainly self-serving, crafted to advance their narrow interests. Their positions and submissions should therefore be subjected to close scrutiny.

3. This Reply Factum does not purport to respond to every inaccuracy advanced by the Objecting Landlords given the sheer volume of material they have put forward. Instead, this Reply Factum focuses on correcting several of the most obvious and significant inaccuracies and mischaracterizations that are central to their arguments.

B. The Objecting Landlords' Arguments Rely on a Selective and Misleading Reading of the Record

4. *First*, the Objecting Landlords have repeatedly raised concerns regarding the Purchaser's ability to satisfy the monetary obligations under the CW Leases.[2] Yet, in doing so, they conspicuously omit the Monitor's finding that there is a reasonable evidentiary basis to conclude the Purchaser can satisfy the financial obligations under the CW Leases, thereby satisfying the financial wherewithal requirement under section 11.3(3)(b) of the CCAA[3] – the central issue in the decisions interpreting section 11.3.[4]

5. *Second*, the Objecting Landlords continue to assert that the proposed assignment will cause them significant prejudice, often relying on exaggerated figures. For example, Oxford

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[1] Capitalized terms used herein and not otherwise defined have the meanings ascribed to such terms in the materials referenced in the Factum of the Applicants dated August 21, 2025.
[2] KingSett Responding Factum at paras 24, 26, 30-31, 32, 33-36, 37-54; Cadilac Fairview Responding Factum at paras 6, 27(b) and 47-48.
[3] Eighth Report of the Monitor dated August 20, 2025, at s. 6.9, 6.38 and 6.39.
[4] *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678 ("***Dundee***"); *In the Matter of a Plan of Arrangement of UrtheCast Corp.*, 2021 BCSC 1819 ("***UrtheCast***"); *Donnelly Holdings Ltd. (Re)*, 2024 BCSC 275 ("***Donnelly***").

claims "hundreds of millions of dollars" in purported prejudice to just three properties.[5] The suggestion that their evidence on this point is uncontested is remarkable – the Applicants have consistently challenged these assertions and presented evidence to the contrary through both affidavit evidence and cross-examinations.[6] Even the Monitor has concluded that it is not clear that the Objecting Landlords will suffer material prejudice if the CW Transactions are completed (which the Objecting Landlords also neglect to mention).[7]

6. *Third*, the Objecting Landlords state as an uncontroverted fact for the first time in their Joint Factum that the Company was "clearly in material breach, including its store conditions", without proffering any evidence in support of this allegation.[8] To be clear, there is no evidence in the record that the Company was in breach (let alone material breach) of its obligations with respect to its store conditions. The record is clear that none of the Objecting Landlords have delivered any notices of default to the Company in respect of store conditions.[9] On the other hand, the Objecting Landlords delivered notices of monetary defaults almost immediately after the occurrence of any payment delays.[10]

7. *Fourth*, the Objecting Landlords suggest (implicitly if not explicitly) that the Applicants have misled or withheld relevant information from this Court. They also impute nefarious motives to the Applicants' affiants in providing their evidence. There is no basis for such serious allegations. For instance, Oxford (and by virtue of adopting each other's arguments, so do all the other Objecting Landlords) continues to claim that the Applicants failed to disclose the nature of the relationship between Pathlight and Reflect[11]. They do so despite Mr. Zalev's clear answer during cross-examination and in further responses to undertakings that Reflect's previous engagement with Pathlight was disclosed in the retainer letter (which was filed with the Court) and the Monitor's

