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| COURT FILE NUMBER | Clerk's Stamp |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c C-36, AS AMENDED<br><br>AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF CANADIAN OVERSEAS PETROLEUM LIMITED AND THOSE ENTITIES LISTED IN SCHEDULE "A" |
| DOCUMENT: | **BENCH BRIEF OF THE APPLICANTS** |
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**APPLICATION BEFORE THE HONOURABLE JUSTICE JOHNSTON MARCH 19, 2024 AT 2:00 PM ON THE COMMERCIAL LIST**

## PART I - INTRODUCTION

1. On March 8, 2024, Canadian Overseas Petroleum Limited, ("**COPL**"), together with the other applicants listed in Schedule "A" (collectively, the "**Applicants**" and together with the Non-Filing Affiliates (as defined below), the "**COPL Group**"), were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to an initial order of this court (the "**Initial Order**"). The stay of proceedings granted in the Initial Order (the "**Stay of Proceedings**") was extended to Shoreline Canoverseas Petroleum Development Corporation Limited ("**Shorecan**") and Essar Exploration and Production Limited, Nigeria ("**Essar Nigeria**" and, together with ShoreCan, the "**Non-Filing Affiliates**").

2. In order to facilitate an orderly restructuring of the Applicants' business, the Applicants and the lender (the "**Lender**") under the Applicants' senior secured loan agreement (the "**Senior Credit Agreement**") have entered into a support agreement (the "**Restructuring Support Agreement**") whereby the parties have committed to cooperate with each other in good faith and with respect to the Applicants' restructuring. The Restructuring Support Agreement contemplates a sale and investment solicitation process (the "**SISP**") whereby all or substantially all of the assets of the Applicants, aside from COPL, will be sold. As part of the SISP, the Lender (or its assignee(s)) will act as stalking horse bidder (in such capacity, the "**Stalking Horse Bidder**"), and will enter into a stalking horse purchase agreement with the Applicants in accordance with the terms set out in the Restructuring Support Agreement (the "**Stalking Horse Purchase Agreement**", and the transaction contemplated therein, the "**Stalking Horse Transaction**").

3. The Applicants therefore seek at this comeback hearing:

   (a) an Amended and Restated Initial Order (the "**ARIO**"), which will, among other things:

(i) approve the Restructuring Support Agreement and authorize the Applicants and the Lender to enter into the Restructuring Support Agreement as of March 7, 2024, *nunc pro tunc*;

(i) approve the agreement between the Applicants and Province Fiduciary Services ("**Province**"), pursuant to which, among other things, Province will act as the Chief Restructuring Officer ("**CRO**") of the Applicants during these CCAA proceedings through the services of Peter Kravitz, authorize and direct the CRO to carry out the terms of the CRO Engagement Letter (as defined below), and approve the payment of fees contemplated under the CRO Engagement Letter;

(ii) ratify and approve the agreement between the Applicants and Province, LLC ("**Province LLC**"), pursuant to which, among other things, Province LLC will act as financial advisor (the "**Financial Advisor**"), and authorize and direct the Applicants to make the payments contemplated in the FA Engagement Letter (defined below);

(iii) grant the Applicants relief in respect of certain securities filing requirements and in respect of requirements to hold shareholder meetings;

(iv) increase the maximum principal amount on which the Applicants can draw under the DIP Loan to $11 million and, to the extent drawn either in whole or in part, increase the amount secured by the DIP Lender's Charge;

(v) increase the maximum amounts secured by the Administration Charge and Directors' Charge, and increase the scope of the CRO Charge to include the Transaction Fee; and

(vi) extend the Stay of Proceedings, including in respect of the Non-Filing Affiliates, to May 20, 2024.

(b) a Sales Investment Solicitation Process Approval Order (the "**SISP Approval Order**") which will, among other things:

(i) authorize and direct the Applicants and the Lender to negotiate the Stalking Horse Purchase Agreement substantially in accordance with the terms of the Restructuring Term Sheet, including certain bid protections contained therein (as defined below, the "**Bid Protections**"); and

(ii) approve the SISP in respect of which the Stalking Horse Purchase Agreement will serve as the "**Stalking Horse Bid**" and authorize the Applicants to implement the SISP pursuant to its terms.

4. The Restructuring Support Agreement is the product of consensus with the COPL Group's most significant secured creditor and facilitates access to the DIP Loan which permits the Applicants to continue operating during these CCAA proceedings. The continued support of the parties to the Restructuring Support Agreement is essential to the continued operation and successful restructuring of the Applicants, and the proposed SISP, as supported by the Stalking Horse Purchase Agreement, provides certainty to the Applicants and their stakeholders of a going-concern transaction, while also enabling the Applicants, with the assistance and oversight of the

Financial Advisor and the Monitor, to test the market and pursue the possibility of a superior transaction, to the benefit of stakeholders generally.

## PART II -FACTS

5. The facts are more fully set out in the First and Second Affidavits of Peter Kravitz[1] and the First Affidavit of Thomas Richardson.[2]

### A. Overview of the Applicants' Activities since the Initial Application

6. On March 8, 2024, this Court granted the Initial Order, *inter alia*, (i) declaring the Applicants are companies to which the CCAA applies; (ii) appointing KSV Restructuring Inc. as Monitor of the Applicants in these proceedings; (iii) granting a stay of proceedings in respect of the Applicants up to and including March 18, 2024; (iv) extending the stay of proceedings to the Non-Filing Affiliates; (v) authorizing the Applicants to obtain and borrow under the DIP Loan, with borrowings not to exceed US$1.5 million and, to the extent drawn either in whole or in part, a corresponding charge in favour of the DIP Lender; (vi) granting a charge as security for the respective fees and disbursements of counsel to the Applicants, the Monitor and the Monitor's Counsel and the Financial Advisor relating to services rendered in respect of the Applicants; (vii) granting a charge in favour of the directors and officers of the Applicants; and (viii) granting a charge in favour of the CRO to secure its fees and disbursements.[3]

7. On March 11, 2024, COPL, as Foreign Representative of the Applicants, commenced proceedings in the United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**") seeking the recognition of these CCAA proceedings under chapter 15 of Title 11 of the U.S.

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1 Affidavit of Peter Kravitz affirmed March 7, 2024 [First Kravitz Affidavit] and Affidavit of Peter Kravitz Affirmed March 14, 2024 [Second Kravitz Affidavit]. Capitalized terms not otherwise defined have the same meaning as in the First Kravitz Affidavit.

2 Affidavit of Thomas Richardson affirmed March 14, 2024 [First Richardson Affidavit].

3 Second Kravitz Affidavit at para. 5.

Bankruptcy Code (the "**Chapter 15 Case**"). On March 12, 2024, the U.S. Court granted an Order granting provisional relief.[4]

8. Since the date of the Initial Order, the Applicants, in close consultation and with the assistance of the Monitor, have been working in good faith and with due diligence to, among other things:[5]

(a) stabilize the COPL Group's business and operations as part of these CCAA proceedings;

(b) advise its stakeholders about the granting of the Initial Order;

(c) work with U.S. counsel to the Foreign Representative to commence the Chapter 15 Case;

(d) continue to advance discussions with the Lender and DIP Lender regarding the Stalking Horse Purchase Agreement; and

(e) respond to certain employee, shareholder and vendor inquiries regarding these CCAA proceedings and the Chapter 15 Case.

## B. The Restructuring Support Agreement

9. Prior to the commencement of these CCAA proceedings, the COPL Group began exploring DIP financing options with its key stakeholders and other third parties that either regularly provide such financing or might otherwise have a strategic interest in the COPL Group's assets. At the same time as the COPL Group was exploring DIP financing options, COPL America commenced

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4 Second Kravitz Affidavit at paras. 13-14.
5 Second Kravitz Affidavit at para. 6.

discussions with the Lender regarding the terms on which it would support a restructuring of the Applicants.[6]

10. Discussions with the Lender bore fruit, and on March 7, 2024, the COPL Group and the Lender executed the Restructuring Support Agreement, which appended a term sheet (the "**Restructuring Term Sheet**") outlining the terms and steps of the Lender's support.[7] Under the terms of the Restructuring Support Agreement, the Lender and the Applicants agreed to cooperate with each other in good faith and use commercially reasonable efforts with respect to the pursuit, approval, implementation and consummation of the transactions contemplated by the Restructuring Term Sheet.[8]

11. The Restructuring Term Sheet contemplates the sale of all or substantially all of the COPL's Groups assets by way of the SISP, in respect of which the COPL Group committed to seek Court approval within 10 days of commencing these CCAA proceedings.[9] In addition, the Restructuring Term Sheet sets out key terms to be included in the Stalking Horse Purchase Agreement between the Stalking Horse Bidder and the Applicants, which will support the proposed SISP and may ultimately serve as the basis for the restructuring of the COPL Group.[10]

12. The specific terms of the SISP and the Stalking Horse Purchase Agreement, as contemplated by the Restructuring Support Agreement, are described below.

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6 First Kravitz Affidavit at para. 144.

7 First Kravitz Affidavit at para. 146; Second Kravitz Affidavit at para. 31.

8 See First Kravitz Affidavit at para. 184 for a detailed description of the Consenting Lenders' obligations under the Restructuring Support Agreement. See First Kravitz Affidavit at para. 185 for a detailed description of the COPL Group's obligations under the Restructuring Support Agreement.

9 First Kravitz Affidavit at para. 147. Subsequent to delivery of the First Kravitz Affidavit, and following further consultation with the Monitor, the Applicants and the Lender agreed to modify the terms of the SISP. The modified SISP, for which the Applicants are seeking approval pursuant to the proposed SISP Approval Order, is attached to the Second Kravitz Affidavit as Exhibit "E".

10 Second Kravitz Affidavit at para. 31.

## C. The SISP

13. The SISP sets out the manner in which: (i) binding bids for executable transaction alternatives that are superior to the transaction to be provided for in the Stalking Horse Purchase Agreement involving the shares and/or business and assets of some or all of the COPL Group will be solicited from interested parties; (ii) any such bids received will be addressed; (iii) any Successful Bid (as defined below) will be selected; and (iv) Court approval of any Successful Bid will be sought.[11]

14. Under the terms of the proposed SISP, interested parties must enter into non-disclosure agreements and submit letters of intent to bid (each, an "**LOI**") which: (i) identifies the potential purchaser and a general description of the assets and/or business(es) of the COPL Group that would be the subject of the bid; and (ii) reflects a reasonably likely prospect of culminating in a Qualified Bid (as defined below), as determined by the Applicants in consultation with the Monitor and the Lender. Each LOI must be received by April 17, 2024 (the "**LOI Deadline**").[12]

15. Following the LOI Deadline**,** each party that has submitted an LOI will be entitled to submit a bid. In order to constitute a "**Qualified Bid**," each bid must comply with the terms of the SISP, and must, among other things, provide for aggregate consideration, payable in cash in full on closing, in an amount equal to or greater than: (i) all outstanding obligations under the DIP Loan (anticipated to be $11 million), plus cash consideration equal to at least $250,000; (ii) all outstanding obligations under the Senior Credit Facility (anticipated to be $44.46 million), unless otherwise agreed to by the lenders thereunder in their sole discretion; (iii) any obligations in

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11 Second Kravitz Affidavit at para. 34.
12 First Kravitz Affidavit at para. 191; Second Kravitz Affidavit at para. 35(a).

priority to amounts owing under the DIP Term Sheet, including any Charges; and (iv) an amount to satisfy the Bid Protections (anticipated to be $500,000) (the "**Consideration Value**").[13]

16. A Qualified Bid must be reasonably capable of being consummated within 30 days after completion of the Auction (as defined below), be accompanied by a cash deposit equal to at least 10% of the Consideration Value, and must provide written evidence of a bidder's ability to fully fund and consummate the transaction. All bids must be received by May 2, 2024 (the "**Qualified Bid Deadline**").[14]

17. If no LOI has been received on or before the LOI Deadline, or no Qualified Bid (other than the Stalking Horse Transaction) has been received on or before the Qualified Bid Deadline, the SISP will be terminated, and the Stalking Horse Transaction will be considered the "**Successful Bid**," subject to approval by this Court.[15] If one or more Qualified Bids (other than the Stalking Horse Transaction) has been received on or before the Qualified Bid Deadline, the Applicants will proceed with an auction process to determine the successful bid(s) on May 8, 2024 (the "**Auction**").[16] Following selection of the Successful Bid and finalization of all definitive agreements, the Applicants will apply to the CCAA Court for an order or orders approving such Successful Bid.[17]

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13 First Kravitz Affidavit at para. 192; First Report of the Monitor dated March 14, 2024 at para. 5.1.2.1(a) [First Report].
14 First Kravitz Affidavit at para. 192.
15 First Kravitz Affidavit at paras. 191, 193.
16 Second Kravitz Affidavit at para. 35(b).
17 First Kravitz Affidavit at paras. 193-194; Second Kravitz Affidavit at para. 35(c).

