

**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 THE COMPROMISE OR ARRANGEMENT OF ALEAFIA  
HEALTH INC., EMBLEM CORP., EMBLEM CANNABIS CORPORATION, EMBLEM  
REALTY LTD., GROWWISE HEALTH LIMITED, CANABO MEDICAL  
CORPORATION, ALEAFIA INC., ALEAFIA FARMS INC., ALEAFIA BRANDS INC.,  
ALEAFIA RETAIL INC., 2672533 ONTARIO INC., and 2676063 ONTARIO INC.**

Applicants

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**FACTUM OF THE APPLICANTS  
(RETURNABLE AUGUST 22, 2023)**

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August 17, 2023

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## PART I: INTRODUCTION<sup>1</sup>

1. Emblem Corp. (“**Emblem**”), Emblem Cannabis Corporation (“**Emblem Cannabis**”), Emblem Realty Ltd. (“**Emblem Realty**”), Growwise Health Limited (“**Growwise**”), Canabo Medical Corporation (“**Canabo**”), Aleafia Inc. (“**Aleafia Sub**”), Aleafia Farms Inc. (“**Aleafia Farms**”), Aleafia Brands Inc. (“**Aleafia Brands**”), Aleafia Retail Inc. (“**Aleafia Retail**”), 2672533 Ontario Inc. (“**2672**”) and 2676063 Ontario Inc. (“**2676**”) are various subsidiaries (individually, a “**Subsidiary**” and collectively, the “**Subsidiaries**”) of Aleafia Health Inc. (“**Aleafia Parent**” and with the Subsidiaries, the “**Applicants**” or the “**Aleafia Group**”). Aleafia Parent also has an interest in a certain other non-Applicant affiliate.<sup>2</sup>

2. This factum is made in support of a motion by the Applicants for relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “**CCAA**”), seeking an order (the “**SISP Order**”) substantially in the form attached at the Motion Record which, *inter alia*, grants:

- (a) an extension of the Stay Period (as defined in the Initial Order) to October 31, 2023;
- (b) preservation of the “status quo” in respect of the Applicants’ Health Canada and cannabis excise licences (the “**Licences**”) during the pendency of the Stay of Proceedings;

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<sup>1</sup> Terms used herein but undefined are as used in the initial affidavit of Patricia Symmes-Rizakos sworn July 24, 2023 (the “**Initial Affidavit**”), the second affidavit of Patricia Symmes-Rizakos sworn July 26, 2023 (the “**Second Affidavit**”) or the third affidavit of Patricia Symmes-Rizakos sworn August 11, 2023 (the “**Third Affidavit**”).

<sup>2</sup> The non-Applicant party is One Plant (Retail) Corp.

- (c) approval of the sale and investment solicitation process (the “**SISP**”) in a form substantially similar to the form attached as Schedule “A” to the SISP Order;
- (d) authority for the Applicants and the Monitor (as defined below) to immediately commence the SISP;
- (e) authority and direction to the Monitor, the Applicants, and their respective affiliates, partners, employees, advisors and agents (collectively, the “**Assistants**”) to take any and all actions as may be necessary or desirable to implement and carry out the SISP in accordance with its terms and the SISP Order; and
- (f) approving the Stalking Horse Asset Purchase and Subscription Agreement (the “**Stalking Horse Agreement**”) to be entered into between Aleafia Health, Emblem Cannabis, Canabo, Aleafia Farms, Aleafia Retail, Red White & Bloom Brands Inc. (“**RWB**”) and RWB (PV) Canada Inc., a wholly-owned subsidiary of RWB (in such capacity, the “**Stalking Horse Bidder**”) solely for the purpose of constituting the “Stalking Horse Bid” under the SISP.

## **PART II: FACTS**

3. The facts underlying this application are more fully set out in the affidavit of Patricia Symmes-Rizakos, sworn July 24, 2023.<sup>3</sup> The Aleafia Group is a federally licenced Canadian cannabis company providing cannabis products to five of Canada’s largest provinces (Ontario, Alberta, British Columbia, Saskatchewan and Manitoba) and destined for select international medical cannabis markets.<sup>4</sup> The Aleafia Group also operates a virtual cannabis clinic named

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<sup>3</sup> Initial Affidavit, *supra* note 1.

<sup>4</sup> *Ibid* at [para 10](#).

“Canabo Medical Clinic”, staffed by various physicians and nurse practitioners, which also provides health and wellness services across Canada.<sup>5</sup> Medical cannabis is largely produced through Aleafia Group’s Subsidiary Emblem Cannabis.<sup>6</sup>

4. Prior to entering these CCAA proceedings, the Applicants were in a dire liquidity crisis and were not able to meet their obligations as they came due.<sup>7</sup>

5. On or about July 25, 2023, the Honourable Madam Justice Conway granted an urgent order on short notice to the Applicants’ senior secured lenders (the “**Initial Order**”) under CCAA which, *inter alia*, contained the following relief:<sup>8</sup>

- (a) declaring that the Applicants are parties to which the CCAA applies;
- (b) appointing KSV Restructuring Inc. as an officer of the Court to monitor the assets, business, and affairs of the Applicants (once appointed in such capacity, the “**Monitor**”);
- (c) approving the Applicants’ ability to borrow under a debtor-in-possession credit facility (the “**DIP Loan**”) to finance their working capital requirements and other general corporate purposes, expenses and costs over the CCAA proceedings;
- (d) staying, for an initial period of not more than ten (10) days, all proceedings and remedies taken or that might be taken in respect of the Applicants, the Monitor, their directors and officers, or affecting the Applicants’ business or the Property (as

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at [para 8](#).