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[5] Oxford Responding Factum at para 18.
[6] Cross Examination of Patrick Sullivan dated August 15, 2025 at pg. 58, line 11 – pg. 60, line 2, pg. 63, line 19 – pg. 64, line 15, TB Tab G; Cross Examination of Scott Lee dated August 18, 2025, pg. 22 Q.93, pg. 26, Q. 109, TB Tab J; Cross-Examination of Rory MacLeoad dated August 18, 2025 at p. 48, TB Tab N; Cross-Examination of Nadia Corrado dated August 18, 2025, p. 14, TB Tab M; Cross-Examination of Ruby Paola dated August 18, 2025 at p. 26, TB Tab I.
[7] Eighth Report at para 6.43. The Monitor stated: "[I]n contrast, if the Sale Approval Relief and Lease Assignment Relief is approved, it is not clear that the Opposing Landlords will suffer material prejudice. If the CW Transactions are completed, the Opposing Landlords will continue to receive rent and will see funds invested for repairs and renovations. Further, the Opposing Landlords will retain the same rights of termination under the Subject Leases that they bargained for with the Applicants, such that they can terminate if the Proposed Lease Purchaser breaches the terms of the Subject Leases. Finally, if the Potential Lease Purchaser ultimately becomes insolvent, the Opposing Landlords would be in the same position they are in today – as noted above, the Opposing Landlords cannot expect to improve their position through the lease assignments."
[8] Joint Factum of the Objecting Landlords at para 6.
[9] Reply Perugini Affidavit at para. 38, ARR Tab 1.
[10] Affidavit of Theresa Warnaar, Responding Motion Record of KingSett at Exhibits C-J.
[11] Oxford Responding Factum at para 30.

Report when Reflect's engagement was approved by the Court.[12] Mr. Zalev's evidence clearly establishes that there is no ongoing involvement or direct or indirect ownership interest in Reflect by Pathlight, nor has there ever been.[13] Additionally, Reflect is known to the Court and is participating in a highly public, Court-supervised proceeding. The assertion that Mr. Zalev or Reflect are influenced by any prior relationship with Pathlight illustrates the extent to which the Objecting Landlords are willing to go to, even when the evidence doesn't support them.

8. *Fifth*, the claim by the Objecting Landlords that they "considered and rejected" the Purchaser's proposals[14] deliberately disregards the evidentiary record. The Objecting Landlords' so-called 'consideration' of the CW Transaction was wholly perfunctory and foregone:

(a) QuadReal declined to even meet with the Purchaser[15];

(b) Oxford insinuated without any foundation whatsoever that Ms. Liu has ties to the Chinese government before the assignment was ever requested[16]; and

(c) several Objecting Landlords stated outright that, regardless of the business plan, they would not permit the Purchaser to operate in their premises.[17]

9. *Sixth*, despite Ms. Liu's numerous and sworn statements that she intends to comply with the permitted use provisions under the CW Leases,[18] the Objecting Landlords continue to rely on earlier versions of the Purchaser's business plan, irrelevant provisions in the Central Walk APA, or even social media postings (which predate any time period relevant to this motion) to suggest that Ms. Liu is lying to the Objecting Landlords and to the Court, and will renege on her commitment to comply with the provisions in the CW Leases. [19] The suggestion that Central Walk wishes to effectively burn $69.1 million by planning to breach the CW Leases and trigger

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[12] Affidavit of Adam Zalev sworn July 29, 2025 at para 6, AMR Tab 4; Exhibit "F" to the Affidavit of Jennifer Bewley sworn March 14, 2025, Comeback Motion Record of the Applicants dated March 14, 2025, Tab 2-F; First Report of the Monitor dated March 16, 2025 at para 8.41; also see Undertakings Chart of Adam Zalev, Answer #1 to Refusals.

[13] Cross Examination of Adam Zalev dated August 14, 2025 ("**Zalev Cross**") pg. 172 Q. 708 - pg. 173 Q713, Transcripts Brief ("**TB**"), Tab A.

[14] Joint Factum of the Objecting Landlords at para 3.

[15] Cross Examination of Jay Camacho on August 15, 2025 ("**Camacho Cross**") at p. 25, line 22 – p. 26, line 5, page 26, line 17 and page 39, line 8, TB Tab E.

[16] Affidavit of Nadia Corrado sworn Aug 9 at para 123, Motion Record of Oxford Properties Group, Tab 2.

[17] Camacho Cross at pg. 43, line 25 – pg.44, line 5, TB Tab E; Cross Examination of Theresa Warnaar dated August 14, 2025 at pg. 33, Q.127-131, TB Tab B.

[18] Cross-Examination of Weihong (Ruby) Liu dated August 15, 2025 ("**Liu Cross**") at p. 91-96, TB Tab H.