## D. Stalking Horse Purchase Agreement

18. The Restructuring Term Sheet sets out the following key terms to be included in the Stalking Horse Purchase Agreement between the Stalking Horse Bidder and the Applicants:[18]

(a) the Stalking Horse Bidder will make a credit bid of the DIP Loan for all or substantially all of the assets (excluding the "Excluded Assets" (as defined therein)) and/or equity, as applicable and as determined by the Stalking Horse Bidder, of the COPL Group, excluding COPL;

(b) the Stalking Horse Bidder will assume the Applicants' obligations under the Senior Credit Agreement, to the extent not the subject of a credit bid; and

(c) the SISP will be required to be completed in accordance with the terms set out in the Restructuring Term Sheet and the Stalking Horse Purchase Agreement, including in respect of the Bid Protections.

19. The Restructuring Term Sheet additionally sets out the following protections for the Stalking Horse Bidder:[19]

(a) an expense reimbursement for the Stalking Horse Purchaser's reasonable costs and expenses incurred in connection with the transactions contemplated in the Stalking Horse Purchase Agreement (the "**Expense Reimbursement**"); and

(b) a break fee equal to $350,000 (the "**Break Fee**," and together with the Expense Reimbursement, the "**Bid Protections**").

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[18] Second Kravitz Affidavit at para. 32(a).
[19] First Report at para. 5.3.

20. The Restructuring Support Agreement provides that the parties agree to negotiate in good faith to enter into the Stalking Horse Purchase Agreement on or prior to March 22, 2024 substantially on the terms set out in the Restructuring Term Sheet, acting reasonably, with the approval of the Monitor.[20]

## PART III -LAW AND ARGUMENT

21. This Bench Brief addresses the following issues:

(a) the Restructuring Support Agreement should be approved;

(b) the SISP should be approved;

(c) the Applicants should be authorized to negotiate the Stalking Horse Purchase Agreement substantially in the form set out in the Restructuring Term Sheet;

(d) the CRO Engagement Letter and FA Engagement Letter should be approved;

(e) relief should be granted in respect of certain securities filing requirements and in respect of any requirements to hold shareholder meetings;

(f) the Applicants should be permitted to draw on the maximum principal amount under the DIP Loan and to the extent drawn either in whole or in part, there should be a corresponding increase in the amount secured by the DIP Lender's Charge;

(g) the Administration Charge and Directors' Charge should be increased and the scope of the CRO Charge should be increased; and

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[20] Second Kravitz Affidavit at para. 33.

(h) the Stay Period, including in respect of the Non-Filing Affiliates, should be extended until May 20, 2024.

## A. The Restructuring Support Agreement Should be Approved

22. This Court has the jurisdiction to approve the Restructuring Support Agreement under s. 11 of the CCAA, which provides the authority to make any order it sees fit, and s. 11.02(2) of the CCAA, which permits the court to vary a stay of proceedings.[21]

23. CCAA courts commonly authorize debtors to enter into agreements designed to facilitate a prospective restructuring,[22] and have approved restructuring agreements which contemplated sale processes substantially similar to the SISP. For example, in *Just Energy*, the court approved a support agreement which contemplated a SISP and a stalking horse transaction on the grounds that the support agreement was a "critical component" of the debtors' restructuring.[23] Similarly, in *Loyaltyone*, the court approved a support agreement involving a SISP and stalking horse transaction on the grounds that it would provide stability and certainty to the Applicants' stakeholders during the restructuring process.[24]

24. The Restructuring Support Agreement represents a similarly critical development in the COPL Group's ongoing efforts to restructure its business. The Restructuring Support Agreement, among other things: (i) facilitates consensus with the COPL Group's most significant secured creditors; (ii) facilitates access to the DIP Facility; (iii) provides stability to the COPL Group and

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21 *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 7899 at para. 39 [*U.S. Steel*].

22 See, in addition to the cases discussed below, *U.S. Steel* at paras. 43-51.

23 *Just Energy (Re)*, (August 18, 2022), Ont. S.C.J [Commercial List], Court File No. CV-21-00658423-00CL (Endorsement of McEwan, J.) at pp. 3-5 [*Just Energy*].

24 *Loyaltyone Co. (Re)*, (March 20, 2023), Ont. S.C.J [Commercial List], Court File No. CV-23-00696017-00CL (Endorsement of Conway J.) at para. 8 [*Loyaltyone*]. See also *Canwest Publishing Inc./Publications Canwest Inc. (Re),* 2010 ONSC 222 at paras. 20-24, in which the court approved a support agreement whereby the debtors' secured creditors effectively acted as stalking horse bidder in respect of a sale solicitation process conducted by the debtors' financial advisor and supervised by the Monitor.

to these CCAA proceedings by establishing the process by which the Restructuring will take place; and (iv) provides certainty of a going-concern transaction, while also enabling the Applicants, with the assistance and oversight of the Financial Advisor and the Monitor, to test the market and pursue the possibility of a superior transaction.[25] Absent the continuing support of the parties to the Restructuring Support Agreement, the COPL Group would be required to navigate a sale process while wholly exposed to the vagaries of the market, without any assurance of success, and without the protection afforded by the stalking horse bid. The Monitor recommends that the Court approves the Restructuring Support Agreement.[26]

## B. The SISP Should be Approved

25. 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. The Court in *Nortel* identified a number of factors that should be considered in determining whether to authorize a sale process, including:[27]

(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?

(d) Is there a better viable alternative?

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25 First Kravitz Affidavit at para. 189.
26 First Report at para. 3.0.4.
27 *Nortel Networks Corp. (Re)* (2009), 2009 CanLII 39492 (ON SC) at para. 48.

26. Although the *Nortel* criteria were articulated prior to the 2009 amendments to the CCAA, the Court in *Brainhunter* confirmed that the same criteria apply under the post-2009 CCAA in determining whether a sale process should be approved.[28] The Applicants submit that the *Nortel* criteria are satisfied in respect of the SISP, for the reasons set out below.

**(a) The Sales Process is Warranted at this time**

27. The SISP is warranted and necessary at this time. The Applicants are insolvent and their continued operations are dependent on the financing provided by the DIP Lender, which is only expected to provide the Applicants sufficient liquidity to continue their business operations during the period of the SISP.[29] As discussed in greater detail above, the COPL Group made extensive pre-filing efforts to restructure its debts and obtain alternate financing,[30] and the CRO broadly canvassed the market for DIP financing prior to the COPL Group entering into the Restructuring Support Agreement.[31] The SISP was developed by the COPL group in consultation with, and is supported by, the Monitor and the Lender.[32]

28. The situation faced by the COPL Group mirrors previous situations in which courts have approved a SISP. Courts have held that a sales process is warranted where debtors are cash-flow negative and unable to continue operations without a restructuring of their debts,[33] and where the debtors have made reasonable efforts to obtain alternate financing.[34] Further, Courts grant significant weight to the opinion of a monitor or financial advisor that a proposed sales process

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28 *Brainhunter Inc. (Re),* 2009 CanLII 72333 (ON SC) at paras. 15-17 [*Brainhunter*].
29 Second Kravitz Affidavit at para. 29.
30 First Kravitz Affidavit at paras. 132, 144.
31 First Kravitz Affidavit at para. 144.
32 Second Kravitz Affidavit at para. 34.
33 *Cannapiece Group Inc v. Carmela Marzili*, 2022 ONSC 6379 at para.7 [*Cannapiece*]; *Danier Leather Inc*. (Re), 2016 ONSC 1044 at para. 29 [*Danier Leather*].
34 *Danier Leather*, at para. 28.

and stalking horse bid represent the most effective means of obtaining the best realization on the debtor's assets.[35]

**(b) The Sale Process Will Benefit the Whole Economic Community**

29. The SISP, as supported by the Stalking Horse Purchase Agreement, is the most effective means of realizing the value of the debtors' assets for the benefit of the entire economic community. Courts have frequently noted the inherent benefits of a SISP which incorporates a stalking horse bid. For example, in *Danier Leather*, the court found that use of stalking horse bids maximizes the value of a business for the benefit of its stakeholders and enhances the fairness of the overall sale process.[36] In particular, the court accepted that the stalking horse bid was in the interest of the entire economic community because it would establish a price floor and market the debtors' assets via a public marketing process.[37]

30. In this case, the entire economic community will benefit from the SISP and Stalking Horse Purchase Agreement. The SISP and the Stalking Horse Purchase Agreement are structured so as to maximize recovery by: (i) setting a "floor price" and commercial terms for a transaction involving the shares and/or the business and assets of some of the COPL Group entities; (ii) helping to generate interest in the COPL Group among potential purchasers; and (iii) providing a level of certainty, stability and efficiency during the SISP, both in terms of setting a baseline price and documentation for the SISP, and in terms of assuring stakeholder groups that there will be a going concern sale of a significant portion of the COPL Group's business.[38]

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35 See i.e., *Validus Power Corp. (Re)*, 2023 ONSC 6367 at paras. 52-53 [*Validus*]; *Danier Leather* at para. 37.
36 *Danier Leather*, at para. 20.
37 *Danier Leather*, at para. 31. See also *Cannapiece* at para. 8.
38 First Kravitz Affidavit at para. 199.

### (c) The COPL Group's Creditors do not have a Bona Fide Reason to Object

31. The Applicants do not believe that there is any *bona fide* reason for any creditors to object to the SISP or the Stalking Horse Purchase Agreement. The use of the stalking horse process, by establishing a floor price for the COPL's Group's assets, will maximize recovery obtained on the COPL Group's assets, to the benefit of creditors generally.[39]

32. Further, the proposed SISP is an open and transparent process, and all creditors, should they desire, will have an opportunity to submit an LOI and bid on all or some of the COPL Group's assets. In the Monitor's view, the 45-day solicitation period under the SISP is sufficient to allow interested parties to perform diligence and submit offers, in light of: (i) the availability of the detailed Restructuring Term Sheet; (ii) the fact that the SISP will specifically be targeting the oil and gas industry; (iii) the Monitor's previous experience in the sale of distressed oil and gas assets, and the Monitor's review of current market offerings which have similar timelines; (iv) the fact that the SISP will likely receive substantial media attention owing to the public and well-known nature of the COPL Group; and (v) the need to balance time considerations and them managing the costs of conducting these CCAA proceedings.[40] In addition, as reflected in the Cash Flow Forecast, the Applicants do not have sufficient cash or access to funding to support operations during a longer SISP.[41] SISPs with similar or shorter timelines have been approved by CCAA courts in the recent past.[42]

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39 See *Danier Leather*, at paras. 32-33.
40 First Report at para. 5.4.1(d).
41 Second Kravitz Affidavit at para. 36.
42 See., i.e., *Validus* at paras. 47-49, in which the court accepted the opinion of the monitor that a 35-day bid period was sufficient in the circumstances; see also *Loyaltyone Co. (Re)*, (March 20, 2023), Ont. S.C.J [Commercial List], Court File No. CV-23-00696017-00CL (SISP Approval Order), in which the court approved a SISP with a similar 35 day bid solicitation process.

### (d) There is No Better Viable Alternative

33. As discussed in more detail above, the Applicants' engaged in extensive pre-filing attempts to reduce costs and restructure their business and to obtain alternative financing, prior to entering in the Restructuring Support Agreement and developing the SISP was in consultation with the Monitor.[43]

34. Courts have approved SISPs in similar circumstances. For example, in *Cannapiece*, the court approved a SISP where the debtors, in consultation with their advisors, had pursued a number of strategic initiatives to improve their operations and financial position, and the monitor was supportive of the proposed stalking horse process.[44]

## C. The Applicants Should be Authorized to Negotiate a Stalking Horse Purchase Agreement Substantially in the Form Set out in the Restructuring Term Sheet

35. It is well-accepted that a stalking horse transaction is a beneficial mechanism well-suited to supporting a SISP,[45] and SISPs incorporating stalking horse transactions have been approved by the court on many occasions.[46]

36. Sales processes incorporating stalking horse bids are commonly evaluated on the basis of the *Nortel* criteria, as discussed above. In addition, when appraising a proposed stalking horse agreement, the courts have considered: (i) the fairness, transparency and integrity of the proposed process; (ii) the commercial efficacy of the proposed process in light of the specific circumstances; and (iii) whether the sales process will optimize the chances, in the particular circumstances, of

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43 Second Kravitz Affidavit at para. 34.
44 *Cannapiece*, at paras. 10-11.
45 See, i.e., *Danier Leather*, at para. 20.
46 See, i.e., *Cannapiece*, at paras. 4-5; *Danier Leather*, at para. 35; Just *Energy*, at pp. 5-6; *Validus*, at para. 65.

securing the best possible price for the assets up for sale.[47] Further, the following additional factors have also been found to be relevant in evaluating a stalking horse agreement:[48]

(a) How did the stalking horse agreement arise?

(b) What are the stability benefits?

(c) Does the timing support approval?

(d) Who supports or objects to the stalking horse agreement?

(e) What is the true cost of the stalking horse agreement? and

(f) Is there an alternative?

37. In *Validus*, the court held that while different courts have framed these considerations slightly differently, they are ultimately consistent with one another, and essentially ask whether the proposed process, including its stalking horse competent, will likely result in the best recovery on the assets being sold pursuant to a fair and transparent process.[49]

38. In addition, courts in CCAA and receivership proceedings have approved terms sheets for use as stalking horse bids in connection with a sales process where the definitive transaction agreements were still being finalized.[50]

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47 *Validus,* at para. 33.
48 *Validus*, at para. 34.
49 *Validus*, at paras. 35-37.
50 See, i.e., *Black Press Ltd. (Re),* (January 25, 2024), B.C.S.C., No. S-240259 Vancouver Registry (SISP Approval Order) at para. 6; *Urthecast International Corp. (Re),* (October 16, 2020), B.C.S.C., No. S-208894 Vancouver Registry (Sales Process Order) at para. 4; *Balanced Energy Oilfield Services. (Re)*, (March 30, 2022), A.B.K.B., 2201-02699 (Approval of Sales Solicitation Process, Stalking Horse Term Sheet and Receiver's Conduct and Activities) at para. 2.