<sup>8</sup> Third Affidavit, *supra* note 1 at [Exhibit “C”](#).

defined in the Initial Order), except as otherwise set forth in the Initial Order or as otherwise permitted by law (the “**Stay of Proceedings**”);

- (e) granting the following charges (collectively, the “**Charges**”) over the Property:
  - (i) an “Administration Charge” against the Property in the initial amount of \$500,000, as security for the payment of the professional fees and disbursements incurred and to be incurred by the Monitor, counsel to the Monitor, and counsel to the Applicants, in connection with the CCAA proceedings both before and after the making of the Initial Order;
  - (ii) a “DIP Lender’s Charge” against the Property to the maximum amount of the Applicants’ obligations under the DIP Loan at the relevant time, up to a maximum of \$2,270,000;
  - (iii) a “Directors’ Charge” against the Property in the maximum amount of \$835,000, in favour of the directors and officers of the Applicants, as security for the Applicants’ obligation to indemnify such directors and officers for obligations and liabilities they may incur in such capacities after the commencement of the CCAA proceedings, except to the extent that such obligation or liability was incurred as a result of the director’s or officer’s gross negligence or wilful misconduct;
- (f) approving payment to certain suppliers who are critical to the business and operations of the Aleafia Group for pre-filing expenses or to honour cheques issued to providers of goods and services prior to the Initial Order, with consent of the

Monitor, which are necessary to facilitate the Applicants' ongoing operations and to preserve value during the CCAA proceedings, up to a maximum of \$300,000; and

- (g) authorizing the Aleafia Group to continue utilizing its Cash Management System (as defined in the Initial Order).

6. On or about August 4, 2023, the Honourable Justice Penny granted an amended and restated initial order which granted the following relief:<sup>9</sup>

- (a) extending the Stay Period to September 1, 2023;
- (b) granting authority for the Applicants to increase the amounts which may be borrowed by the Applicants under the DIP Loan to \$6.6 million;
- (c) granting an extension of the time limit to call and hold the annual general meeting of shareholders of Aleafia Parent until after the conclusion of the CCAA proceedings, subject to further order of this Court;
- (d) granting authority for the Applicants to incur no further expenses in relation to any filings (including financial statements), disclosures, core or non-core documents, restatements, amendments to existing filings, press releases or any other actions (collectively, the "**Securities Filings**") that may be required by any federal, provincial, or other law respecting securities or capital markets in Canada or the United States, or by the rules and regulations of a stock exchange and declare that none of the directors and officers, employees, and other representatives of the

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<sup>9</sup> *Ibid* at [Exhibit "E"](#).

Applicants or the Monitor in these CCAA proceedings (and its directors, officers, employees and representatives) shall have any personal liability for any failure by the Applicants to make the Securities Filings;

- (e) increasing the Charges granted in the Initial Order and grants them priority, as follows:
  - (i) first, the Administration Charge increased from \$500,000 to \$1,250,000;
  - (ii) second, the DIP Lender’s Charge increased from \$2,270,000 to \$6,600,000;
  - (iii) third, the Directors’ Charge increased from \$835,000 to \$2,850,000; and
- (f) increasing the critical supplier payment maximum aggregate amount to \$500,000.

**A. The Licences**

7. The Licences are held variously by each of Emblem Cannabis and Aleafia Farms, as summarized in the below table:

<b>HEALTH CANADA LICENCES</b>				
<b>Address Listed</b>	<b>License Type/No.</b>	<b>Entity</b>	<b>Current Term Effective Date</b>	<b>Expiry Date</b>
378 South Service Road, Grimsby ON	Standard Cultivation / LIC-VTQAQTTMOL	Aleafia Farms	June 7, 2023	June 13, 2024
2540 Regional Road 19, Blackstock ON	Standard Cultivation / LIC-GYAJNCME6L	Aleafia Farms	December 9, 2020	October 9, 2023
20 Woodslee Avenue, Paris ON	Standard Cultivation;	Emblem Cannabis	January 19, 2023	January 20, 2028

<b>HEALTH CANADA LICENCES</b>				
<b>Address Listed</b>	<b>License Type/No.</b>	<b>Entity</b>	<b>Current Term Effective Date</b>	<b>Expiry Date</b>
	Standard Processing; Sale for Medical Purposes / LIC-0CNIN0V9QK			
20 Woodslee Avenue, Paris ON	Research / LIC-28X6T94W2Y	Emblem Cannabis	April 29, 2021	April 7, 2026
85 Basaltic Road, Unit A, Vaughan ON	Standard Processing; Sale for Medical Purposes / LIC-CTHF6SVA0C	Emblem Cannabis	June 10, 2022	February 12, 2024

<b>CANNABIS EXCISE LICENCES</b>				
<b>Address Listed</b>	<b>License No.</b>	<b>Entity</b>	<b>Current Term Effective Date</b>	<b>Expiry Date</b>
378 South Service Road, Grimsby ON; 2540 Shirley Avenue, Blackstock ON	88009 9247	Aleafia Farms	October 17, 2022	October 16, 2024
20 Woodslee Avenue, Paris ON; 85 Basaltic Road, Unit A, Concord ON	85070 8975 RD0002; 85070 8975 RD0005	Emblem Cannabis	October 17, 2022	October 16, 2023

8. Two of the Licences are set to expire in October of 2023. The Canada Revenue Agency (“CRA”) has advised the Applicants that Emblem Cannabis is not eligible to renew its cannabis excise licence which expires in October 2023 due to not meeting the licensing requirements



prescribed by s. 2(2)(c)(ii) of the Regulations Respecting Excise Licences and Registrations, SOR/2003-115.<sup>10</sup>

**B. The SISP**

9. The SISP has been developed by the Applicants and the Monitor as a means of seeking to maximize the value of the Applicants' business assets.<sup>11</sup> Capitalized terms used in this subsection and not otherwise defined have the meaning ascribed to them in the SISP.