[19] Oxford Responding Factum at paras 10, 15, 16 and 29; Combined Responding factum of Morguard, Ivanhoe and Westcliff at para 67; Quadreal and Primaris Responding Factum at para 70 and 72.

corresponding termination rights after closing is nonsensical.

10. For instance, QuadReal and Primaris suggest that the Purchaser itself acknowledges that it will require amendments to the permitted use clauses for its flagship stores and suggest that is evidence of the Purchaser admitting it does not intend to comply with existing permitted use clauses.[20] However, the cite to Ms. Liu's cross-examination proffered by QuadReal and Primaris in support of such statement clearly shows that Ms. Liu has no such intention as she stated that "all these are subject to the agreement of the landlords, the consent to the agreement, or consent to the – consent from the landlords … additional agreement will need to be entered into, and then also further negotiations will be conducted."[21]

11. Oxford similarly continues to mischaracterize the terms of the Central Walk APA in an attempt to suggest that the Purchaser is seeking amendments to the CW Leases and not taking them on an "as-is, where-is" basis[22], by stating that the Central Walk APA sought to, among other things, secure a rent abatement of up to ten months and amend the terms of the CW Leases governing permitted uses and concessions.[23] Both of these amendments are included in the Central Walk APA, but only with respect to the form of Landlord waiver. If Landlord consent cannot be obtained and the parties seek a forced assignment (which is presently the case), the Central Walk APA does not contemplate either of these amendments.[24]

12. Mr. Perugini addressed this issue in his Reply Affidavit, and clarified (again), that no amendments were being sought. Despite not being cross examined by Oxford on the issue, they continue to pursue this incorrect argument.[25] Further, many of the allegations of potential prejudice suffered by the Landlords, flow from the incorrect assumption that the Purchaser will not abide by the Permitted Use clauses of the Leases, and as such are fatally flawed.[26]

13. *Seventh,* while it is undisputed that, as of July 5, 2025, the Purchaser's business plan was deficient, the record is also clear that the Purchaser made significant improvements to its business plan since that date.[27] By its nature a business plan is an evolving document.[28] The Objecting Landlords seek to impose a standard of finality and perfection to the Business Plan. Further, the

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[20] QuadReal and Primaris Responding Factum at para 72.
[21] Liu Cross at pg. 137, line 4, TB Tab H
[22] Other than the declaration with respect to the IC Ipso Facto Clauses.
[23] Oxford Responding Factum at para 51.
[24] See Exhibit B to Second Perugini Affidavit at 2.3(1) and (2), AMR Tab 2-B.
[25] Reply Affidavit of Franco Perugini at para 28-30, ARR Tab 1.
[26] Oxford Responding Factum at para 9-16.
[27] Applicants Factum at para 36.
[28] Zalev Cross at pg. 153, Q. 629, pg. 48-49, Q. 164, TB Tab A.

Objecting Landlords argue that a line by line analysis of a potential assignees' business plan sets the new standard for Landlords and future Courts reviewing assignment requests.

14. *Eighth***,** the Objecting Landlords also attempt to gain some credibility for their objections by touting Cadillac Fairview as having nothing to gain from a disclaimer of its leases (due to the lack of any Restrictive Covenants in their leases) and, in fact, foregoing their potential recoveries as a secured creditor behind Pathlight. Both of these suggestions are misleading. Even without the Restrictive Covenants, Cadillac Fairview's CW Leases still represent more value to it if disclaimed as it will be able to break up the space and relet to multiple tenants at significantly higher rates than under the current CW Lease terms. As the Applicants' and its advisors have stated on several occasions, it is their belief that Pathlight is the fulcrum creditor. The recovery that Cadillac Fairview is suggesting it is foregoing from any distributions from the CW Transactions is so illusory as to be non-existent based on the shortfall anticipated to be suffered by Pathlight (which ranks ahead of Cadillac Fairview).[29]