39. The Applicants submit that the Stalking Horse Transaction, substantially on the terms set out in the Restructuring Term Sheet, will likely result in the best recovery on the Applicants' assets, and should be approved based on the criteria outlined above:

(a) **Development of the Stalking Horse Agreement and stability benefits**: The terms for the Stalking Horse Purchase Agreement, as reflected in the Restructuring Term Sheet, arose following an extensive canvasing of the market for alternate financing and will provide significant stability benefits by setting a price floor on the COPL Group's assets and ensuring that the SISP will ultimately result in a successful sale.[51]

(a) **Timing considerations:** The timelines and terms of the proposed SISP are fair and reasonable in the circumstances and will provide sufficient time to allow interested parties to fully participate in the SISP. As reflected in the Cash Flow Forecast, the Applicants do not have sufficient cash or access to funding to support operations during a longer SISP.[52] As discussed in greater detail above, the Monitor views the 45-day solicitation period under the SISP as sufficient to allow interested bidders to come forward.[53]

(b) **Support and opposition:** The SISP was developed in consultation with the Monitor,[54] and the Monitor supports the approval of the SISP and the Stalking Horse Agreement, noting that "stalking horse sale processes are a recognized

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51 First Kravitz Affidavit at para. 199.
52 Second Kravitz Affidavit at para. 36.
53 First Report at para. 5.4.1(d).
54 Second Kravitz Affidavit at para. 34.

mechanism in restructuring processes which maximize recoveries, while providing the stability and certainty of a going-concern transaction".[55]

40. In regard to the "true cost" of the Stalking Horse Purchase Agreement, the Bid Protections are well within the range commonly approved by CCAA courts. Break fees and expense reimbursements are frequently approved in insolvency proceedings and are designed not only to compensate the cost and risk incurred by the stalking horse purchaser in putting together the stalking horse bid, but also to reflect the value of the stability which a stalking horse bid provides.[56]

41. The reasonableness of break fees and expense reimbursements are subject to the exercise of the applicants' business judgment, so long as they lie within a range of reasonable alternatives.[57] The maximum amount of the Bid Protections is $500,000, which represents approximately 0.63% of the Purchase Price. The Monitor has reviewed bid protections approved by Canadian courts in recent insolvency proceedings and believes the Bid Protections to be: (i) customary (even including in the context of a credit bid); (ii) reasonable in the circumstances and below the general range of reasonable bid protections in comparable restructuring proceedings; and (iii) such as will not create uncertainty or discourage interested parties form submitting offers in the SISP.[58] Although the fact the Stalking Horse Bid is a credit bid is a relevant factor in considering bid protection, the courts have recognized that it is not the only factor,[59] and have approved bid protections in relation to credit bids.[60]

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55 First Report at para. 5.4.1.
56 *Danier Leather*, at para. 41; *Green Growth Brands Inc. (Re)*, 2020 ONSC 3565 at para. 52 [*Green Growth*].
57 *Cannapiece,* at para. 5.
58 First Report at paras. 5.3.3; 5.4.1(f).
59 *Fire & Flower Holdings Corp., et al. (Re)*, 2023 ONSC 4048 at para. 31 [*Fire & Flower*].
60 See. i.e., *Fire & Flower* at paras. 32-34; *Loyaltyone*, at para. 13; *Green Growth*, at para. 52.

42. Finally, the Applicants' request that the Court grant a charge over the Property in favour of the Stalking Horse Purchaser as security for payment of the Bid Protections. Similar charges for Bid Protections are commonly granted by CCAA courts.[61]

43. In light of the benefits outline above, the Applicants should be authorized to negotiate and finalize the Stalking Horse Agreement for use in respect of the SISP, substantially in accordance with the terms set out in the Restructuring Term Sheet. The Applicants will return to this Court to seek approval of any Successful Bid resulting from the SISP, and do not seek any relief approving the sale and vesting of any of the Property as part of the Stalking Horse Purchase Agreement approval at this time.

## D. The CRO Engagement Letter and FA Engagement Letter Should be Approved

44. The Applicants request that the following agreements be approved:

(a) the agreement between the Applicants and Province, pursuant to which, among other things, Province will act as the CRO of the Applicants during these CCAA proceedings through the services of Peter Kravitz (the "**CRO Engagement Letter**"); and

(b) the agreement between the Applicants and Province, LLC, pursuant to which, among other things, Province LLC will act as Financial Advisor to the Applicants (the "**FA Engagement Letter**").

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[61] See, i.e., *Loyaltyone*, at para. 13; *Just Energy (Re)*, (August 18, 2022), Ont. S.C.J [Commercial List], Court File No. CV-21-00658423-00CL (SISP Approval Order) at para. 10.

45. This Court has the jurisdiction to approve engagement the CRO and Financial Advisor.[62] CCAA courts frequently appoint a chief restructuring officer and financial advisor in order to, among other things: (i) provide expertise which will assist the debtors in achieving the objectives of the CCAA; (ii) assist the debtor's management in dealing with a crisis situation; and (iii) permit management to focus on the debtor's continued operation.[63]

46. Both the CRO and the Financial Advisor are essential elements of the Applicants current operations. Mr. Kravitz was appointed as CRO of the Applicants on December 29, 2023. Since his appointment, Mr. Kravitz has been a critical component of the Applicants' management team, which might otherwise of have been unequipped to deal with the liquidity constraints and insolvency proceedings it faced. Mr. Kravitz's continued service is necessary in order to ensure the Applicants' continued stability and permit the Applicants to continue to benefit from his expertise in managing and overseeing the Applicants' business during the course of these CCAA proceedings.[64] The CRO has experience serving in such role and other fiduciary roles in the oil and gas exploration and production sector, including with respect to, among other engagements, Basic Energy Services, Inc, Sable Permian Resources and Mesquite Energy.[65]

47. Province LLC was engaged by the Applicants as Financial Advisor on December 29, 2023. The Financial Advisor is assisting a very lean finance team that is currently without a CFO in, among other things, completing company financial analysis, overseeing CCAA reporting, interfacing with vendors and managing payables and receivables. The Applicants do not have

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62 See, i.e., *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re),* 2019 ONSC 1215 at para. 33 [*Payless ShoeSource*]; *Walter Energy Canada Holdings, Inc., (Re)*, 2016 BCSC 107 at paras. 39-43 [*Walter Energy*].

63 See, i.e., *Pascan Aviation inc., (Re)*, 2015 QCCS 4227 at paras. 57-58; *Walter Energy*, at para. 35; *JTI-Macdonald Corp. (Re),* 2019 ONSC 1625 at para. 26 [*JTI-Macdonald*].

64 First Richardson Affidavit at paras. 5, 7, 14; First Kravitz Affidavit at paras. 156-157.

65 First Report at para. 4.1.2(f).

sufficient resources or expertise internally to manage the current insolvency proceedings and/or manage the cash position of COPL, and will continue to require the Financial advisor's expertise throughout the insolvency process, including through the administration of the SISP.[66] The Financial Advisor has extensive experience providing advisory services in the oil and gas exploration and production sector, including with respect to, among other engagements, the insolvency proceedings of Basic Energy Services Inc., TPC Group Inc., and Fieldwood Energy, LLC.[67]

48. Approval the CRO Engagement Letter and FA Engagement Letter is therefore essential in order to maintain the stable operations of the Applicants during the course of these CCAA Proceedings, including the proposed SISP. The Monitor supports the retention of the CRO and the Financial Advisor, and views the fees set out in the CRO Engagement Letter as fair and reasonable in the circumstances, and comparable to fees charged by entities that have provided similar services in CCAA proceedings. [68]

## E. The Applicants Should be Granted Relief from Certain Securities Filing Requirements and in Respect of any Requirements to Hold Shareholder Meetings

49. COPL is a publicly traded company and reporting issuer, whose common shares previously traded on the Canadian Stock Exchange ("**CSE**") under the trading symbol "XOP" as well as on the London Stock Exchange ("**LSE**") under the trading symbol "COPL."[69]

50. Directing further time and resources to securities reporting is not practical at this time, and would only serve to distract the Applicants from the ongoing restructuring process.[70] As a result,

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66 First Richardson Affidavit at para. 10.
67 First Report at para. 4.2.3.
68 First Report at paras. 4.1.2, 4.2.2.
69 First Kravitz Affidavit at para. 200.
70 Second Kravitz Affidavit at para. 23.

Applicants seek authorization for the Applicants to incur no further expenses in relation to any filings (including financial statements), disclosures, core or non-core documents and press releases that may be required by any law respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange. CCAA courts have granted similar relief in favour of reporting issuers on numerous occasions,[71] including in relation to filing obligations in foreign jurisdictions.[72]

51. Similarly, it would be an unnecessary distraction and expense to hold shareholder meetings while the Applicants are subject to CCAA protection.[73] The Applicants therefore seek authorization to postpone the requirement for any future annual or other meetings of COPL's shareholders until after the conclusion of these CCAA proceedings. A number of CCAA courts have authorized reporting issues to delay shareholder meetings during ongoing CCAA proceedings.[74]

52. No prejudice will result to stakeholders as a result of these orders, as detailed financial information and other information regarding the Applicants will continue to be made publicly available through the materials filed in these CCAA proceedings and published on the Monitor's Website.[75] Further, the language in the proposed ARIO is limited to what is necessary for the Applicants to focus on their restructuring and does not overreach by purporting to prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it

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71 *BZAM Ltd. (Re)*, (February 28, 2024), Ont S.C.J [Commercial List] Court File No. CV-24-00715773-00CL, Endorsement of Justice Osborne) at paras. 70-71.

72 See., i.e., *Urthecast International Corp.. (Re)*, (September 23, 2020), B.C.S.C., No. S-208894 Vancouver Registry (Revised Amended and Restated Initial Order) at paras. 53-54; *Canntrust Holdings Inc. (Re)*, (March 31, 2020), Ont S.C.J [Commercial List], Court File No. CV-21-00638930-00CL (Initial Order) at para. 46.

73 Second Kravitz Affidavit at para. 24.

74 See, i.e., *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 at paras. 53-54; *Lightstream Resources Limited. (Re)*, (September 26, 2016), A.B.K.B., 1601-12571 (Order Extending Time for Annual General Meeting).

75 Second Kravitz Affidavit at para. 23.

may have as described in section 11.1(2) of the CCAA as a consequence of such failure by the Applicants to make any securities filings. The Monitor supports this relief.[76]

## F. The Applicants Should be Authorized to Draw on the Full Amount of the DIP Loan, and the Charges Should be Increased or Extended

### (a) The DIP Loan and DIP Lender's Charge

53. The Initial Order approved the DIP Term Sheet, pursuant to which the DIP Lender agreed to fund the DIP Loan in a maximum principal amount of $11 million, of which $1.5 million was available as an initial draw. The Initial Order further granted the DIP Lender's Charge in order to secure the DIP Loan.[77]

54. The Applicants request the authority to draw down the remainder of the DIP Loan. Based on the Cash Flow Forecast, the DIP Loan is expected to provide the Applicants with sufficient liquidity to continue their business operating during these CCAA proceedings and to implement the SISP, for the benefit of the Applicants and their stakeholders. Pursuant to the DIP Term Sheet, the DIP Lenders' obligation to advance the full amount of the DIP Loan is subject to this Court's approval and the DIP Lenders' Charge being granted.[78]

55. The Applicants' further request that the DIP Lender's Charge be increased in order to secure the increased availability being sought.[79] All creditors who are likely to be affected by the proposed DIP Lenders' Charge, including the increase thereof, have been served with, among other things, a copy the Applicants' materials in respect of this Application. The Applicants submit that

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76 First Report at para. 8.3.
77 Second Kravitz Affidavit at para. 28.
78 First Kravitz Affidavit at para. 165(g).
79 Second Kravitz Affidavit at para. 29.

application of the factors enumerated in sections 11.2(1) and (4) of the CCAA to the facts of this case support the approval of same.

56. The Monitor is supportive of the proposed increases to the maximum amount available under the DIP Loan and the increased amount of the DIP Lenders' Charge.[80]

**(b) The Administration and Directors' Charges**

57. The Initial Order approved the Administration Charge in the amount of CAD$1.5 million. The Applicants now seek to increase the Administration Charge to CAD $2.5 million. Similarly, the Initial Order approved the Directors' Charge in the amount of CAD$500,000, which the Applicants seek to increase to CAD$1,000,000.[81]

58. The Court has discretion to grant and increase these charges in an amount that the Court considers appropriate pursuant to sections 11.51 and 11.52 of the CCAA.[82] These relatively modest requested increases reflect greater potential obligations and liabilities that may arise as a result of these CCAA proceedings, including during the conduct of the SISP. The Applicants propose that the Administration Charge be increased to secure the fees and disbursements of the beneficiaries of the Administration Charge.[83] The increase to the Directors' Charge is necessary so that the Applicants may continue to benefit from the experience and guidance of its current directors and officers throughout the remainder of these CCAA proceedings.[84] Both increases to these Charges have been sized in consultation with the Monitor in order to achieve these objectives.[85]

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80 First Report at para. 9.4.2.
81 Second Kravitz Affidavit At paras. 26-27.
82 See Applicants' Initial Order Bench Brief at paras. 53, 61-65.
83 Second Kravitz Affidavit at para. 26.
84 Second Kravitz Affidavit at para. 27.
85 Second Kravitz Affidavit at paras. 26-27.

