

COURT FILE NUMBER

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COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE

SASKATOON

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 101098672  
SASKATCHEWAN LTD., MORRIS INDUSTRIES LTD., MORRIS SALES AND SERVICE LTD.,  
CONTOUR REALTY INC., and MORRIS INDUSTRIES (USA) INC.

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BRIEF OF LAW OF THE MONITOR, ALVAREZ & MARSAL CANADA INC.

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Hearing Date: November 26, 2020

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## I. INTRODUCTION

1. This Brief of Law is filed in support of the application by Alvarez & Marsal Canada Inc. (the "**Monitor**"), Court-appointed Monitor of 101098672 Saskatchewan Ltd., Morris Industries Ltd., Morris Sales and Service Ltd., Contour Realty Inc., and Morris Industries (USA) Inc. (collectively, the "**Morris Group**"), for an Order:
  - (a) extending the term of the Amended and Restated Initial Order of the Honourable Mr. Justice R.S. Smith granted in these proceedings on January 16, 2020 (the "**ARI Order**"), and the stay of proceedings provided for therein, from 11:59 p.m. Saskatchewan time on Monday, November 30, 2020 to 11:59 p.m. Saskatchewan time on Friday, December 18, 2020;
  - (b) increasing the maximum amount of interim financing available pursuant to the ARI Order from \$6,500,000.00 to \$8,000,000.00;
  - (c) increasing the amount of the "**Interim Lender's Charge**" (as that term is defined in the ARI Order) from \$6,500,000.00 to \$8,000,000.00;
  - (d) approving the actions of the Monitor;
  - (e) approving the fees and disbursements of the Monitor and its legal counsel;
  - (f) sealing the Confidential Appendix to the Eleventh Report of the Monitor (the "**Confidential Appendix**") on the Court file; and
  - (g) such further and other relief as counsel may request and this Honourable Court may allow.

## II. FACTS AND BACKGROUND

2. Pursuant to the Order (Enhancement of Monitor's Powers) of the Honourable Mr. Justice R.W. Elson granted on February 18, 2020 (the "**EMP Order**"), the Monitor is empowered, *inter alia*, to take any steps reasonably incidental to certain enumerated powers described therein and to exercise statutory rights and remedies on behalf of Morris Group (paragraph 3(d)). This is the authority relied upon by the Monitor to bring applications in these proceedings on behalf of the Morris Group, including the within application.
3. The facts relied upon by the Monitor in support of this application are set out in the Eleventh Report of the Monitor (the "**Eleventh Report**"), as well as the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Reports previously filed by the Monitor in relation to these proceedings.

### **III. ISSUES**

4. This Brief addresses the following issues, namely:
- (a) Have the statutory requirements for extending the ARI Order, and the stay of proceedings thereunder, been met?
  - (b) Should the maximum amount of interim financing and the Interim Lender's Charge be increased from \$6,500,000.00 to \$8,000,000.00?

### **IV. ARGUMENT**

#### **A. The Statutory Requirements For Extending The ARI Order And The Stay Of Proceedings Have Been Met**

5. The Court's jurisdiction to extend the stay of proceedings granted pursuant to an initial order, and the prerequisites that must be met before the Court may grant such an extension, are set out in subsections 11.02(2) and (3) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "CCAA"), which provide as follows:

#### **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.

6. In considering whether circumstances exist that make the extension order sought appropriate, the Courts have looked to, among others, the following, non-exhaustive list of factors:
- (a) whether the extension sought furthers the underlying purposes of the CCAA; namely: to avoid the social and economic losses resulting from liquidation of an insolvent company, by facilitating a plan of arrangement or compromise between the debtor company and the creditors;<sup>1</sup>
  - (b) the debtor company's progress during the previous stay period toward a restructuring;
  - (c) whether creditors will be prejudiced if the court grants the extension; and
  - (d) the comparative prejudice to the debtor company, creditors, and other stakeholders, if the stay extension were not granted.<sup>2</sup>
7. In the circumstances of this application, the Monitor is continuing its efforts to close transactions for the sale of the business assets of the Morris Group with a view to maximizing value for all stakeholders. The first ranking secured creditor, Bank of Montreal ("**BMO**"), has expressed its support for the requested extension, and continues to fund the CCAA proceedings as interim financing lender.
8. As described in the Eleventh Report, the Monitor and the prospective purchaser have executed Asset Purchase Agreements. This proposed transaction represents the best chance at this time to maximize the value of the assets of Morris Group.
9. To the knowledge of the Monitor, no party is opposing the stay extension sought and no viable alternative to an extension of the stay of proceedings has been identified or brought forward by any party. No party has applied for a receivership order directed against the Morris Group. The Monitor has been operating the business of Morris Industries Ltd. since the resignation or retirement of the last remaining directors and officers in February, and is best positioned to "keep the lights on" within the Morris Group pending a sale. Any change in course at this point would be expected to jeopardize the Monitor's extensive efforts to conclude a sale of the assets of Morris Group and to result in a significant increase in professional fees.
10. For all of these reasons, the Monitor respectfully submits that circumstances exist which make an Order extending the stay of proceedings appropriate.

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<sup>1</sup> *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522 at paras 11-12, 88 CBR (5<sup>th</sup>) 239.

<sup>2</sup> *Federal Gypsum Co., Re*, 2007 NSSC 347 at paras 24-29, 40 CBR (5<sup>th</sup>) 80.

11. The requirements of good faith and due diligence were the subject of recent comment by the Supreme Court of Canada in 9354-9186 *Québec Inc. v Callidus Capital Corp.*, as follows:

49 The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above. Additionally, the court must keep in mind three “baseline considerations” (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the CCAA context. Appropriateness “is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA”. Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the CCAA, which provides:

**Good faith**

**18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

**Good faith — powers of court**

**(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

51 The third consideration of due diligence requires some elaboration. Consistent with the CCAA regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. The procedures set out in the CCAA rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights. A party’s failure to participate in CCAA proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the CCAA regime.

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the CCAA. The monitor is an independent and impartial expert, acting as “the eyes and the ears of the court” throughout the proceedings. The core of the monitor’s role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing.<sup>3</sup>

[citations omitted]

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<sup>3</sup> 2020 SCC 10, 2020 CarswellQue 3772.

12. In this case, the Monitor, an officer of this Honourable Court, is overseeing management of the debtor companies pursuant to the EMP Order. All of the Monitor's actions have been directed at maximizing value for stakeholders. There is no suggestion of which the Monitor is aware that the Monitor's conduct has not been in good faith. Further, there has been no breakdown of communication of treatment of stakeholders on unequal terms that would support a finding of a lack of due diligence as described by the Supreme Court above. To the contrary, the Monitor has fulfilled the role described by the Supreme Court of Canada – an independent party safeguarding the process and (pursuant to the EMP Order) the business of the debtor companies.
13. For all of these reasons, the available evidence establishes that the Morris Group has acted and continues to act in good faith and with due diligence.

**B. The Maximum Amount of Interim Financing And The Interim Financing Charge Should Be Increased From \$6,500,000.00 to \$8,000,000.00**

14. When interim financing is sought on an application other than an application for an initial order pursuant to the CCAA, the application is governed by subsections 11.2(1-4) of the CCAA, which provide as follows:

**Interim financing**

**11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

**Priority — secured creditors**

**(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**Priority — other orders**

**(3)** The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

**Factors to be considered**

**(4)** In deciding whether to make an order, the court is to consider, among other things,

**(a)** the period during which the company is expected to be subject to proceedings under this Act;

**(b)** how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

15. The secured creditors of Morris Group have been provided with notice of this application as required by subsection 11.2(1) of the CCAA.
16. Regarding the prescribed factors in subsection 11.2(4):
  - (a) The sale transactions currently under contemplation, as discussed in more detail in the Eleventh Report and previous reports of the Monitor, will dispose of all or substantially all of the business of Morris Group which is saleable on a going concern basis. Once the contemplated transactions conclude, the remaining assets can be liquidated, and these proceedings concluded, in relatively short order.
  - (b) The Morris Group have been managed by the Monitor, under the oversight of this Honourable Court, since the granting of the EMP Order in February of 2020.
  - (c) The largest creditor of Morris Group (namely, BMO), continues to support the process and continues to fund these proceedings as interim financing lender. Neither of the other senior secured creditors of Morris Group (Farm Credit Canada and Avrio Subordinated Debt) has applied for a receivership or bankruptcy order in respect of any of the entities within the Morris Group and, to the knowledge of the Monitor, neither of these entities opposes the continuation of these proceedings on the terms requested by the Monitor.
  - (d) The increase to the amount of interim financing is necessary in order to preserve the going concern value of Morris Group pending the contemplated sale transactions. This preservation of value benefits all stakeholders and, in the Monitor's view, represents a better opportunity to maximize value than bankrupting some or all of Morris Group.
  - (e) Although Morris Group does own substantial tangible assets, there remains material going-concern value in the business of Morris Group, which value cannot be realized unless funding is provided which permits the Monitor to maintain that going concern value pending a sale of the business.



- (f) As the contemplated sale transactions hold the promise of the best realization which is realistically possible in the circumstances, the increase to interim financing at this time benefits all stakeholders, and prejudices none.
- (g) The Monitor, in its Eleventh Report, supports the proposed increase in the amount of interim financing.
17. The statutory factors set out in subsection 11.2(4) of the CCAA militate strongly in favour of the requested increase in the amount of interim financing being granted.

**V. CONCLUSION**

18. Based upon the foregoing, the Monitor respectfully requests that this Honourable Court grant an Order extending the ARI Order and the stay of proceedings thereunder to and Friday, December 18, 2020, increasing the maximum amount of interim financing and of the Interim Lender's Charge from \$6,500,000.00 to \$8,000,000.00, and providing for certain other relief, in the form of the Draft Order (Extension of Stay of Proceedings and Other Relief) filed.

ALL OF WHICH is respectfully submitted at Saskatoon, Saskatchewan, this 23rd day of November, 2020.

**MLT AIKINS LLP**

Per: 

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Solicitors for the Monitor, Alvarez & Marsal Canada Inc.

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## VI. LIST OF AUTHORITIES

As per the recently amended Rule 13-38(2-3), the authorities in this List of Authorities are available on <[www.canlii.org](http://www.canlii.org)> and are not enclosed.

The summary statements of legal principles relied upon from each authority (required by the new Rule 13-38(1)(b)(ii)) are not intended to be exhaustive, and should be read in context with the body text of the Brief of Law.

1. 9354-9186 *Québec Inc. v Callidus Capital Corp.*, 2020 SCC 10, 2020 CarswellQue 3772.

**-Legal principles relied upon:** Discussion of the meaning of good faith and due diligence in the CCAA context.

**-Paragraphs relied upon:** 49-52.

2. *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522, 88 CBR (5<sup>th</sup>) 239.

**-Legal principles relied upon:** Discussion of the purposes of the CCAA and confirmation that those purposes are substantially similar to the factors to be considered in support of an extension of the CCAA proceedings. "...in appropriate circumstances the purposes of the CCAA will be met even though the re-organization involves the sale of the company as a going concern, with the consequence that the debtor no longer would continue to carry on the business..."

**-Paragraphs relied upon:** 11-12.

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

**-Legal principles relied upon:** General law applicable to proceedings and applications of this nature.

**-Sections relied upon:** 11.02(2-4) and 11.2(1-4).

4. *Federal Gypsum Co., Re*, 2007 NSSC 347, 40 CBR (5<sup>th</sup>) 80.

**-Legal principles relied upon:** On an application to extend a stay of proceedings in the CCAA context, the Court will consider the comparative prejudice to the debtor company, creditors, and other stakeholders, if the stay extension were not granted.

**-Paragraphs relied upon:** 24-29.