C. Reasonableness of Landlords' Refusal to Grant Consent is Irrelevant to the Section 11.3 Analysis

15. The Objecting Landlords rely on a single isolated statement in *Donnelly*[30] to argue that, although not codified, the reasonableness of a landlord's withholding of consent is inherent in the factors under section 11.3(3)(b) and (c) of the CCAA. They then rely on caselaw addressing whether a landlord acted reasonably in refusing consent to an assignment outside the insolvency context, which is entirely irrelevant to the statutory analysis mandated by section 11.3. The relevant caselaw in fact establishes the opposite - assignment may be ordered even where the counterparty's refusal to consent is reasonable.[31]

16. The Applicants ask the Court to reject the Landlords' attempts to reshape the section 11.3 analysis to include a requirement for the refusal to the consent to have been unreasonable. If accepted, this requirement would strip any purpose from section 11.3 by limiting forced assignments to circumstances in which the counterparty could not reasonably withhold consent anyway. The Landlords' position is untenable.

17. None of the decisions granting a forced assignment under section 11.3 of the CCAA have

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[29] Eighth Report of the Monitor dated August 20, 2025, Confidential Appendix B – Confidential Secured Lender Recovery Analysis.
[30] *Donnelly* at para. 51.
[31] *Playdium Entertainment Corp., Re*, 2001 CanLII 28281 at para 22.

considered or analyzed the reasonableness of a counterparty withholding consent at all.[32] Most notably, even in *Donnelly*, the very case relied upon by the Objecting Landlords and which involved the forced assignment of a real property lease – the Court did not analyze or discuss the reasonableness of the landlord's refusal to consent.

D. Maximizing Value for Creditors is a Legitimate Purpose in Insolvency Proceedings

18. The Objecting Landlords argue that s. 11.3 should not be utilized in a liquidating CCAA or for the benefit of one stakeholder. As is well known to this Court, CCAA proceedings in Canada take a range of phases, and it is not unusual for proceedings, particularly in the retail space, to proceed by way of liquidating CCAA or orderly windup. Further, it is also not unusual for the only stakeholder who expects recovery to be the fulcrum secured lender.[33] As the Supreme Court of Canada held in *Callidus*: "where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage."[34] As such, it is appropriate for HBC to consider all available tools within the CCAA to achieve maximum creditor recovery.

E. The Objecting Landlords' Reliance on the Unreliable EY Report

19. At paragraph 29 of its factum, Cadillac Fairview complains that it is "perverse" and "grossly unfair" to criticize Ms. Hamilton for not doing what she described in her own words as "the type of work that we would like to do, obviously, if we had a significant amount of time."[35] The Applicants have framed their critique of Ms. Hamilton's report with great respect for her as an insolvency practitioner – but the fact remains – the 60-page expert report that was drafted in ten days[36] and tendered before this Court on a fundamental issue was based on incomplete work, unsupported assumptions, and unreliable data. The report should be given minimal or no weight.

20. Cadillac Fairview engages in a double-standard in criticizing Mr. Zalev, who has not been put forward as an expert, for not meeting the requirements of Rule 53, when Ms. Hamilton, who is not herself an expert on retail or real estate, relies in her report on the work of undisclosed retail and real estate experts who have not been identified, in non-compliance with Rule 53.[37]

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[32] *Donnelly*, *Dundee*, and *UrtheCast*.
[33] Joint Factum of the Objecting Landlords at para 5.
[34] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 46.
[35] Cross-Examination of Sharon Hamilton dated August 18, 2025 ("**Hamilton Cross**") pg. 34, Q.122, TB Tab K.
[36] Hamilton Cross pg. 77, Q. 266, TB Tab K.
[37] CF Factum para 32; EY Report at para. 5, Responding Motion Record of Cadillac Fairview, Tab 2-B.

21. Similarly, Cadillac Fairview criticizes Mr. Zalev for failing to conduct benchmarking to support the CW Forecast Model,[38] while the expert that Cadillac Fairview is putting forward for her expertise in "sophisticated benchmarking"[39] herself did little in that regard. Indeed, Ms. Hamilton's evidence was that: "[T]here really are not very many good benchmarks in Canada for which we were able to obtain publicly available information," and as a result, EY did not conduct benchmarking for any of the "operating metrics typical of a retail business plan" identified at paragraph 50 of the EY Report.[40]

22. Instead, the EY Report conducted *ad hoc* comparisons to a very small number of largely US-based retailers and used those comparators inconsistently, ignoring comparative data where that data suggested results were consistent with the CW Forecast Model.