### (c) The CRO Charge

59. The Applicants do not seek to increase the CRO Charge, but rather propose that the CRO Charge now cover the Transaction Fee (as defined in the CRO Engagement Letter), which was previously excluded from the CRO Charge.

60. Under the terms of the CRO Engagement Letter, upon the consummation of any Transaction (as defined in the CRO Engagement Letter), COPL committed to pay Province, LLC either: (i) $400,000, where the Transaction is consummated by an acquirer who provided any new value to the Applicants or their estate in full or partial consideration of the acquisition; or (ii) $250,000 if the Transaction is consummated by an acquirer who capitalizes said acquisition exclusively through a credit bid.[86]

61. Extending the CRO Charge in order to secure the transactions fees is appropriate in the circumstances, as the Transaction Fee is only payable upon the completion of a Transaction, and the larger Transaction Fee is only payable upon the completion of a Transaction that provides new value to the Applicants which, if realized, would benefit the Applicants and their stakeholders. The Monitor supports of the inclusion of the Transaction Fee in the CRO Charge.[87]

## G. The Stay of Proceedings Should be Extended

62. Pursuant to section 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence. There is no statutory time limit on how long a stay of proceedings can be extended.

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86 See First Richardson Affidavit at para. 6(b) for a full description of the Transaction Fee.
87 First Richardson Affidavit at paras. 12-13.

63. The Applicants, as supported by the Monitor, ask that the Stay of Proceedings be extended up to and including May 20, 2024 in order to permit the Applicants the time needed to administer the SISP and complete the other steps contemplated as part of the Restructuring Support Agreement.[88] In addition, the Applicants submit that the Stay of Proceedings should also be extended in respect of the Non-Filing Affiliates.

64. The extension of a stay to non-filing affiliates is derived from the broad jurisdiction allotted to the court under ss. 11 and 11.02(1) of the CCAA and is commonly granted as part of CCAA proceedings,[89] including to non-applicant foreign affiliates.[90] In *JTI-Macdonald Corp*, the Court outlined the factors determining when it is appropriate to extend a CCAA stay over non-filing affiliates, including where the business of the non-filing affiliate is significantly intertwined and integrated with that of the debtors, extending the stay would help maintain stability during the CCAA process, and not extending the stay would have a negative impact on the debtors ability to restructure.[91]

65. The Applicants submit that these factors support the extension of the Stay of Proceedings to the Non-Filing Affiliates. The businesses of the Non-Filing Affiliates are significantly intertwined and integrated with the rest of the COPL Group. COPL Technical Services Limited is ShoreCan's primary source of engineering, geological, geophysical and legal and accounting services, which in turn flow through to Essar Nigeria. COPL management employees have historically participated in the strategic decision-making and direction of the Non-Filing Affiliates. Two former CEOs of COPL currently serve as Directors of ShoreCan, while a former President of

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88 First Report at para. 7.0.2.

89 *Chalice Brands Ltd. (Re),* 2023 ONSC 3174 at para. 35 [*Chalice Brands*].

90 See, i.e., *Chalice Brands*, at paras. 35, 42; *Lydian International Limited (Re)*, 2019 ONSC 7473 at para. 39; *Tamerlane Ventures Inc (Re)*, 2013 ONSC 5461 at paras. 20-21; *Target Canada Co. (Re),* 2015 ONSC 303 at paras. 49-50; *Nordstrom Canada Retail, Inc. (Re),* 2023 ONSC 1422 at paras. 36-37, 42.

91 *JTI-Macdonald,* at para. 15. See also *Chalice*, at paras. 33-42.

COPL America currently serves as a director and Chief Operating Officer of Esso Nigeria.[92] These individuals support the extension of the Stay of Proceedings to the Non-Filing Affiliates.[93]

66. Further, extending the Stay of Proceedings to the Non-Filing Affiliates will help maintain stability and value to the estate and will facilitate the Restructuring. Essar Nigeria (and through it, ShoreCan) holds an 100% interest in an oil prospecting license, which has the potential to be a productive asset. The extension of the Stay of Proceedings to the Non-Filing Affiliates is necessary to prevent any realization enforcement attempts from being made in Nigeria or elsewhere and will prevent any potential cross-defaults from being declared in respect of any of the Non-Filing Affiliates' agreements that may arise from the Applicants' insolvency. Any enforcement action against the Non-Filing Affiliates could lead to immediate loss of value for the Applicants and their Stakeholders.[94]

## PART IV -NATURE OF THE ORDER SOUGHT

67. For the foregoing reasons, the Applicants respectfully submit that this Court should grant the ARIO and the SISP Approval Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15th day of March, 2024:

Osler, Hoskin & Harcourt LLP
Counsel for the Applicants

92 Second Kravitz Affidavit at paras. 15-17.
93 Second Kravitz Affidavit at para. 17.
94 Second Kravitz Affidavit at paras. 18-19.

## TABLE OF AUTHORITIES

21. *Nordstrom Canada Retail, Inc. (Re),* 2023 ONSC 1422

22. *Nortel Networks Corp. (Re)* (2009), 2009 CanLII 39492 (ON SC)

23. *Pascan Aviation inc., (Re)*, 2015 QCCS 4227

24. *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re),* 2019 ONSC 1215

25. *Tamerlane Ventures Inc (Re)*, 2013 ONSC 5461

26. *Target Canada Co. (Re),* 2015 ONSC 303

27. *Urthecast International Corp.. (Re)*, (September 23, 2020), B.C.S.C., No. S-208894 Vancouver Registry (Revised Amended and Restated Initial Order)

28. *Urthecast International Corp. (Re),* (October 16, 2020), B.C.S.C., No. S-208894 Vancouver Registry (Sales Process Order)

29. *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 7899

30. *Validus Power Corp. (Re)*, 2023 ONSC 6367

31. *Walter Energy Canada Holdings, Inc., (Re)*, 2016 BCSC 107

# TAB 1

| | |
|---|---|
| COURT FILE NUMBER | 2201-02699 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | NATIONAL BANK OF CANADA |
| DEFENDANTS | BALANCED ENERGY OILFIELD SERVICES INC., BALANCED ENERGY OILFIELD SERVICES (USA) INC., BALANCED ENERGY HOLDINGS INC., MICHELLE THOMAS, NEIL SCHMEICHEL, DARREN MILLER, and CODY BELLAMY |
| DOCUMENT | **ORDER**<br><br>**(Approval of Sales Solicitation Process, Stalking Horse Term Sheet and Receiver's Conduct and Activities)** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **OSLER, HOSKIN & HARCOURT LLP**<br>Barristers & Solicitors<br>Brookfield Place, Suite 2700<br>225 6 Ave SW<br>Calgary, AB T2P 1N2<br><br>Solicitors: Randal Van de Mosselaer / Emily Paplawski<br>Telephone: (403) 260-7060 / (403) 260-7071<br>Facsimile: (403) 260-7024<br>Email: RVandemosselaer@osler.com / EPaplawski@osler.com<br>File Number: 1230496 |

Clerk's Stamp
JUDICIAL CENTRE OF CALGARY
FILED
Apr 14, 2022
by Email
CLERK OF THE COURT

**DATE ON WHICH ORDER WAS PRONOUNCED:** March 30, 2022

**NAME OF JUDGE WHO MADE THIS ORDER:** The Honourable Justice J.T. Neilson

**LOCATION OF HEARING:** Edmonton, Alberta (by WebEx)

**UPON** the application of FTI Consulting Canada Inc. in its capacity as receiver and manager (the "**Receiver**") of all the current and future assets, undertakings, properties whatsoever and wherever situate of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc., and Balanced Energy Holdings Inc. (the "**Debtors**") for an order, among other things, approving the binding term sheet (as amended, the "**Stalking Horse Term Sheet**") between XDI Energy Solutions Inc. (the "**Stalking Horse Bidder**") and the Receiver, dated March 21, 2022, as attached as Appendix "B" to the First Report of the Receiver, dated March 21, 2022 (the "**First Report**"), and approving the proposed sales solicitation process ("**SSP**") attached as Appendix "A" to the First Report and as Schedule "A" hereto; **AND UPON** having reviewed the

Receivership Order granted by the Honourable Madam Justice Grosse on March 7, 2022 (the "**Receivership Order**"), the First Report, including the Confidential Supplement thereto, and the Affidavit of Service of Elena Pratt, sworn March 22, 2022; **AND UPON** hearing from counsel for the Receiver and any other interested party; **IT IS HEREBY ORDERED AND DECLARED THAT:**

**SERVICE**

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this Application and time for service of this Application is abridged to that actually given.

**APPROVAL OF STALKING HORSE TERM SHEET AND SSP**

2. The Stalking Horse Term Sheet is hereby approved and the execution of the Stalking Horse Term Sheet by the Receiver is hereby authorized and approved, and the Receiver is authorized and directed to take such additional steps and execute such additional documents and make such minor amendments to the Stalking Horse Term Sheet as may be necessary or desirable for the completion of the terms of the Stalking Horse Term Sheet, in all cases subject to the terms of this Order.

3. The Break Fee as defined in the SSP is hereby approved and the Receiver is authorized and directed to pay the Break Fee in the manner and circumstances described therein.

4. The SSP attached hereto as **Schedule "A"**, is hereby approved. The Receiver is hereby authorized and directed to implement the SSP and do all things as are reasonably necessary to conduct and give full effect to the SSP and carry out its obligations thereunder.

5. In connection with the SSP and pursuant to section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the Receiver is authorized and permitted to disclose personal information of identifiable individuals to prospective purchasers or offerors and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more transactions (each, a "**Transaction**"). Each prospective purchaser or offeror to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its

evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Receiver; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver or ensure that other personal information is destroyed.

6. In the event no Superior Offers are received in the SSP or if the Stalking Horse Bidder is the Successful Bidder in the SSP, the Receiver is authorized and directed to file the Receiver's Certificate substantially in the form attached hereto as **Schedule "B"** (the "**Receiver's SSP Certificate**") certifying that no Superior Offers were received in the SSP or, in the alternative, that the Stalking Horse Bidder is the Successful Bidder in the SSP and that, as a result, the Receiver is proceedings to close the transactions detailed in the Stalking Horse Term Sheet, and serve the Receiver's SSP Certificate on the Service List established in these proceedings and on all Qualified Bidders (as defined in the SSP) which participated in the SSP.

7. Following the filing and service of the Receiver's SSP Certificate in accordance with paragraph 6 above, the Receiver is hereby authorized and empowered to close the transactions detailed in the Stalking Horse Term Sheet including, but not limited to, filing the Receiver's Certificates appended at Schedules A to the Approval and Vesting Order and Approval and Reverse Vesting Order granted by this Honourable Court concurrent with this Order.

8. In the event a Superior Bid is received in the SSP, the Receiver shall be at liberty to apply for an Order vesting title to the purchased assets in the name of the Successful Bidder in accordance with, and as defined in, the SSP.

**APPROVAL OF CONDUCT AND ACTIVITIES**

9. The actions, conduct and activities of the Receiver, as reported in the First Report are hereby approved.

**MISCELLANEOUS**

10. Paragraph 21 of the Receivership Order is hereby amended to increase the Receiver's Borrowings Charge from $1,000,000 to $1,750,000.

11. The Receiver shall serve by courier, fax transmission, email transmission or ordinary post, a copy of this Order on all parties present at this Application and on all parties who are presently on the service list established in these proceedings and such service shall be deemed good and sufficient for all purposes.

James T. Neilson

Justice of the Court of Queen's Bench of Alberta

# SCHEDULE "A"

## Sales Solicitation Process

## Sales Solicitation Process

1. On March 7, 2022, the Alberta Court of Queen's Bench (the "**Alberta Court**") made an order (the "**Receivership Order**") appointing FTI Consulting Canada Inc. ("**FTI**") as receiver and manager (the "**Receiver**") of the property, assets and undertakings of Balanced Energy Oilfield Services Inc. ("**BCAN**"), Balanced Energy Oilfield Services (USA) Inc. ("**BUSA**") and Balanced Energy Holdings Inc. ("**BEH**", and collectively with BCAN and BUSA, "**Balanced Energy**").

2. The Receiver is requesting the Alberta Court's approval of the sale solicitation process (the "**Sales Process**") set forth herein at a court application scheduled on March 30, 2022 (the "**SSP Approval Order**").

3. Set forth below are the procedures (the "**Sales Process Procedure**") to be followed with respect to the Sale Process to be undertaken to seek a Successful Bid, and if there is a Successful Bid, to complete the transactions contemplated by the Successful Bid.