10. The SISP was designed to be broad and flexible. The SISP is intended to solicit interest in, and opportunities for: (a) one or more sales or partial sales of all, substantially all, or certain portions of the Property or the Business (terms as defined in the Initial Order); and/or (b) an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Applicants or their Business.<sup>12</sup>

11. The SISP calls for a one-stage streamlined process. A summary of key dates is below:<sup>13</sup>

<b>Milestone</b>	<b>Key Dates</b>
Distribution of Teaser Letter and NDA	No later than August 24, 2023
Binding Offer Deadline	October 2, 2023
Auction (if any)	October 10, 2023
Approval and Vesting Order hearing (if Successful Bid is the Stalking Horse Bid)	October 10, 2023
Approval and Vesting Order hearing (if Successful Bid is not the Stalking Horse Bid)	October 18, 2023
Closing of the Successful Bid	No later than November 22, 2023

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<sup>10</sup> *Ibid* at [para 20](#).

<sup>11</sup> *Ibid* at [para 24](#).

<sup>12</sup> *Ibid* at [para 27](#).

<sup>13</sup> Second Report of the Monitor dated August 17, 2023 at 5.3(4) (the “**Second Report**”). Note: the dates contained in the above chart have been slightly modified from those in the Third Affidavit due to the original auction date provided for in the SISP (October 9, 2023) falling on Thanksgiving.

12. A Potential Bidder (who has delivered an executed NDA and provided to the Monitor written confirmation of the identity of the Potential Bidder, including full disclosure of the direct and indirect principals of the Potential Bidder) will be deemed a “**Qualified Bidder**” if the Monitor, in its reasonable judgment, and in consultation with the Applicants, determines such person is likely, based on the availability of financing, experience and other considerations, to be able to consummate a sale or investment pursuant to the SISP. All Qualified Bidders will receive a Confidential Information Memorandum prepared by the Monitor and will be granted access to the virtual data room.<sup>14</sup>

13. Binding Offers will only be considered if they, *inter alia*:<sup>15</sup>

- (a) provide net cash proceeds on closing via provisions that meet the following requirements, that are not less than the aggregate total of: (i) sufficient cash to satisfy all secured indebtedness, liabilities and obligations owing by the Aleafia Group to the DIP Lender on account of its pre-filing secured loans<sup>16</sup> and the DIP Facility, plus (ii) the amount of cash payable under the Stalking Horse Agreement, plus (iii) the amount of cash payable to cover the Expense Reimbursement (as defined in the Stalking Horse Agreement) of up to \$500,000 payable to the Stalking Horse Bidder, plus (iv) a minimum overbid amount of \$200,000 (the “**Minimum Purchase Price**”); provided, however, that the Monitor may, in its reasonable judgment, and in consultation with the Aleafia Group, deem this criterion satisfied if the Sale Proposal, Partial Sale Proposal or the Investment Proposal, together with one or more other non-overlapping Sale Proposal, Partial Sale Proposal or

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<sup>14</sup> *Ibid* at [para 35](#).

<sup>15</sup> *Ibid* at [para 38](#).

<sup>16</sup> Estimated to be \$15,230,687 as at July 31, 2023 (Second Report at 5.9(4)).

Investment Proposal, in the aggregate, meet or exceed the Minimum Purchase Price and such Minimum Purchase Price is payable in full in cash on closing;

- (b) are submitted on or before the Binding Offer Deadline by a Qualified Bidder;
- (c) are made by the way of binding, definitive transaction document(s) that is/are executed by the Binding Offer Bidder;
- (d) are unconditional, other than as set forth therein;
- (e) contain the proposed treatment of employees of the applicable Aleafia Group entities;
- (f) are not subject to any financing condition, diligence condition or internal or board approval;
- (g) identify whether any Approval Order requires “reverse vesting”;
- (h) provides for any anticipated corporate, licensing, securityholder, Health Canada, legal or other regulatory approvals required to close the transaction, and an estimate of the anticipated time frame and any anticipated impediments for obtaining such approvals; and
- (i) do not provide for any break or termination fee, expense reimbursement or similar type of payment, it being understood and agreed that no bidder (other than the Stalking Horse Bidder) will be entitled to any bid protections.

14. The Monitor, in consultation with the Applicants, may waive strict compliance with the above. In the circumstance that a Binding Offer does not provide for net cash proceeds that are at least equal to the Minimum Purchase Price, the Monitor will consult with the DIP Lender and, subject to the prior written consent of the DIP Lender in its sole discretion, may elect that such Binding Offer be nevertheless considered as a potential Successful Bid and be entitled to

participate in the Auction. Specific requirements are also set out for Sale Proposals and Investment Proposals at paragraph 16 of the SISP.<sup>17</sup>

15. The Applicants and the Monitor will: (i) review and evaluate each relevant Binding Offer; and (ii) following the completion of the Auction (as defined below), (A) identify the highest or otherwise best Binding Offer (the “**Successful Bid**”, and the Binding Offer Bidder making such Successful Bid, the “**Successful Bidder**”), and (B) identify the next highest or otherwise second best Binding Offer (the “**Back-Up Bid**”, and the Binding Offer Bidder making such Back-Up Bid, the “**Back-Up Bidder**”).<sup>18</sup>