23. For instance, Cadillac Fairview's factum claims that, based on "established benchmarks", the Purchaser would be expected to hire nearly twice as many corporate staff as in the CW Forecast Model.[41] In fact, the "established benchmarks" consisted of 2015 Target head count numbers heavily adjusted based on broad assumptions, plus one industry source, all converted to dollar amounts based on further assumptions.[42] This "benchmarking" resulted in EY estimating corporate compensation for the Purchaser at around 2x to 2.5x more per capita than HBC itself spent – a comparison that Ms. Hamilton dismissed as not relevant[43] but that renders the purported "benchmarking" on its face implausibly high.

24. Cadillac Fairview's factum also relies on the EY Report's critique of the Purchaser's projected payroll, which further reveals EY's flawed and inconsistent use of benchmarking.[44]In cross-examination, Ms. Hamilton admitted that she was not aware of any public source using the headcount-per-square-foot metric she used, nor was this data actually comparable between retailers.[45] Ms. Hamilton agreed that comparing payroll to sales might have been more useful.[46] Had EY done that analysis, it would have shown that the payroll as a percentage of sales projected by the Purchaser was comparable to that of at least one of EY's "benchmarks",

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[38] CF Factum para 32.
[39] CF Factum para 28.
[40] Hamilton Cross pg. 42, Q. 146 – pg. 45, Q.158, TB Tab K.
[41] CF Factum at para. 45(a).
[42] EY Report at paras. 144-145, and 147, Responding Motion Record of Cadillac Fairview, Tab 2-B.
[43] Hamilton Cross pg. 151-155, Qs 549-569, TB Tab K.
[44] CF Factum at para. 43.
[45] EY Report at para. 130 Responding Motion Record of Cadillac Fairview, Tab 2-B; Hamilton Cross at pg. 136-142, Qs 482-508, TB Tab K.
[46] Hamilton Cross pg. 143, Q 515, TB Tab K.

Dillard's.[47] When taken through this, Ms. Hamilton insisted that a US retailer was not, in fact, an appropriate benchmark (even though EY used only US retailers as benchmarks for other metrics[48]), but also that "there's limited available financial information for Canadian department stores."[49] The upshot is that there was, in fact, no appropriate payroll benchmark identified by EY.

25. In other places, the EY Report asserts, and the Cadillac Fairview Factum repeats, that the Purchaser will have to incur substantial additional costs without any benchmarking whatsoever. For instance, the EY Report factors in an additional $5-$15 million on IT and $10 million on "professional fees" – estimates put forward with no support.[50]

26. Cadillac Fairview relies on the EY Report to argue that the EBITDA or store-level contribution projected under the Financial Model is unrealistic because it is 22x HBC's 2024 EBITDA.[51] That number is used for shock value without the context that (i) EBITDA is highly sensitive to even small percentage changes in revenue, and (ii) EY compared the Financial Model's projections only to HBC's results in the poor 2024 financial year, when the company's sales fell 27%.[52] When the comparison is made to a year when the stores were barely profitable, even small changes in costs or revenues result in large percentage increases in EBITDA because the denominator is very small.

27. While the CF Factum argues that the Purchaser's equity commitment is insufficient based on the sensitivity analyses in the EY Report, no weight can be placed on them.