4. All dollar amounts set out in this Sale Process shall be deemed to be in Canadian dollars unless otherwise noted.

## Defined Terms

5. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Receivership Order or the Stalking Horse Term Sheet. In addition, in these Sale Process Procedures:

**"Break Fee"** means the sum of $250,000, which shall be paid to the Stalking Horse Bidder in the circumstances described herein;

"**Business Day"** means a day, other than a Saturday or Sunday, on which banks are open for business in the City of Calgary;

"**Court**" means the Alberta Court of Queen's Bench;

"**Damaged Unit Repair Costs**" means all costs incurred prior to closing of the Successful Bid or the transactions detailed in the Stalking Horse Term Sheet, as applicable, in connection with repairs to be made to that damaged coiled tubing unit of BCAN having serial No. 27124977-0435A-1013 and included in the Purchase Price, as specified in the Stalking Horse Term Sheet;

"**Laurentian**" means Laurentian Bank, a secured lender to BUSA holding first lien security over certain equipment held by BUSA;

"**Laurentian Debt**" means all secured debt of BUSA to Laurentian, currently estimated at $900,000;

"**Minimum Incremental Overbid**" means cash (or a non-cash equivalent) value of at least $250,000;

"**NBC**" means National Bank of Canada, the primary secured creditor of Balanced Energy;

**"Pre-Closing Expense Amount"** has the meaning given in the Stalking Horse Term Sheet and is included in the Purchase Price as specified in the Stalking Horse Term Sheet;

"**Pre-Closing Coiled Tubing Inventory Amount**" has the meaning given in the Stalking Horse Term Sheet and is included in the Purchase Price as specified in the Stalking Horse Term Sheet;

"**Property**" means all, substantially all, or certain of the assets, property, and undertakings of BCAN, BUSA, BEH, or any one of them;

"**Purchase Price**" has the meaning given in the Stalking Horse Term Sheet and in paragraph 21 below;

"**Purchased Assets**" means the assets of BUSA defined and enumerated in the Stalking Horse Term Sheet;

"**Purchased Shares**" means all of the issued and outstanding common shares in the capital of BCAN;

"**Receivership Obligations**" means the indebtedness, liabilities and obligations secured by the Receiver's Charge and Receiver's Borrowing Charge (as defined in the Receivership Order) granted in favour of the Receiver pursuant to the Receivership Order;

"**Retained Assets**" means all of the assets of BCAN proposed to be retained BCAN in accordance with the Stalking Horse Term Sheet, as further defined and enumerated in the Stalking Horse Term Sheet;

"**Retained Liabilities**" means all of the liabilities of BCAN proposed to be retained in BCAN in accordance with the Stalking Horse Term Sheet, as further defined and enumerated in the Stalking Horse Term Sheet;

"**Stalking Horse Bidder**" means XDI Energy Solutions Inc.;

"**Stalking Horse Term Sheet**" means the Binding Term Sheet between the Stalking Horse Bidder, the Receiver, and NBC dated March 21, 2022 and attached as Schedule "A" hereto;

"**Superior Offer**" means a credible, reasonably certain and financially viable third party offer for the acquisition of some or all of the Property, the terms of which offer are, in the determination of the Receiver, in its sole discretion acting reasonably, no less favourable and no more burdensome or conditional than the terms contained in the Stalking Horse Term Sheet, and which at a minimum includes a payment in cash of the Purchase Price under

Stalking Horse Term Sheet plus the Break Fee plus one Minimum Incremental Overbid as at the closing of such transaction;

"**Transferred Assets**" means all of the assets of BCAN proposed to be transferred to BEH in accordance with the Stalking Horse Term Sheet, as further defined and enumerated in the Stalking Horse Term Sheet;

**"Transferred Liabilities"** means all of the liabilities of BCAN proposed to be transferred to BEH in accordance with the Stalking Horse Term Sheet, as further defined and enumerated in the Stalking Horse Term Sheet;

## Stalking Horse Term Sheet

6. The Receiver has entered into the Stalking Horse Term Sheet with the Stalking Horse Bidder and with NBC, pursuant to which, if there is no Successful Bid (as defined below) from a party other than the Stalking Horse Bidder, the Stalking Horse Bidder will, by virtue of the transactions set out in the Stalking Horse Term Sheet, acquire (directly or indirectly) the Purchased Assets, Purchased Shares, Retained Assets, and Retained Liabilities, but specifically excluding the Transferred Assets and Transferred Liabilities which will remain with BEH and be subject to the terms of the Receivership Order.

7. The Stalking Horse Term Sheet is attached hereto as **Schedule "A".**

## Sales Process Procedure

8. The Sales Process Procedure set forth herein describes, among other things, the Property available for sale, the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Property, the manner in which bidders and bids become Qualified Bidders and Qualified Bids (each as defined below), respectively, the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder (as defined below) and the Courts' approval and recognition thereof. The Receiver shall administer the Sales Process Procedure. In the event that there is disagreement as to the interpretation or application of this Sales Process Procedure, the Court will have jurisdiction to hear and resolve such dispute.

9. The Receiver will use reasonable efforts to complete the Sales Process Procedure in accordance with the timelines as set out herein. The Receiver shall be permitted to make such adjustments to the timeline that it determines are reasonably necessary.

## Purchase Opportunity

10. A non-confidential teaser letter prepared by the Receiver (the **"Teaser"**) describing the

opportunity to acquire the Property be made available by the Receiver to prospective purchasers and will be posted on the Receiver's website as soon as practicable following the execution of the Stalking Horse Term Sheet.

11. The Receiver will also populate an electronic data room with detailed information regarding the Purchased Assets including, but not limited to, listings, photographs, financial information, technical specifications and other information required for prospective purchasers to perform due diligence on the Property.

**"As Is, Where Is"**

12. The sale of the Property will be on an "as is, where is" basis and without surviving representations, warranties, covenants or indemnities of any kind, nature, or description by the Receiver or any of its agents, except to the extent set forth in the relevant final sale agreement with a Successful Bidder. The representations, warranties, covenants or indemnities shall not be materially more favourable than those set out in the Stalking Horse Term Sheet except to the extent additional tangible monetary value of an equivalent amount is provided by a Successful Bidder other than the Stalking Horse Bidder for such representations, warranties, covenants or indemnities.

**Free of Any and All Claims and Interests**

13. In the event of a sale pursuant to this Sales Process, all of the rights, title and interests of Balanced Energy in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests thereon and there against (collectively the **"Claims and Encumbrances**"), such Claims and Encumbrances to attach to the net proceeds of the sale of such Property (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), pursuant to an approval and vesting order made by the Court, upon the application of the Receiver, except to the extent otherwise set forth in the relevant sale agreement with a Successful Bidder. The vesting out of Claims and Encumbrances by a Successful Bidder other than the Stalking Horse Bidder shall not be materially more favourable to the Successful Bidder than those set out in the Stalking Horse Term Sheet except to the extent additional tangible monetary value of an equivalent amount is provided for the vesting out of such Claims and Encumbrances.

**Publication of Notice and Teaser**

14. As soon as reasonably practicable after the execution of the Stalking Horse Term Sheet the Receiver will cause a notice of the Sales Process contemplated by these Sale Process Procedures, and such other relevant information which the Receiver considers appropriate, to be published in *The Daily Oil Bulletin* and *Insolvency Insider.* At the same time, the Receiver will

invite, pursuant to the Teaser, and by whichever means the Receiver deems appropriate, bids from interested parties.

## Participation Requirements

15. In order to participate in the Sales Process, each person interested in bidding on the Property (a **"Potential Bidder")** must deliver to the Receiver at the address specified in **Schedule "B"** hereto (the **"Notice Schedule")** (including by email transmission), and prior to the distribution of any confidential information by the Receiver to a Potential Bidder, an executed non-disclosure agreement substantially in the form attached at **Schedule "C"** hereto, which shall inure to the benefit of any purchaser of the Property.

16. A Potential Bidder that has executed a non-disclosure agreement, as described above, and who the Receiver in its sole discretion determines has a reasonable prospect of completing a transaction contemplated herein, will be deemed a "**Qualified Bidder**" and will be promptly notified of such classification by the Receiver.

## Due Diligence

17. The Receiver shall provide any person deemed to be a Qualified Bidder with access to the electronic data room and the Receiver shall provide to Qualified Bidders further access to such reasonably required due diligence materials and information relating to the Property as the Receiver deems appropriate. The Receiver makes no representation or warranty as to the information to be provided through the due diligence process or otherwise, regardless of whether such information is provided in written, oral or any other form, except to the extent otherwise contemplated under any definitive sale agreement with a Successful Bidder executed and delivered by the Receiver and approved by the Court.

## Seeking Qualified Bids from Qualified Bidders

18. A Qualified Bidder that desires to make a bid for the Property must deliver either:

(a) a written final, binding proposal (the **"Final Bid")** in the form of a fully executed purchase and sale agreement substantially in the form attached hereto as **Schedule "D"** (the "**Template Sale Agreement**"); or

(b) a signed letter confirming that the Qualified Bidder wishes to assume and perform the obligations of the Stalking Horse Bidder under the Stalking Horse Term Sheet, subject to the necessary adjustment to the Purchase Price to include the Minimum Incremental Overbid and the Break Fee, and detailing

any adjustments, revisions or other terms that the Qualified Bidder proposes be included in the Stalking Horse Term Sheet (a "**Confirmation of Term Sheet Assumption**"),

in each case to Receiver at the address specified in the Notice Schedule (including by email transmission) so as to be received by it not later than 4:00 p.m. Calgary time on April 27, 2022 (the **"Final Bid Deadline")**.

**Qualified Bids**

19. A Final Bid will be considered a Qualified Bid only if it is submitted by a Qualified Bidder and the Final Bid complies with, among other things, the following conditions (a **"Qualified Bid"):**

(a) it contains

(i) a duly executed purchase and sale agreement substantially in the form of the Template Sale Agreement and a blackline of the executed purchase and sale agreement to the Template Sale Agreement; or

(ii) a Confirmation of Term Sheet Assumption compliant with the requirements in paragraph 18(b) above;

(b) it includes a letter stating that the Final Bid is irrevocable until there is a Selected Superior Offer (as defined below), provided that if such Qualified Bidder is selected as the Successful Bidder, its Final Bid shall remain an irrevocable offer until the earlier of (i) the completion of the sale to the Successful Bidder and (ii) the outside date stipulated in the Successful Bid;

(c) it provides written evidence of a firm, irrevocable financial commitment for all required funding or financing;

(d) it provides a written confirmation that the Qualified Bidder has not engaged in any collusion with any other bidder;

(e) it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;

(f) it is accompanied by a refundable deposit (the **"Deposit"**) in the form of a wire transfer (to a bank account specified by the Receiver), or such other form of payment acceptable to the Receiver, payable to the order of the Receiver, in trust, in an amount equal to 10% of the total consideration in the Qualified Bid to be held and dealt with in accordance with these Sale Process Procedures;

(g) the aggregate consideration, as calculated and determined by the Receiver in its sole discretion, to be paid in cash by the Qualified Bidder under the Qualified Bid exceeds the aggregate of the Purchase Price under the Stalking Horse Term Sheet, plus the Break Fee and plus one Minimum Incremental Overbid, upon completion of the transaction contemplated by the Stalking Horse Term Sheet;

(h) it is not conditional upon:

(i) the outcome of unperformed due diligence by the Qualified Bidder, and/or

(ii) obtaining financing;

(i) it contains evidence of authorization and approval from the Qualified Bidder's board of directors (or comparable governing body); and

(j) it is received by the Final Bid Deadline.

**Stalking Horse Term Sheet**

20. No deposit is required in connection with the Stalking Horse Term Sheet.

21. The purchase price for the Purchased Assets, Purchased Shares, and Retained Assets identified in the Stalking Horse Term Sheet includes the sum of:

(a) $11,250,000 in cash;

(b) such amount as shall be required to pay out and satisfy, in full, the Laurentian Debt (estimated to be approximately $900,000);

(c) such amount equal to the Damaged Unit Repair Costs;

(d) such amount equal to the Pre-Closing Coiled Tubing Inventory Amount; and

(e) such amount equal to the Pre-Closing Expense Amount;

(collectively, the "**Purchase Price**").

**No Qualified Bids**

22. If none of the Qualified Bids received by the Receiver constitutes a Superior Offer, the Receiver shall promptly file the Receiver's Certificate substantially in the form attached

as Schedule "A" to the SSP Order (the "**Receiver's SSP Certificate**") and shall proceed immediately to close the transactions enumerated in the Stalking Horse Term Sheet.