16. In the event that no Binding Offer is selected (other than the Stalking Horse Bid), the Aleafia Group will promptly seek Court approval of the Stalking Horse Agreement. In the event there is at least one Binding Offer in addition to the Stalking Horse Bid, the Successful Bid will be identified through an auction (the “**Auction**”) to be carried out on October 10, 2023.<sup>19</sup>

17. The Successful Bid and the Back-Up Bid, if any, will be selected by no later than 5:00 p.m. (Eastern Time) on October 10, 2023 (or such later date immediately thereafter if the Auction is conducted and not completed in one day) and the completion and execution of definitive documentation in respect of the Successful Bid and the Back-Up Bid, as applicable, must be finalized and executed no later than October 10, 2023 (or such later date immediately thereafter if the Auction is conducted and not completed in one day), which definitive documentation will be conditional only upon the receipt of the Approval Order(s) and the express conditions set out therein and will provide that the Successful Bidder will use all reasonable efforts to close the

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<sup>17</sup> Third Affidavit, *supra* note 1 at [para 39](#).

<sup>18</sup> *Ibid* at [para 40](#).

<sup>19</sup> *Ibid* at [para 41](#). Note: the dates contained in paragraphs 16 and 17 have been slightly modified due to the original auction date provided for in the SISP (October 9, 2023) falling on Thanksgiving; see the Second Report at 5.3(4).

proposed transaction by no later than the Target Closing Date, or such longer period as may be agreed to by the Monitor, in consultation with the Applicants and the Successful Bidder.<sup>20</sup>

18. In any event, the Successful Bid must be closed by no later than the Outside Date. If a Back-Up Bid is identified in accordance with the SISP, then such Back-Up Bid shall remain open until the date (the “**Back-Up Bid Outside Date**”) on which the transaction contemplated by the Successful Bid is consummated or such earlier date as the Monitor, in consultation with the Applicants, determines.<sup>21</sup>

19. If the transactions contemplated by the Successful Bid have not closed by the Outside Date or the Successful Bid is terminated for any reason prior to the Outside Date, the Applicants may elect, with the consent of the Monitor, to seek to complete the transactions contemplated by the Back-Up Bid and will promptly seek to close the transaction contemplated by the Back-Up Bid. The Back-Up Bid will be deemed to be the Successful Bid and the Applicants will be deemed to have accepted the Back-Up Bid only when the Applicants and the Monitor have made such election.<sup>22</sup>

20. All Binding Offers (other than the Successful Bid but including the Back-Up Bid) will be deemed rejected on and as of the date of the closing of the Successful Bid, with no further or continuing obligation of the Aleafia Group or the Monitor to any unsuccessful Binding Offer Bidders.<sup>23</sup>

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<sup>20</sup> *Ibid* at [para 43](#).

<sup>21</sup> *Ibid* at [para 44](#).

<sup>22</sup> *Ibid* at [para 45](#).

<sup>23</sup> *Ibid* at [para 46](#).

### C. The Stalking Horse Agreement

21. The Applicants have negotiated with RWB (in its capacity as both the prepetition senior secured creditor of the Applicants and the DIP Lender) the Stalking Horse Agreement.<sup>24</sup>

Capitalized terms used in this subsection and not otherwise defined have the meaning ascribed to them in the Stalking Horse Agreement.

22. The Stalking Horse Agreement provides for, *inter alia*:<sup>25</sup>

- (a) the purchase of (i) the Purchased IP of Aleafia Health and (ii) the ECC Purchased Shares, the Canabo Purchased Shares, the Aleafia Farms Purchased Shares, and the Aleafia Retail Purchased Shares which shares shall represent 100% of the outstanding Equity Interests in each of ECC, Canabo, Aleafia Farms and Aleafia Retail after such cancellation and issuance, on an “*as is, where is*” basis;
- (b) the retention of certain liabilities, being all post-filing Claims set out in Schedule 2.4 of the Stalking Horse Agreement, all liabilities of the Purchased Entities arising from and after Closing, Tax liabilities of the Purchased Entities for any period, or the portion thereof, beginning on or after the Closing Date, and those specific Retained Liabilities set forth in Schedule 2.4 of the Stalking Horse Agreement;
- (c) an Expense Reimbursement for the benefit of the Purchaser; and
- (d) a closing date of no later than five (5) Business Days after the Conditions set forth in Article 7 of the Stalking Horse Agreement have been satisfied or waived, other than the conditions that by their terms are to be satisfied or waived at Closing (or

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<sup>24</sup> *Ibid* at [para 25](#).

<sup>25</sup> *Ibid* at [para 53](#).

such other date agreed to by the Parties in writing), provided that Closing takes place no later than the Outside Date.

23. While the Applicants 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 preservation and continuity of the Applicants' core business as a going concern, and the continued employment of substantially all of the Applicants' employees.<sup>26</sup>

24. The terms of the Stalking Horse Agreement were negotiated extensively between the Applicants and the Monitor on the one hand, and the Stalking Horse Bidder on the other hand.<sup>27</sup>

### **PART III: ISSUES**

25. The issue to be considered on this motion is whether to grant the proposed form of SISP Order. The issues addressed in this factum are accordingly whether:

- (a) the Stay of Proceedings should be extended;
- (b) a regulatory stay should be imposed over the Licences during the course of the CCAA proceedings;
- (c) the SISP should be approved; and
- (d) the Stalking Horse Agreement should be approved for the purposes of serving as the Stalking Horse Bid under the SISP.