28. The biggest factor driving the sensitivity analyses was leasehold improvement costs, accounting for $331 million out of $402 million (or 82%) of the negative adjustments in EY's scenario 1, and $989 million out of $1,139 million (or 87%) of negative adjustments in EY's scenario 2.[53] The rest of the negative adjustments include the unsupported figures for increased corporate payroll, IT, and professional fees addressed above. Ms. Hamilton agreed that an estimate that ranges by $700 million or 3.5x times, as do EY's, is not reliable.[54]

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[47] Hamilton Cross pg. 143-145, Q 516-527, TB Tab K.
[48] EY Report at paras. 119 and 168, Responding Motion Record of Cadillac Fairview, Tab 2-B.
[49] Hamilton Cross pg. 146, Q 532, TB Tab K.
[50] CF Factum at paras. 52 and 53(a); EY Report at paras. 160 and 170, Responding Motion Record of Cadillac Fairview, Tab 2-B.
[51] Joint Factum of the Objecting Landlords at para. 35(c); CF Factum at paras. 42-43.
[52] EY Report at para. 121, Responding Motion Record of Cadillac Fairview, Tab 2-B; Hamilton Cross at pg. 160 Q 591-592, TB Tab K; Zalev Affidavit at para. 42, AMR Tab 4.
[53] EY Report at para. 178, Responding Motion Record of Cadillac Fairview, Tab 2-B, sum of first three adjustments versus total adjustments.
[54] Hamilton Cross pg. 156-157, Q 575, TB Tab K.

29. Ms. Hamilton has no expertise in the cost of renovations or other leasehold improvements. She admitted in cross-examination that she did not know (or ask either) what renovations the Purchaser was contemplating or the extent of construction undertaken by the comparators used in her report.[55]

30. As such, Cadillac Fairview's argument that the equity commitment is insufficient rests on Ms. Hamilton's unsupported assumptions and unreliable estimates outside of her expertise about the magnitude of repair costs and should be rejected.

F. IC Factum Elevates Form Over Substance, Contrary to S. 34

31. In its factum regarding the IC Lease Relief, IC makes the remarkable submission that this Court should convert to a trial an issue on which the parties are in agreement on the facts and disagree solely on their legal characterization and implications. The parties agree that:

(a) IC exercised an option pursuant to which the Original Leases were terminated and replaced with the IC Leases;

(b) the IC Leases contained terms materially less favourable to HBC than the Original Leases, including deleting Restrictive Development Covenants and shortening their term;

(c) the parties agreed that the Original Leases would be reinstated in November 2028, and in the meantime, IC would not take any action inconsistent with the Restrictive Development Covenants in the Original Leases, unless HBC defaulted on its payment obligations or became insolvent or bankrupt; and

(d) this arrangement was entered into specifically so as "to eliminate the Restrictive Development Covenants in the Original Leases and to shorten their term in the event that Hudson's Bay became insolvent."[56]

32. In substance, the effect of these arrangements regarding the IC Leases was to make amendments to the leases between the parties that would not have any practical effect unless HBC defaulted or became insolvent, at which point HBC would lose its valuable Restrictive Development Covenants and term extensions forever. That is a textbook fact pattern for the application of both the anti-deprivation rule ("**ADR**") and section 34 of the *CCAA*.

33. Both the ADR and section 34 of the *CCAA* override freedom of contract and are expressly

[55] Hamilton Cross pg. 63-65, Qs 215-221, pg. 69-74, Qs 229-259, and p. 75-75, Qs 262-263, TB Tab K.
[56] IC Factum at para. 12, citing Reply Perugini Affidavit at para. 53.

effects-based and concerned with substance rather than form.[57] In contrast, IC's submissions are the epitome of form over substance.

34. In arguing that section 3.05(A) of the IC Leases is properly characterized as a condition precedent rather than a condition subsequent, IC is trying to distinguish between HBC losing the right to have the leases revert if it becomes insolvent before November 2028, versus HBC not-gaining the right to have the leases revert if it remains not-insolvent until November 2028. The effect of the condition precedent or condition subsequent would be the same – and IC implicitly concedes that the condition subsequent would offend the ADR and section 34.