**If a Superior Offer is Received**

23. If the Receiver determines in its reasonable discretion that one or more of the Qualified Bids constitutes a Superior Offer, the Receiver shall provide the parties making Superior Offers and the Stalking Horse Bidder the opportunity to make further bids through the auction process set out below (the **"Auction").**

**Auction**

24. If an Auction is to be held, the Receiver will conduct the Auction commencing at 10:00 a.m. (Calgary time) on May 4, 2022 at the offices of the Receiver's legal counsel, Osler Hoskin & Harcourt LLP, Suite 2700 Brookfield Place, 225 6 Ave SW, Calgary Alberta, or such other location as shall be timely communicated to all entities entitled to attend at the Auction, which Auction may be adjourned by the Receiver. The Auction shall run in accordance with the following procedures:

(a) prior to 4:00 p.m. Calgary time on May 2, 2022, the Receiver will provide unredacted copies of the Qualified Bid(s) which the Receiver believes is/are (individually or in the aggregate) the highest or otherwise best Qualified Bid(s) (the "**Starting Bid**") to the Stalking Horse Bidder and to all Qualified Bidders that have made a Superior Offer;

(b) prior to 4:00 p.m. Calgary time on May 3, 2022, each Qualified Bidder that has made a Superior Offer and the Stalking Horse Bidder, must inform the Receiver whether it intends to participate in the Auction (the parties who so inform the Receiver that they intend to participate are hereinafter referred to as the "**Auction Bidders**");

(c) prior to the Auction, the Receiver shall develop a financial comparison model (the "**Comparison Model**") which will be used to compare the Starting Bid and all Subsequent Bids (as defined below) submitted during the Auction, if applicable;

(d) during the morning of May 4, 2022, the Receiver shall make itself available to meet with each of the Auction Bidders to review the procedures for the Auction, the mechanics of the Comparison Model, and the manner by which Subsequent Bids shall be evaluated during the Auction, and the Auction shall be held immediately thereafter;

(e) only representatives of the Auction Bidders, the Receiver, and such other persons as permitted by the Receiver (and the advisors to each of the foregoing entities) are entitled to attend the Auction in person (and the Receiver shall have the discretion to allow such persons to attend by teleconference);

(f) the Receiver shall arrange to have a court reporter attend at the Auction;

(g) at the commencement of the Auction, each Auction Bidder shall be required to confirm that it has not engaged in any collusion with any other Auction Bidder with respect to the bidding or any sale;

(h) only the Auction Bidders will be entitled to make a Subsequent Bid (as defined below) at the Auction; provided, however, that in the event that any Qualified Bidder elects not to attend and/or participate in the Auction, such Qualified Bidder's Qualified Bid, shall nevertheless remain fully enforceable against such Qualified Bidder if it is selected as the Winning Bid (as defined below);

(i) all Subsequent Bids presented during the Auction shall be made and received in one room on an open basis. All Auction Bidders will be entitled to be present for all Subsequent Bids at the Auction with the understanding that the true identify of each Auction Bidder at the Auction will be fully disclosed to all other Auction Bidders at the Auction and that all material terms of each Subsequent Bid will be fully disclosed to all other Auction Bidders throughout the entire Auction;

(j) all Auction Bidders must have at least one individual representative with authority to bind such Auction Bidder present in person at the Auction;

(k) the Receiver may employ and announce at the Auction additional procedural rules that are reasonable under the circumstances (e.g., the amount of time allotted to make a Subsequent Bid, requirements to bid in each round, and the ability of multiple Auction Bidders to combine to present a single bid) for conducting the Auction, provided that such rules are (i) not inconsistent with these Sale Process Procedures, general practice in insolvency proceedings, or the Receivership Order and (ii) disclosed to each Auction Bidder at the Auction;

(l) bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by an Auction Bidder (a "**Subsequent Bid**") that the Receiver, utilizing the Comparison Model, determines is (i) for the first round, a higher or otherwise better offer than the Starting Bid, and (ii) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (as defined below), in

each case by at least the Minimum Incremental Overbid. After the first round of bidding and between each subsequent round of bidding, the Receiver shall announce the bid (including the value and material terms thereof) that it believes to be the highest or otherwise best offer (the "**Leading Bid**"). A round of bidding will conclude after each Auction Bidder has had the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid;

(m) to the extent not previously provided (which shall be determined by the Receiver), an Auction Bidder submitting a Subsequent Bid must submit, at the Receiver's discretion, as part of its Subsequent Bid, written evidence (in the form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Receiver), demonstrating such Auction Bidder's ability to close the transaction proposed by the Subsequent Bid;

(n) the Receiver reserves the right, in its reasonable business judgment, to make one or more adjournments in the Auction of not more than 24 hours each, to among other things (i) facilitate discussions between the Receiver and the Auction Bidders; (ii) allow the individual Auction Bidders to consider how they wish to proceed; (iii) consider and determine the current highest and best offer at any given time in the Auction; and (iv) give Auction Bidders the opportunity to provide the Receiver with such additional evidence as the Receiver, in its reasonable business judgment, may require that that Auction Bidder (including, as may be applicable, the Stalking Horse Bidder) has sufficient internal resources, or has received sufficient non-contingent debt and/or equity funding commitments, to consummate the proposed transaction at the prevailing overbid amount;

(o) the Stalking Horse Bidder shall be permitted, in its sole discretion, to submit Subsequent Bids, provided, however, that such Subsequent Bids are made in accordance with these Sale Process Procedures;

(p) if, in any round of bidding, no new Subsequent Bid is made, the Auction shall be closed;

(q) the Auction shall be closed within 5 Business Days of the start of the Auction unless extended by the Receiver; and

(r) no bids (from Qualified Bidders or otherwise) shall be considered after the conclusion of the Auction.

25. At the end of the Auction, the Receiver shall select the winning bid (the "**Winning Bid**"). Once a definitive agreement has been negotiated and settled in respect of the Winning Bid as selected by the Receiver (the "**Selected Superior Offer**") in accordance with the provisions hereof, the Selected Superior Offer shall be the "Successful Bid" hereunder and the person(s) who made the Selected Superior Offer shall be the "Successful Bidder" hereunder. If the Successful Bidder is a bidder other than the Stalking Horse Bidder, the Stalking Horse Bidder shall be entitled to receive, and the Receiver shall pay to it, the Break Fee, immediately after closing, from the Successful Bidder's payment of cash at closing.

## Alberta Court Approval Motion

26. Unless the Successful Bid is the Stalking Horse Term Sheet (in which case the provisions of the SSP Order shall govern and the transaction detailed in the Stalking Horse Term Sheet shall be closed in accordance with the requirements thereof), the Receiver shall apply to the Court (the **"Approval Motion")** for an order (the **"Sale Approval and Vesting Order")** approving the Successful Bid and authorizing the Receiver to enter into any and all necessary agreements with respect to the Successful Bidder, as well as an order vesting title to the Property in the name of the Successful Bidder.

27. The Approval Motion will be held on May 13, 2022 at 2:00 p.m., or such further and other date as may be agreed by the Receiver and the Successful Bidder.

28. All Qualified Bids and Subsequent Bids (other than the Successful Bid) shall be deemed rejected on and as of the date and of approval of the Successful Bid by the Court, but not before, and shall remain open for acceptance until that time.

## Deposits

29. All Deposits shall be retained by the Receiver in a bank account specified by the Receiver. If there is a Successful Bid, the Deposit (plus accrued interest, if any) paid by the Successful Bidder whose bid is approved at the Approval Motion shall be applied to the purchase price to be paid by the Successful Bidder upon closing of the approved transaction and will be non-refundable. The Deposits (plus applicable interest, if any) of Qualified Bidders not selected as the Successful Bidder shall be returned to such bidders within five (5) Business Days of the date on which the Sale Approval and Vesting Order is granted by the Court or, if the Successful Bid is the Stalking Horse Term Sheet, the date on which the Receiver files the Receiver's SSP Certificate. If there is no Successful Bid, all Deposits shall be returned to the bidders within five (5) Business Days of the date upon which the Sale Process is terminated in accordance with these procedures.

## Approvals

30. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the applicable law in order to implement a Successful Bid.

## No Amendment

31. Subject to paragraph 9 above, there shall be no amendments to these Sale Process Procedures without the consent of the Receiver.

## Further Orders

32. At any time during the Sales Process, the Receiver may apply to the Court for advice and directions with respect to the discharge of its powers and duties hereunder.

**Schedule "A" to Sales Solicitation Process**

**BINDING TERM SHEET**

**RVO TRANSACTION**

*(All amounts expressed herein are in Canadian Dollars)*

This Term Sheet sets forth the agreement of the parties hereto (the "**Parties**") with respect to the proposed transaction which is described herein (the "**Proposed Transaction**"). In the Proposed Transaction, the Purchaser will: (i) purchase the Purchased Shares of Balanced Canada; and (ii) purchase the Purchased Assets of Balanced USA. Pursuant to the AVO and RVO, those purchases shall be approved and: (i) the Purchased Shares will be transferred from Balanced Holdings to the Purchaser; (ii) the Transferred Assets will be transferred from Balanced Canada to Balanced Holdings, in consideration for Balanced Holdings assuming from Balanced Canada the Transferred Liabilities; and (iii) the Purchased Assets will be transferred to the Purchaser, free and clear of all claims of the creditors of the Debtors.

The Parties acknowledge that this Term Sheet is being provided as part of a SH SSP (as that term is defined below) being administered by the Receiver (as defined below).

Upon execution of this Term Sheet by the Parties, this Term Sheet shall create a binding legal obligation on the part of the Parties, subject only to the terms and conditions hereof and of the RVO and approval of the Court of Queen's Bench of Alberta. The terms and conditions set forth in this Term Sheet, together with the RVO, are intended to be comprehensive and are not subject to any further due diligence by any Party or to any further definitive documentation, except as expressly permitted or contemplated hereunder.

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| **Purchaser:** | The Purchaser will be XDI Energy Solutions Inc. (the "**Purchaser**"). |
| **Seller:** | FTI Consulting Canada Inc., in its capacity as the Receiver (the "**Receiver**") of Balanced Energy Holdings Ltd. ("**Balanced Holdings**"), Balanced Energy Oilfield Services Inc. ("**Balanced Canada**") and Balanced Energy Oilfield Services (USA) Inc. ("**Balanced USA**") (collectively, the "**Debtors**"), and not in its personal or corporate capacity. |
| **Secured Creditor:** | National Bank of Canada, the primary secured creditor of the Debtors ("**NBC**"). |
| **Closing Date:** | Closing of the Proposed Transaction (the "**Closing**") shall occur on or about three business days after the closing conditions have been satisfied or waived, or such earlier or later date as agreed by the Parties (the "**Closing Date**"). |
| **Proposed Definitive Documents:** | NBC has commenced proceedings in the Court of Queen's Bench of Alberta (the "**Court**") and on March 7, 2022, the Court appointed the Receiver over all the business, assets and undertaking of the Debtors (the "**Receivership Order**") in Action No. 2201-02699. On March 30, 2022 (the "**Sale Approval Date**"), the Receiver shall apply for a Sale Approval and Vesting Order, substantially in the form attached as Schedule A, approving the purchase and sale of the Purchased Assets (the "**AVO**") and a Reverse Vesting Order, in substantially the form attached as Schedule B, approving the Proposed Transaction regarding Balanced Canada (the "**RVO**"), the effectiveness of the AVO and the RVO each being subject to the outcome of the SH SSP. |
| **Balanced Canada Purchased Shares:** | Concurrent with Closing, all of the issued and outstanding common shares in the capital of Balanced Canada (the "**Purchased Shares**") shall be transferred to the Purchaser, pursuant to the RVO. |
| **Balanced Canada Preferred Shares:** | Concurrent with, and only in the event of, Closing, each of Balanced Holdings, Neil Schmeichel, Michelle Thomas, Codie Bellamy and Darren Miller hereby consent and agree to the cancellation, for no consideration other than the consideration contained in |

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| | this Term Sheet, of: (i) all preferred shares (the "**Preferred Shares**") in the capital of Balanced Canada which are issued and outstanding thereto; and (ii) all rights and entitlements in connection with the Preferred Shares and, for clarity, upon Closing all claims which the foregoing individuals may have against the Debtors in connection with the Preferred Shares shall be released. |
| **Balanced Canada Transferred Assets:** | Pursuant to the RVO, the following assets of Balanced Canada shall be transferred to Balanced Holdings (collectively, the "**Transferred Assets**"):<br><br>(a) all of the Debtors' cash and cash equivalents, including all cash collateral and deposits posted by or for the benefit of the Debtors as security for any obligation;<br><br>(b) all accounts receivable, notes receivable and negotiable instruments of the Debtors;<br><br>(c) all rights to receive any refund, rebate, credit, abatement or recovery of or with respect to taxes;<br><br>(d) all of the right, title and interest of Balanced Canada in and to the intercompany loan agreement between Balanced Canada and Balanced USA which was entered into by the parties to facilitate the transfer of certain equipment from Balanced Canada to Balanced USA (the "**Intercompany Loan**"); and<br><br>(e) subject to the prior written consent of the Receiver, any other assets of Balanced Canada designated by the Purchaser as Transferred Assets, prior to the Closing Date. |
| **Balanced Canada Transferred Liabilities:** | Pursuant to the RVO, the following liabilities of Balanced Canada shall be assumed by Balanced Holdings on or prior to Closing (collectively, the "**Transferred Liabilities**"), in consideration for the transfer to Balanced Holdings of the Transferred Assets:<br><br>(a) all unpaid funded indebtedness, including all claims of NBC, BDC and EDC;<br><br>(b) all unsecured claims;<br><br>(c) all liabilities associated with the employees that are not retained, which employees shall be identified by the Purchaser prior to Closing (the "**Excluded Employees**");<br><br>(d) all of the right, title and interest of Balanced Canada in and to the Calgary office lease (the "**Calgary Lease**") and all liabilities associated with the Calgary Lease;<br><br>(e) all of the right, title and interest of Balanced Canada in and to the Brooks facility lease (the "**Brooks Lease**") and all liabilities associated with the Brooks Lease; and<br><br>(f) subject to the prior written consent of the Receiver, any other liabilities designated by the Purchaser as Transferred Liabilities, prior to the Closing Date. |
| **Balanced Canada Retained Assets:** | The following assets of Balanced Canada shall not be transferred to Balanced Holdings and shall be retained by Balanced Canada (collectively, the "**Retained Assets**"):<br><br>(a) all prepaid charges and expenses, including all prepaid rent;<br><br>(b) all inventory;<br><br>(c) all equipment and other tangible assets, including all vehicles, tools, parts and supplies, fuel, machinery, furniture, furnishing, appliances, fixtures, office equipment |