#### **A. THE STAY OF PROCEEDINGS SHOULD BE EXTENDED**

26. The Stay of Proceedings currently expires on September 1, 2023. The Applicants are requesting an extension of the Stay of Proceedings to October 31, 2023. A stay of proceedings is

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<sup>26</sup> *Ibid* at [para 56](#).

<sup>27</sup> *Ibid* at [para 58](#).

appropriate where it provides the debtors with breathing room while they seek to restore their solvency and emerge from their restructuring on a going concern basis.<sup>28</sup> The extension of the Stay Period is necessary and appropriate in these circumstances to provide the Applicants with continued space while they attempt to maximize value for the benefit of their stakeholders through the CCAA proceedings and the SISP sought herein.<sup>29</sup>

27. Since the granting of the Initial Order, the Applicants have acted, and are continuing to act in good faith and with due diligence.<sup>30</sup> The Monitor, the Applicants, and the Assistants will need time in order to properly and diligently implement and carry out the SISP in accordance with its terms and the SISP Order, to obtain the maximum value possible for all stakeholders.<sup>31</sup>

## **B. THE REGULATORY STAY OF THE LICENCES SHOULD BE GRANTED**

28. CCAA courts have regularly granted regulatory stays over licences where, without regulatory stays, the applicable regulators were likely to suspend or cancel licences due to the relevant parties having commenced CCAA proceedings. Courts have commented that to “permit the immediate termination of [a debtor corporation’s] licences would not avoid social and economic losses but amplify them”.<sup>32</sup>

29. For example, in *Just Energy Corp.* (“**Just Energy**”), *Abbey Resources Corp, Re* (“**Abbey Resources**”), and *Original Traders Energy Ltd. et al.* (“**Original Traders**”), the following fact scenarios occurred:

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<sup>28</sup> *Century Services Inc v Canada (AG)*, [2010 SCC 60](#) at [para 14](#); *Target Canada Co (Re)*, [2015 ONSC 303](#) at [para 8](#).

<sup>29</sup> Third Affidavit, *supra* note 1 at [para 16](#).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid* at [para 17](#).

<sup>32</sup> *Re Just Energy Corp.*, [2021 ONSC 1793](#) at [para 87](#) [*Just Energy*].



- (a) **Just Energy:** Five different provincial regulators issued licences to 16 different Just Energy entities allowing them to sell gas and electricity; without a regulatory stay, various regulators were likely to trigger suspension or cancellation of their licences upon the Just Energy entities entering CCAA proceedings. This Court held that the imposition of a regulatory stay against all regulators was appropriate. The regulatory stay provisions were further allowed even though the relief sought under s. 11.1(3) of the CCAA was without notice to regulators; in part, notice was not given because the regulators could otherwise have demanded on surety bonds of up to \$46.3 million.
- (b) **Abbey Resources:** The debtor held licences granted by the Saskatchewan Ministry of Energy and Resources (the “MOER”), which opposed the CCAA proceedings.<sup>33</sup> The MOER required an additional security deposit from the debtor of over \$13 million to maintain its licences,<sup>34</sup> and threatened that, if not paid the substantial security deposit from the debtor, it intended to take regulatory action that would inhibit the debtor from carrying on business.<sup>35</sup> The MOER further held discretionary statutory power to cancel a licence if “the security required [...] has not been provided in the amount and within the time required” by the *Oil & Gas Conservation Act*.<sup>36</sup> The Court of Queen’s Bench for Saskatchewan in Bankruptcy and Insolvency granted the Initial Order which provided for a regulatory stay against the MOER to prohibit the MOER from cancelling or suspending the debtor’s licence due to non-payment of the security owing to the MOER.
- (c) **Original Traders:** The debtor corporations sought a stay of the revocation of licences by the Ontario Ministry of Finance, as the debtors were in default of fuel and gas filings due in July, August and September, 2022 with amounts outstanding of: gas licences - \$27,856,055.71; and fuel licences - \$6,885,045.70.<sup>37</sup> This Court granted a stay of the revocation of licences, despite those significant amounts outstanding, in favour of the debtor corporations.<sup>38</sup>

30. In *Just Energy*, this Court stated:<sup>39</sup>

- (a) More plainly put, the CCAA automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means

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<sup>33</sup> *Abbey Resources Corp., Re*, (29 July 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB) (Abbey Resources Corp.’s [Supplemental Brief of Law](#))

<sup>34</sup> *Abbey Resources Corp., Re*, (4 August 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB) (Abbey Resources Corp.’s [Second Supplemental Brief of Law](#)) at para 3.

<sup>35</sup> *Ibid* at paras 12–15.

<sup>36</sup> *RSS 1978, c. O-2*, s. 12(2)(c).

<sup>37</sup> *Original Traders Energy Ltd. et al.*, (30 January 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00693758-00CL ([Endorsement](#)) at para 22.

<sup>38</sup> *Original Traders Energy Ltd. et al.*, (30 January 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00693758-00CL ([Initial Order](#)) at para 19.

<sup>39</sup> *Just Energy*, *supra* note 32 at [para 79](#).

that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.

31. Beyond the significant examples cited above, Canadian courts have also stayed CRA from seeking to enforce its rights through regulatory actions and estopped CRA from rescinding or destroying products related to an excise licence for the duration of a cannabis company's protection under an insolvency regime.

32. Tantalus Labs Ltd. ("**Tantalus**") filed a Notice of Intention to Make a Proposal pursuant to s. 50.4(1) of the *BIA* on June 28, 2023. CRA had previously issued to Tantalus a cannabis excise licence under the *Excise Act, 2001*. The Licences at issue in this proceeding include the same cannabis excise licence at issue in *Tantalus*.