35. IC's submissions about the importance of the intention of the parties ignore the Supreme Court's holding in *Chandos* that effect, not intention, is what matters: "The effects-based rule, as it stands, is clear. Courts (and commercial parties) do not need to look to anything other than the trigger for the clause and its effect. **The effect of a clause can be far more readily determined in the event of bankruptcy than the intention of contracting parties**."[58] The *Chandos* majority rejected an intention-based test, holding that: "Parties will often be able to state some commercial rationale for provisions altering contractual rights in the event of a counterparty's insolvency, such as guarding against the risk of the counterparty's non-performance. **An intention-based test would render the rule ineffectual, save in the most flagrant cases of deliberate circumvention of insolvency law.**"[59]

36. In comments that are particularly apposite to the facts in this case, the *Chandos* majority also held that: "Reliance on general principles of contractual freedom to support an intention-based test is no less misplaced," because parties "do not negotiate with a view to protecting the interests of their creditors in the event of their bankruptcy."[60]

37. Contrary to IC's submissions, the Applicants do not impermissibly seek to rewrite the contracts, eliminate cross default rights, or "evanesce history". Section 3.05(A) of the IC Leases states in relevant part that "if at November 13, 2028… **no Event… has occurred or is continuing**, and there is not then any default occurring of the Tenant's obligations under this Lease, **failing which this provision shall not apply and be null and void**," the parties shall

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[57] *Chandos Construction Ltd. v Deloitte Restructuring Inc.*, 2020 SCC 25 ("***Chandos***") at paras. 31 and 35-36; *CCAA* s. 34(5) ("Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.").
[58] *Chandos* at para. 35.
[59] *Chandos* at para. 36.
[60] *Chandos* at para. 37.

enter into the Reinstated Original Lease.[61] The relief sought is a declaration that the portions of this clause that would render it "null and void" upon an Event of insolvency or bankruptcy are invalid and unenforceable because they are *ipso facto* clauses, offending the ADR and section 34. The Applicants have expressly excluded from this relief any defaults due purely to non-payment without insolvency.[62] The relief sought is consistent with the clear applicable law and should be granted.

38. The allegation of bad faith at paragraph 70 of the IC Factum is unsupported and inflammatory. HBC refused documentary requests that were disproportionate fishing expeditions, while inviting IC to make appropriate and tailored requests. HBC properly refused, on the basis of privilege, three questions that asked its in-house counsel for his views on legal issues.[63] None of this gives rise to any "genuine issue with bad faith" and the suggestion amounts to IC grasping at any straw to avoid the determination of the clear-cut issue of the IC Ipso Facto Clauses.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of August, 2025.

Stikeman Elliott LLP

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[61] See, e.g. s. 3.05(A) of the Current Mapleview Centre Lease dated February 1, 2024, attached as Exhibit P to the Affidavit of Charles Saint-Pierre, affirmed August 9, 2025, in the Responding Motion Record of Ivanhoe Cambridge dated August 9, 2025, Tab 2-P.
[62] Notice of Motion at para. 14.
[63] IC Factum at footnote 89.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678
2. *In the Matter of a Plan of Arrangement of UrtheCast Corp.*, 2021 BCSC 1819
3. *Donnelly Holdings Ltd. (Re)*, 2024 BCSC 275
4. *Playdium Entertainment Corp., Re*, 2001 CanLII 28281
5. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10
6. *Chandos Construction Ltd. v Deloitte Restructuring Inc.*, 2020 SCC 25

I certify that I am satisfied as to the authenticity of every authority.

Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2))

Date: August 27, 2025 B. Ketwaroo

Signature

SCHEDULE "B"

TEXT OF STATUTES AND REGULATIONS

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

Assignment of agreements
11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions
(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;
(b) an eligible financial contract; or
(c) a collective agreement.

Factors to be considered
(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;
(b) whether the person to whom the rights and obligations are to be assigned would be able toperform the obligations; and
(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction
(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.

Copy of order
(5) The applicant is to send a copy of the order to every party to the agreement.

Certain rights limited
34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

Lease
(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

Public utilities
(3) No public utility may discontinue service to a company by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid for services rendered or goods provided before the commencement of those proceedings.

Certain acts not prevented
(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;

(b) requiring the further advance of money or credit; or

(c) [Repealed, 2012, c. 31, s. 421]

Provisions of section override agreement
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Powers of court
(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Eligible financial contracts
(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* and the by-laws and rules of that Association.

Permitted actions
(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction
(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values
(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF 1242939 B.C. UNLIMITED LIABILITY COMPANY et al.

Court File No. CV-25-738613-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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