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| | and supplies, owned and licensed computer hardware and related documentation, stored data, communication equipment, trade fixtures and leasehold improvements, in each case, with any transferable warranty and service rights of any Seller related thereto;<br><br>(d) all contracts (except for accounts receivable payable to the Debtors under such contracts);<br><br>(e) all licenses and permits used by Balanced Canada in connection with the operation of its business;<br><br>(f) all employees of Balanced Canada which the Purchaser decides to retain, acting in its sole discretion (the "**Retained Employees**");<br><br>(g) all intellectual property;<br><br>(h) all goodwill and intangibles;<br><br>(i) all books and records;<br><br>(j) all rights under insurance contracts and policies;<br><br>(k) all telephone numbers, fax numbers and email addresses;<br><br>(l) all prepaid taxes and tax credits;<br><br>(m) all bank accounts;<br><br>(n) all non-disclosure agreements entered into by the Receiver on behalf of the Debtors in connection with the Stalking Horse SSP process;<br><br>(o) all proceeds of insurance paid following Closing in connection with that damaged coiled tubing unit of Balanced Canada having serial No. 27124977-0435A-1013 (the "**Damaged Unit**");<br><br>(p) NBC shall assign to the Purchaser all life insurance policies outstanding in respect of Mr. Neil Schmeichel and Ms. Michelle Thomas; and<br><br>(q) all other or additional assets, properties, privileges, rights and interests relating to the business of Balanced Canada (the "**Canadian Business**"), the Retained Liabilities or the assets of Balanced Canada (other than any Transferred Assets) of every kind and description and wherever located, whether known or unknown, fixed or unfixed, accrued, absolute, contingent or otherwise, and whether or not specifically referred to in this Term Sheet.<br><br>The Purchased Shares and the Canadian Business shall be acquired on an “as is where is” basis without any representation or warranty as to fitness or condition. |
| **Balanced Canada Retained Liabilities:** | The following liabilities of Balanced Canada shall remain with Balanced Canada and shall not be assumed by Balanced Holdings (collectively, the "**Retained Liabilities**"):<br><br>(a) all liabilities and obligations arising from the possession, ownership and/or use of the Purchased Shares and the Retained Assets following Closing; |

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| | (b) all liabilities associated with contracts included in Retained Assets;<br><br>(c) all outstanding property taxes or obligations;<br><br>(d) all liabilities of Balanced Canada with respect to the following shareholder loans made to Balanced Canada: (i) loan from 1821109 Alberta Ltd. in the approximate amount of $181,931.71; and (ii) loan from Michelle Thomas in the approximate amount of $508,286.15;<br><br>(e) all liabilities associated with the Retained Employees; and<br><br>(f) any other liabilities of Balanced Canada designated by the Purchaser as Retained Liabilities, prior to the Closing Date. |
| **Balanced USA Purchased Assets:** | Pursuant to the AVO, the Purchaser shall purchase the following assets of Balanced USA (collectively, the "**Purchased Assets**"):<br><br>(a) all prepaid charges and expenses, including all prepaid rent;<br><br>(b) all inventory;<br><br>(c) all equipment and other tangible assets, including all vehicles, tools, parts and supplies, fuel, machinery, furniture, furnishing, appliances, fixtures, office equipment and supplies, owned and licensed computer hardware and related documentation, stored data, communication equipment, trade fixtures and leasehold improvements, in each case, with any transferable warranty and service rights of any Seller related thereto;<br><br>(d) all intellectual property;<br><br>(e) all goodwill and intangibles;<br><br>(f) all books and records;<br><br>(g) all rights under insurance contracts and policies;<br><br>(h) all telephone numbers, fax numbers and email addresses;<br><br>(i) all prepaid taxes and tax credits;<br><br>(j) all bank accounts; and<br><br>(k) all other or additional assets, properties, privileges, rights and interests relating to the business of Balanced USA (the "**US Business**"), excluding the US Excluded Assets.<br><br>The Purchased Assets shall be acquired free and clear of all claims of the creditors of Balanced USA, and on an “as is where is” basis without any representation or warranty as to fitness or condition. The Parties acknowledge that the following Balanced USA Purchased Assets are currently under seizure in North Dakota or are otherwise unable to be transferred into Canada in advance of Closing (the "**Detained Assets**"):<br><br>(a) Unit HCRT 2 (Trailer only, no tractor) (“**Unit HCRT 2**”); |

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| | (b) Unit 804 (KW tractor only, no cryogenic trailer) ("**Unit 804**"); and<br><br>(c) Unit 211 (200Ton Todano Crane) ("**Unit 211**").<br><br>The Parties shall work together to secure physical possession of the Detained Assets so that they may be transferred to the Purchaser in accordance with this Term Sheet. |
| **Balanced USA Excluded Assets:** | Pursuant to the AVO, the following assets of Balanced USA shall remain with Balanced USA and shall not be transferred to the Purchaser on Closing (the "**US Excluded Assets**"):<br><br>(a) all of Balanced USA's cash and cash equivalents, including all cash collateral and deposits posted by or for the benefit of Balanced USA as security for any obligation;<br><br>(b) all accounts receivable, notes receivable and negotiable instruments of Balanced USA;<br><br>(c) all contracts of Balanced USA; and<br><br>(d) such additional assets as may be identified by the Purchaser on or prior to Closing. |
| **Balanced USA Liabilities:** | Pursuant to the AVO, no liabilities or obligations of Balanced USA shall be assumed by the Purchaser on Closing including, without limitation, any of the following:<br><br>(a) all liabilities associated with the employees Balanced USA;<br><br>(b) all liabilities associated with the contracts of Balanced USA; and<br><br>(c) all of Balanced USA's liabilities and obligations in respect of the Intercompany Loan. |
| **Damaged Unit:** | NBC, Balanced Canada, the Receiver and the Purchaser agree that Balanced Canada and the Receiver may proceed with procuring the repairs to the Damaged Unit prior to Closing and in advance of confirmation of whether the costs of completing such repairs will be covered by insurance. NBC agrees to fund the cost of making such repairs, whether incurred before or after the appointment of the Receiver (the "**Damaged Unit Repair Costs**"), subject to reimbursement of all such costs by the Purchaser on Closing. Following Closing, the Purchaser, provided it has reimbursed NBC for the Damaged Unit Repair Costs, shall be entitled make an insurance claim in respect of the Damaged Unit Repair Costs and shall be entitled to retain all proceeds of insurance paid in connection therewith. |
| **Pre-Closing Inventory:** | NBC, Balanced Canada and the Purchaser acknowledge that Balanced Canada was required to purchase approximately $300,000 of coiled tubing inventory in connection with ongoing business operations prior to Closing ("**Pre-Closing Coiled-Tubing Inventory**"). NBC agreed to and did fund the cost of procuring the Pre-Closing Coiled-Tubing Inventory. Two business days prior to the Closing Date, Balanced Canada shall deliver a report which details the remaining useful life, described as a percentage, of all Pre-Closing Coiled-Tubing Inventory which was funded by NBC. On Closing, the Purchaser shall reimburse NBC for the value of the remaining useful life of the Pre-Closing Coiled-Tubing Inventory, which amount shall be calculated by multiplying the purchase price of the Pre-Closing Coiled-Tubing Inventory by the percentage of useful life remaining in respect of the Pre-Closing Coiled-Tubing Inventory (the "**Pre-Closing Coiled-Tubing Inventory Amount**"). |

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| **Pre-Closing Certification and Repairs:** | NBC, Balanced Canada, the Receiver and the Purchaser agree that, between the Sale Approval Date and the Closing Date, Balanced Canada will incur certain expenses in respect of annual maintenance, repairs, inspection and re-certification of its equipment (the "**Pre-Closing Work**"). NBC agrees that the cost of the Pre-Closing Work shall be paid by Balanced Canada from cash on hand, accounts receivable which are collected by Balanced Canada or by NBC by extending additional funding to the Receiver through additional advances under the Receiver's Borrowing Charge established by the Receivership Order. On the date that is two business days prior to Closing, Balanced Canada shall deliver a report (the "**Pre-Closing Expense Report**") which details all costs incurred in connection with the Pre-Closing Work, together with a report of which items of Pre-Closing Work could reasonably be attributed to either: (i) routine annual maintenance, repairs, inspection and re-certification of equipment for future use by the Purchaser (collectively, "**Annual Maintenance Expenses**"); or (ii) generating additional revenue and accounts receivable during the period prior to Closing (collectively, "**Revenue Generating Expenses**"). The Pre-Closing Expense Report shall calculate the difference between the Annual Maintenance Expenses minus the Revenue Generating Expenses and, if such difference is positive, the Purchase Price shall be adjusted upward by the amount of such positive amount and, if such difference is negative, the Purchase Price shall be adjusted downward by such negative amount (the "**Pre-Closing Expense Amount**"). The Receiver and the Purchaser currently estimate that the Pre-Closing Expense Amount will result in an upward adjustment to the Purchase Price of approximately $650,000. |
| **Closing Sequence:** | Closing shall be sequenced such that: (i) the Preferred Shares shall be cancelled by Balanced Canada; (ii) the Purchased Shares shall be transferred to the Purchaser; and (iii) immediately following the cancellation of the Preferred Shares and the transfer of the Purchased Shares, the Purchased Assets shall be transferred to Balanced Canada upon it becoming a wholly-owned subsidiary of the Purchaser. |
| **Purchase Price:** | The total aggregate purchase price for the Purchased Shares and Purchased Assets shall be:<br><br>(a) CA$11,250,000 in cash;<br><br>(b) such amount as shall be required to pay out and satisfy, in full, the first charge held by Laurentian Bank over certain equipment held by Balanced USA (currently estimated at approximately CA$900,000);<br><br>(c) increased, dollar for dollar, by an amount equal to the Damaged Unit Repair Costs;<br><br>(d) increased, dollar for dollar, by an amount equal to the Pre-Closing Coiled-Tubing Inventory Amount; and<br><br>(e) increased or decreased (as the case may be), dollar for dollar, by an amount equal to the Pre-Closing Expense Amount;<br><br>(the "**Purchase Price**").<br><br>The Purchase Price shall not be subject to any additional increase or decrease. |
| **Detained Assets:** | Notwithstanding the foregoing, in the event that the Detained Assets have not been transferred into Canada on or prior to the Closing Date, Closing shall still occur, but the |

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| | amount of the Purchase Price paid on Closing shall be reduced by the following amount, per unit, set forth below:<br><br>(a) Unit HCRT 2 – $CA551,000;<br><br>(b) Unit 804 – $CA68,000; and<br><br>(c) Unit 211 – $CA763,000.<br><br>Following Closing, upon each Detained Asset being transferred into Canada, but in any event not later than two business days following completion of such transfer, the Purchaser shall pay the Receiver the applicable portion of the Purchase Price which corresponds to the individual Detained Asset which has been so transferred into Canada. |
| **Stalking Horse SSP Process:** | The Purchaser hereby agrees to allow for disclosure of this Term Sheet to the Court and all other parties by the Receiver as part of a stalking horse sales solicitation process (the "**SH SSP**") to be commenced by the Receiver as soon as practicable following execution of this Term Sheet. Additionally, upon issuance of the AVO and the RVO, and subject to receiving approval of the Court to proceed with the SH SSP, the Receiver shall continue carrying out the SH SSP in accordance with the provisions set forth in Schedule C. |
| **Transfer Taxes:** | The Purchase Price is exclusive of all transfer taxes, including GST, and the Purchaser shall pay, or shall otherwise be responsible for, all transfer taxes and GST which may become payable in connection with the purchase of the Proposed Transaction.<br><br>The Parties shall, acting reasonably, mutually agree upon an allocation of the Purchase Price among the Purchased Shares and the Purchased Assets in such a manner as will reduce transfer taxes payable by the Purchaser to the greatest extent possible. |
| **Distribution to Creditors:** | After Closing, the Receiver shall obtain one or more distribution orders from the Court in order to cause the assets in Balanced Holdings to be distributed to the creditors of the Debtors, in accordance with the priority of their claims against the Debtors. |
| **Representations and Warranties:** | The purchase and sale shall be on an "as is, where is" basis, with only such representations and warranties as are customary in receivership transactions. |
| **Conditions to Closing:** | The Purchaser's and the Receiver's obligation to close the Proposed Transaction will be subject to the following conditions precedent:<br><br>(a) the granting of the AVO and the RVO, all in a form satisfactory to Purchaser, the Receiver and NBC, acting reasonably;<br><br>(b) the release by NBC of all personal guarantees (the "**Personal Guarantees**") granted to NBC by shareholders, directors, officers or employees of the Debtors ("**Key Debtor Personnel**");<br><br>(c) resolving all potential liability of the Key Debtor Personnel to Business Development Bank of Canada and Export Development Canada to the sole satisfaction of the Key Debtor Personnel;<br><br>(d) this Term Sheet being the successful bid under the SH SSP or there is no Superior Offer under the SH SSP; and |