33. Tantalus sought an order from the Supreme Court of British Columbia that its excise cannabis licence be extended over the course of its *BIA* proceedings. CRA opposed, arguing that a ministerial decision to not renew a licence that expires during insolvency proceedings did not qualify as "something that is "stayed" under the [BIA]".<sup>40</sup> The Honourable Madam Justice Fitzpatrick rejected CRA's argument and granted an order maintaining the status quo over the cannabis excise licence during the course of the proposal proceedings.<sup>41</sup>

34. The Licences are among the Applicants' most valuable assets, and are required to permit the Applicants to operate their underlying business.<sup>42</sup> If the Licences are cancelled, the Applicants' operation and delivery of products will likely be halted or suspended. Accordingly, the cancellation of the Licences would terminate their ability to restructure or continue as a going-concern business.

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<sup>40</sup> *Tantalus Labs Ltd.* (9 July 2023) Vancouver B-230269 (BCSC) ([Application Response](#)) at Part 5, para 7.

<sup>41</sup> *Tantalus Labs Ltd.* (10 July 2023) Vancouver B-230269 (BCSC) ([Order Made After Application](#)).

<sup>42</sup> Third Affidavit, *supra* note 1 at [para 21](#).

Without the stable of customer contracts that the Applicants have developed, they would lose vital revenue streams, threatening their viability and frustrating the fundamental purpose of these insolvency proceedings.

35. There is no factor which reflects a public policy rationale for refusing to grant a regulatory stay, against the prior precedents of *Just Energy*, *Abbey Resources*, *Original Traders* and *Tantalus*. The status quo relief, if granted, will mitigate the material, pressing and significant risk that the revocation of the Licences would destroy the business of the Applicants and significantly curtail the value to be generated from the SISP.<sup>43</sup>

### **C. THE SISP SHOULD BE APPROVED**

36. It is well-recognized that a CCAA court has jurisdiction to approve a sale process in relation to a CCAA debtor's business and assets, prior to the development (or even in the absence) of a plan of compromise and arrangement.<sup>44</sup> This Court identified in *Nortel Networks Corp. (Re) (2009)* ("*Nortel*") a number of factors that should be considered in determining whether to authorize a sale process, including:<sup>45</sup>

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole "economic community"?
- (c) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

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<sup>43</sup> *Ibid.*

<sup>44</sup> See *Nortel Networks Corp. (Re) (2009)*, [55 C.B.R. \(5th\) 229 \(Ont. S.C.J. \[Commercial List\]\)](#) at [para. 48](#) [*Nortel*]; CCAA at ss. [11](#) and [36](#).

<sup>45</sup> *Nortel* at [para 49](#).

(d) Is there a better viable alternative?

37. These criteria have also been applied recently by this Court in *Green Growth Brands, (Re)*, *Just Energy* and *Fire & Flower Holdings Corp. et al.* (“**Fire & Flower**”) to support the approval of sale processes.<sup>46</sup> Although the above *Nortel* criteria were articulated in the CCAA context prior to the 2009 amendments, this Court in *Brainhunter Inc., (Re)* confirmed that the same criteria apply under the post-2009 CCAA.<sup>47</sup>

38. This Court has noted that s. 36 of the CCAA directly applies only in the context of the approval of a sale, not of a sales process.<sup>48</sup> In other words, it is not this Court’s role in approving a sale process to apply the s. 36 criteria. Such criteria will apply and be considered by the Court if the Court is eventually asked to approve the Successful Bid arising from the SISP. Nevertheless, the *Nortel* criteria should be evaluated in light of considerations that may apply when seeking approval for a concluded sale under s. 36, and the Court can consider whether the proposed SISP is likely to satisfy the requirement that the process be fair and that the best price has been obtained, whether the Monitor supports the SISP and the stalking horse transaction, as well as the extent to which creditors were consulted and other relevant factors.

39. In other CCAA cases, courts have also considered the following factors:<sup>49</sup>

(a) the fairness, transparency and integrity of the proposed process;

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<sup>46</sup> *Green Growth Brands, (Re)*, [2020 ONSC 3565](#) at [para 61](#); *Fire & Flower Holdings Corp. et al.* [*Fire & Flower*] (21 June 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00700581-00CL ([Endorsement](#)); *Just Energy Group Inc. et al.* (August 18, 2022) Toronto, Ont Sup Ct [Commercial List] CV-21-00658423-00CL ([Endorsement](#)).

<sup>47</sup> *Brainhunter Inc., (Re)*, (2009), [62 CBR \(5th\) 41](#) (Ont. S.C.J. [Commercial List]) at [paras 15-17](#).

<sup>48</sup> *Ibid* at [para 17](#).

<sup>49</sup> *Walter Energy Canada Holdings, Inc.*, [2016 BCSC 107](#) at [paras 20-21](#); *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#) at [para 6](#) [*CCM Master*].

- (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.

40. In a June 2023 decision in *Fire & Flower*, the Honourable Justice Osborne conducted a detailed analysis of whether to approve a SISP in circumstances where a stakeholder requested an adjournment and contested the proposed process, holding as follows:<sup>50</sup>

I am satisfied that the SISP is appropriate here, and in my view will maximize the value of the business and assets of the Applicants for the benefit of all stakeholders [...]

I am further satisfied as to the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances of this case; and whether the sales process will optimize the chances, in these particular circumstances, of securing the best possible price for the assets [...]

These factors are to be considered in light of the well-known *Soundair* Principles, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles applicable to that process itself. [...]

The use of stalking horse bids to set a baseline for a sales process can be a reasonable and useful approach. As observed by Penny, J. of this Court, such an agreement can maximize value of a business for the benefit of stakeholders and enhance the fairness of the sales process as it establishes a baseline price and transactional structure for any superior bids. [...]

I am satisfied that the inclusion of this as part of the SISP will facilitate the exploration of potential transactions but also provide a floor or a minimum by establishing a baseline price and deal structure. It provides for the preservation and continuity of the core business of the Applicants as a going concern, including but not limited to the continued employment of many employees as well as supplier and customer relationships.

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<sup>50</sup> *Fire & Flower Holdings Corp. et al.* (25 June 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00700581-00CL ([Endorsement](#)) at paras 17 and 26-29.

41. In light of the above, the Applicants submit that the *Nortel* criteria are satisfied in these circumstances, as:

- (a) **Warranted Sales Process:** The SISP was developed by the Applicants in consultation with the Monitor and other stakeholders. It is intended to provide a fair and reasonable process to canvass the market to confirm whether the Stalking Horse Agreement delivers the best possible result for stakeholders.
- (b) **Benefits the Economic Community:** If the Stalking Horse Agreement is the Successful Bid, it will benefit the whole community with an economic interest by providing a going-concern solution for the Applicants, thereby potentially preserving the jobs of the Applicants' employees, as well as critical economic relationships with multiple suppliers, regulators, and other stakeholders. Moreover, it is necessary and urgent for the preservation of value of the Applicants' business that the Applicants complete a going-concern solution and conclude these proceedings.
- (c) **No *Bona Fide* Reason to Object:** The Applicants do not believe that there is any *bona fide* reason for their creditors to object to the sale of the business or the need to undertake a SISP.
- (d) **Better Alternative:** There is no other viable alternative to the SISP and the Stalking Horse Agreement, let alone a better one.

42. For additional consideration, in anticipation of the criteria that may eventually have to be satisfied under s. 36 of the CCAA in approving the Stalking Horse Agreement, the Applicants submit that the proposed SISP is fair, transparent and objective. As noted above, it is modelled on the SISP that was recently approved in *Fire & Flower* into a more streamlined one-phase process. The Monitor has provided its view that the timelines and terms of the SISP are fair, reasonable and

appropriate in the circumstances and provide sufficient time to allow interested parties to fully participate in the SISP.<sup>51</sup>

43. The SISP should be approved as the Applicants are insolvent, unable to indefinitely continue operations in their current state and must restructure to preserve their business. A sale will maximize value for the Applicants' stakeholders, either through allowing the business to continue as a going-concern or through ascribing fair market value to the business and assets of the Applicants. The broad flexibility afforded by the SISP is designed to solicit the highest value available for the Property and Business, for the benefit of all stakeholders.

#### **D. THE STALKING HORSE AGREEMENT SHOULD BE APPROVED**

44. 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.

45. Approval of stalking horse agreements and related SISP's has become a common feature in CCAA proceedings.<sup>52</sup> The benefits of having a stalking horse bid are well recognized by the CCAA courts, which include, among others:

- (a) facilitating 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>53</sup>

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<sup>51</sup> Third Affidavit, *supra* note 1 at para 31; Second Report, *supra* note 13 at 5.10(1).

<sup>52</sup> *Re Harte Gold Corp.* (20 December 2021) Toronto, Ont Sup Ct [Commercial List] CV-21-00673304-00CL ([Endorsement](#)); *Re Loyalty One, Co.* [*Loyalty One*] (20 March 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00696017-00CL ([Endorsement](#)).

<sup>53</sup> *Daniel Leather Inc. Re*, [2016 ONSC 1044](#) at [para 20](#) [*Daniel Leather*]; *CCM Master*, *supra* note 49 at [para 7](#).

- (b) establishing deal structure by providing a template for competing bidders to use for the submission of competing offers;<sup>54</sup> and
- (c) providing certainty that a going-concern solution for the business has already been identified.<sup>55</sup>

46. As stated by the Honourable Justice Penny in *Cannapiece Group Inc.*:<sup>56</sup>

[T]he stalking horse agreement provides some certainty that the applicants' business will continue as a going concern. If the stalking horse agreement is not approved, the applicants will not have sufficient funds to continue operating, to the detriment of their stakeholders. The baseline price in the stalking horse agreement will assist in maximizing the value of the applicants' business by canvassing the market to obtain the best bids available. Importantly, no better or other alternative has been identified. Despite the applicants' efforts, they were unable to source other rescue financing or purchase proposals, either inside or outside of the filing.

47. This situation is similar to the Applicants' fact scenario. In addition, this Honourable Court has approved numerous stalking horse agreements for the purposes of being a stalking horse bidder under a SISP,<sup>57</sup> as well as in *Fire & Flower*,<sup>58</sup> which this SISP was modeled on.

48. As contemplated in the applicable authorities, the Stalking Horse Agreement (a) sets a "floor price" and the commercial terms for a transaction involving the shares and/or business and assets of the Applicants; (b) helps generate interest among potential purchasers; and (c) provides certainty, stability and efficiency not only by setting the baseline price and documentation for the

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<sup>54</sup> *Daniel Leather* at [para 20](#).

<sup>55</sup> *Cannapiece Group Inc. v Marzili*, [2022 ONSC 6379](#) at [para 4](#).

<sup>56</sup> *Ibid.*

<sup>57</sup> *Loyalty One*, *supra* note 52; *Re Tehama Inc.* (9 February 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00010241-00CL ([Endorsement](#)); *Greenspace Brands Inc., Re* (14 April 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00697516-00CL ([SISP Approval Order](#)).

<sup>58</sup> *Fire & Flower*, *supra* note 46.



SISP, but also assuring stakeholders that there will be a going concern sale of the Applicants' business and a near term exit from these CCAA proceedings.

49. While the Applicants are optimistic that the SISP will result in a competitive bidding process in furtherance of a value maximizing transaction, the Stalking Horse Agreement benefits the entire economic community, as it assures the preservation and continuity of the Applicants' core business as a going concern, the continued employment of substantially all of the Applicants' employees, and important relationships with the Applicants' suppliers, customers, and other stakeholders.

50. The terms of the Stalking Horse Agreement were negotiated extensively between the Applicants, the Monitor and the Stalking Horse Bidder. 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. The Monitor also supports approval for the purpose of becoming the Stalking Horse Bid under the SISP.<sup>59</sup>

#### **PART IV: RELIEF REQUESTED**

51. The Applicants submit that they meet all of the qualifications required to obtain the requested relief and request that this Court grant the proposed form of Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** as of the date first written above.

*Tamie Dolny on behalf of K. Plunkett*

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**K. Plunkett / M. Spence / T. Dolny / S. Hans**

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<sup>59</sup> Third Affidavit, *supra* note 1 at [para 58](#); Second Report, *supra* note 13 at 5.10(1).

**SCHEDULE A – LIST OF AUTHORITIES**

1.	<i>Century Services Inc v Canada (AG)</i> , <a href="#">2010 SCC 60</a>
2.	<i>Target Canada Co (Re)</i> , <a href="#">2015 ONSC 303</a>
3.	<i>Re Just Energy Corp.</i> , <a href="#">2021 ONSC 1793</a>
4.	<i>Abbey Resources Corp., Re</i> , (29 July 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB) ( <a href="#">Supplemental Brief of Law</a> )
5.	<i>Abbey Resources Corp., Re</i> , (4 August 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB) ( <a href="#">Second Supplemental Brief of Law</a> )
6.	<i>Original Traders Energy Ltd. et al.</i> , (30 January 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00693758-00CL ( <a href="#">Endorsement</a> )
7.	<i>Original Traders Energy Ltd. et al.</i> , (30 January 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00693758-00CL ( <a href="#">Initial Order</a> )
8.	<i>Tantalus Labs Ltd.</i> (9 July 2023) Vancouver B-230269 (BCSC) ( <a href="#">Application Response</a> )
9.	<i>Tantalus Labs Ltd.</i> (10 July 2023) Vancouver B-230269 (BCSC) ( <a href="#">Order Made After Application</a> )
10.	<i>Nortel Networks Corp. (Re) (2009)</i> , <a href="#">55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List])</a>
11.	<i>Green Growth Brands, (Re)</i> , <a href="#">2020 ONSC 3565</a>
12.	<i>Fire &amp; Flower Holdings Corp. et al.</i> (21 June 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00700581-00CL ( <a href="#">Endorsement</a> )
13.	<i>Just Energy Group Inc. et al</i> (18 August 2022) Toronto, Ont Sup Ct [Commercial List] CV-21-00658423-00CL ( <a href="#">Endorsement</a> )
14.	<i>Brainhunter Inc., (Re)</i> , (2009), <a href="#">62 CBR (5th) 41 (Ont. S.C.J. [Commercial List])</a>
15.	<i>Walter Energy Canada Holdings, Inc.</i> , <a href="#">2016 BCSC 107</a>
16.	<i>CCM Master Qualified Fund v blutip Power Technologies</i> , <a href="#">2012 ONSC 1750</a>
17.	<i>Fire &amp; Flower Holdings Corp. et al.</i> (25 June 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00700581-00CL ( <a href="#">Endorsement</a> )
18.	<i>Re Harte Gold Corp.</i> (20 December 2021) Toronto, Ont Sup Ct [Commercial List] CV-21-00673304-00CL ( <a href="#">Endorsement</a> )
19.	<i>Re Loyalty One, Co.</i> (20 March 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00696017-00CL ( <a href="#">Endorsement</a> )
20.	<i>Daniel Leather Inc. Re</i> , <a href="#">2016 ONSC 1044</a>
21.	<i>Cannapiece Group Inc. v Marzili</i> , <a href="#">2022 ONSC 6379</a>
22.	<i>Re Tehama Inc.</i> (9 February 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00010241- 00CL ( <a href="#">Endorsement</a> )
23.	<i>Greenspace Brands Inc., Re</i> (14 April 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00697516- 00CL ( <a href="#">SISP Approval Order</a> )

## SCHEDULE B – STATUTES RELIED ON

### *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.

#### **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.

### *Oil & Gas Conservation Act, RSS 1978, c. O-2*

#### **Amendment, suspension, cancellation of licences**

**12(2)** The minister may amend, suspend or cancel a licence if:

[...]

(c) the security required pursuant to section 15 has not been provided in the amount and within the time required.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED  
AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ALEAFIA HEALTH INC., EMBLEM CORP.,  
EMBLEM CANNABIS CORPORATION, EMBLEM REALTY LTD., GROWWISE HEALTH LIMITED, CANABO MEDICAL  
CORPORATION, ALEAFIA INC., ALEAFIA FARMS INC., ALEAFIA BRANDS INC., ALEAFIA RETAIL INC., 2672533  
ONTARIO INC., and 2676063 ONTARIO INC.

Court File No.: CV-23-00703350-00CL

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**Proceedings commenced at Toronto**

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