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| | (e) the RVO and AVO becoming final orders, not subject to any stay or filed appeal, no later than May 15, 2022. |
| **Post-Closing Covenants:** | The parties acknowledge that the Receiver is commencing ancillary proceedings pursuant to Chapter 15 of the US *Bankruptcy Code* (the "**US Bankruptcy Proceedings**") to seek, among other things, recognition of the Receivership Order, AVO and RVO. If the Detained Assets are not transferred into Canada on or prior to the Closing Date, the Receiver shall continue its efforts in the US Bankruptcy Proceedings (or otherwise) to recover the Detained Assets and the Purchaser, the Receiver and NBC agree that, upon the transfer of the Detained Assets into Canada, a second closing will occur with respect to such assets for the purchase price per unit specified in the section titled "*Detained Assets*", above.<br><br>All fixtures and leasehold improvements retained by Balanced Canada will be subject to all claims by the landlord under the Calgary Lease and Brooks Lease, as applicable, and Balanced Canada shall indemnify and hold Balanced Holdings harmless in respect of any claims made by either such landlord that relate to the fixtures or leasehold improvements retained by Balanced Canada. |
| **Covenants that continue whether or not Purchaser is not the Successful Bidder under the SSP** | The Purchaser shall provide reasonable assistance to the Receiver in connection with the collection of all accounts receivable owing to the Debtors including, without limitation, accounts receivable owing to Balanced USA by the United States Federal Government (approximately USD$500,000) whether it is the successful bidder under the SH SSP or not.<br><br>NBC agrees that in the event that the Successful Bidder chosen under the SH SSP is a party other than the Purchaser, the Key Debtor Personnel shall be released of all their obligations under the Personal Guarantees provided that the Key Debtor Personnel provide assistance to the Receiver in connection with the collection of the accounts receivable outlined above. |
| **No Post-Closing Adjustments:** | The Purchaser is not entitled to any claim, adjustment or abatement arising from any claim, as to the conditions, existence of or effective assignment or transfer of the Purchased Shares or the Purchased Assets, provided, however, that if following Closing:<br><br>(a) any Transferred Asset or Transferred Liability is found to have been retained or received by Balanced Canada, Balanced Canada shall transfer such Transferred Asset or Transferred Liability to Balanced Holdings, including, for greater certainty, any amounts that may have been received by Balanced Canada in respect of any: (A) cash collateral and deposits posted by or for the benefit of the Debtors as security for any obligations, (B) accounts receivable, notes receivable, and negotiable instruments, and (C) refund, rebate, credit, abatement or recovery of or with respect to taxes, in each case which form part of the Transferred Assets;<br><br>(b) any Retained Asset or Retained Liability is found to have been transferred to Balanced Holdings, Balanced Holdings shall transfer such Retained Asset or Retained Liability to Balanced Canada;<br><br>(c) any Purchased Asset is found to have been retained or received by Balanced USA, Balanced USA shall transfer such Purchased Asset to Balanced Canada; and<br><br>(d) any US Excluded Asset is found to have been transferred to or received by Purchaser, Purchaser shall transfer such US Excluded Asset to Balanced USA, including, for |

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| | greater certainty, any amounts that may have been received by Purchaser in respect of any: (A) cash collateral and deposits posted by or for the benefit of the Debtors as security for any obligations, and (B) accounts receivable, notes receivable, and negotiable instruments, in each case which form part of the US Excluded Assets. |
| **Expenses:** | Each Party shall pay its own expenses in connection with the Proposed Transaction, whether or not the Proposed Transaction is completed, unless otherwise mutually agreed by the Parties. |
| **Governing Law:** | This Term Sheet will be governed by and construed in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable therein. |
| **Counterparts:** | This Term Sheet may be executed and delivered electronically in two or more counterparts, any one of which need not contain the signature of more than one Party, but all such counterparts taken together shall constitute one and the same instrument. |
| **Assignment:** | This Term Sheet may not be assigned without the prior written consent of the other Parties hereto. |
| **Further Assurances** | Each of the Parties hereto shall at the request and expense of the other Party hereto so requesting execute and deliver such further or additional documents and instruments as may reasonably be considered necessary or desirable to properly reflect and carry out the true intent and meaning of this Term Sheet. |
| **Prior Term Sheet:** | All of the Parties hereby agree and acknowledge that this Term Sheet represents the final and binding agreement of the Parties with respect to the subject matter provided for herein and the Parties further agree that the prior term sheet dated as of the 28th day of February, 2022, and executed by all Parties except the Receiver, shall be replaced in its entirety by this Term Sheet and shall of no further force or effect. |

***[Signature page follows]***

Dated effective as of the ____ day of March, 2022

**XDI ENERGY SOLUTIONS INC.**

Per: _____
Name: Michelle Thomas
Title: Director

Agreed and accepted as of the 21st day of March, 2022, by:

**FTI CONSULTING CANADA INC.**, in its capacity as Receiver of the Debtors, and not in its personal or corporate capacity

Per: _____
Name: Dustin Olver
Title: Senior Managing Director

Agreed and accepted as of the ____ day of March, 2022, by:

**NATIONAL BANK OF CANADA**

Per: Dana Ades-Landy
Digitally signed by Dana Ades-Landy
DN: cn=Dana Ades-Landy, o=Banque Nationale, ou=Special Loans/Unite d'Intervention, email=dana.adeslandy@nbc.ca, c=CA
Date: 2022.03.21 17:43:20 -04'00'
Name: Dana Ades-Landy
Title: Senior Manager Special Loans

Chantal Tremblay
2022.03.21 17:45:56 -04'00'

Agreed and accepted as of the ____ day of March, 2022, by:

Name: Chantal Tremblay
Title: Senior Manager Special Loans

**BALANCED ENERGY HOLDINGS INC.**

Per: _____
Name: Neil Schmeichel
Title: Director

Agreed and accepted as of the ____ day of March, 2022, by:

**BALANCED ENERGY OILFIELD SERVICES INC.**

Per: _____
Name: Neil Schmeichel
Title: Director

Dated effective as of the ____ day of March, 2022

**XDI ENERGY SOLUTIONS INC.**

Per: _____
Name: Michelle Thomas
Title: Director

Agreed and accepted as of the 21st day of March, 2022, by:

**FTI CONSULTING CANADA INC.**, in its capacity as Receiver of the Debtors, and not in its personal or corporate capacity

Per: _____
Name: Dustin Olver
Title: Senior Managing Director

Agreed and accepted as of the ____ day of March, 2022, by:

**NATIONAL BANK OF CANADA**

Per: _____
Name:
Title:

Agreed and accepted as of the 21 day of March, 2022, by:

**BALANCED ENERGY HOLDINGS INC.**

Per: _____
Name: Neil Schmeichel
Title: Director

Agreed and accepted as of the 21 day of March, 2022, by:

**BALANCED ENERGY OILFIELD SERVICES INC.**

Per: _____
Name: Neil Schmeichel
Title: Director

Agreed and accepted as of the 21 day of March, 2022, by:

**NEIL SCHMEICHEL**

Agreed and accepted as of the 21 day of March, 2022, by:

**MICHELLE THOMAS**

Agreed and accepted as of the ____ day of March, 2022, by:

**CODIE BELLAMY**

Agreed and accepted as of the ____ day of March, 2022, by:

**DARREN MILLER**

Agreed and accepted as of the ____ day of March, 2022, by:

**NEIL SCHMEICHEL**

Agreed and accepted as of the ____ day of March, 2022, by:

**MICHELLE THOMAS**

Agreed and accepted as of the 31st day of March, 2022, by:

**CODIE BELLAMY**

Agreed and accepted as of the ____ day of March, 2022, by:

**DARREN MILLER**

Agreed and accepted as of the ____ day of March, 2022, by:

**NEIL SCHMEICHEL**

Agreed and accepted as of the ____ day of March, 2022, by:

**MICHELLE THOMAS**

Agreed and accepted as of the ____ day of March, 2022, by:

**CODIE BELLAMY**

Agreed and accepted as of the 21 day of March, 2022, by:

**DARREN MILLER**

## SCHEDULE A

## FORM OF APPROVAL AND VESTING ORDER

**(attached)**

## SCHEDULE B

## FORM OF REVERSE VESTING ORDER

**(attached)**

# SCHEDULE C

# SALE SOLICITATION PROCESS

**(attached)**

**Schedule “B” to Sales Solicitation Process**

To the Receiver at:

**FTI Consulting Canada Inc.**
Suite 1610, 520 – 5th Avenue S.W.
Calgary, AB T2P 3R7

**Attention: Dustin Olver / Brett Wilson**
E-mail: Dustin.Olver@fticonsulting.com / Brett.Wilson@fticonsulting.com

With copy to:

**Osler, Hoskin & Harcourt LLP**
Suite 2700, Brookfield Place
225 – 6th Avenue S.W.
Calgary, AB T2P 1N2

**Attention: Randal Van de Mosselaer / Emily Paplawski**
Email: RVandemosselaer@osler.com / EPaplawski@osler.com

**Schedule “C” to Sales Solicitation Process**

# NON-DISCLOSURE AGREEMENT

_____, 2022

Attention:

Dear Sirs & Mesdames:

On March 7, 2022, FTI Consulting Canada Inc. (the "**Receiver**", "**us**" or "**we**") was appointed receiver and manager of all of the assets, undertakings and properties of every nature and kind whatsoever and wherever situate, including all proceeds thereof of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc., and Balanced Energy Holdings Inc. (collectively, the "**Debtors**"), pursuant to an Order of the Court of Queen's Bench of Alberta (the "**Court**").

On March 30, 2022, the Court issued an order, *inter alia*, approving the Sales Solicitation Process (the "**SSP**"). The purpose of the SSP is for the Receiver to seek sale or investment proposals for the shares and/or assets of the Debtors (collectively, the "**Potential Transactions**") from Qualified Bidders and to subsequently implement one or a combination of such Potential Transactions. Capitalized terms used in this NDA and not otherwise defined herein have the meanings given to them in the SSP.

This SSP describes, among other things, the process by which interested parties and/or prospective bidders may evaluate and participate in Potential Transactions, including: (a) the manner in which such parties may obtain preliminary information, execute non-disclosure agreements and gain access or continue to have access to due diligence materials concerning the Potential Transactions; (b) the manner in which bidders and bids become Qualified Bidders and Qualified Bids, respectively; (c) the process for the evaluation of bids received; (d) the process for the ultimate selection of a Successful Bidder; and (e) the process for obtaining such approvals (including the approval of the Court) as may be necessary or appropriate in respect of a Successful Bid.

In executing this non-disclosure agreement ("**NDA**") you (the "**Potential Bidder**" or "**you**") acknowledge receipt of a copy of the SSP, attached as Schedule 1 hereto, and agree to accept and be bound by the provisions contained therein.

You confirm your interest in participating in the SSP with a view to becoming a Qualified Bidder and subsequently a Successful Bidder in order to close a transaction contemplated by a Successful Bid (the "**Transaction**"). In that regard, you have requested Confidential Information (as defined herein) be furnished to you.

As a condition to us furnishing Confidential Information to you, and in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, you agree on behalf of yourself, your affiliates and Representatives (as

defined herein and to the extent such affiliates and Representatives are in receipt of all or any part of the Confidential Information) as follows:

1. **Confidential Information** – The term "Confidential Information" means: (A) any and all information of whatever nature (including information in the form not only of written information but also information which may be transmitted orally, visually, graphically, electronically or by any other means) relating to the Debtors, their business and property including, without limitation, information concerning any past, present or future customers, suppliers or our technology, and any correspondence, internal business discussions, strategic plans, budgets, financial statements, records, reports, evaluations, notes, analyses, documents, engineering, trade secrets, know-how, data, patents, copyrights, processes, business rules, tools, business processes, techniques, programs, designs, formulae, marketing, advertising, financial, commercial, sales or programming materials, equipment configurations, system access codes and passwords, written materials, compositions, drawings, diagrams, computer programs, studies, works in progress, visual demonstrations, ideas, concepts, or any other documents or information pertaining in any way whatsoever to the Debtors; (B) all information about an identifiable individual or other information that is subject to any federal, provincial or other applicable statute, law or regulation of any governmental or regulatory authority in Canada relating to the collection, use, storage and/or disclosure of information about an identifiable individual, including the *Personal Information and Protection of Electronic Documents Act* (Canada) and equivalent provincial legislation, whether or not any such information is confidential ("**Personal Information**"); and (C) all summaries, notes, analyses, compilations, data, studies or other documents or records prepared by Potential Bidder or its Representatives that contain or otherwise reflect or have been generated, wholly or partly, or derived from, any such information ("**Derivative Information**"). The term "Confidential Information" shall not include such portions of the Confidential Information which: (i) are, or prior to the time of disclosure or utilization become, generally available to the public other than as a result of a disclosure by you or your Representatives; (ii) are received by you from an independent third party who had obtained the Confidential Information lawfully and was under no obligation of secrecy or duty of confidentiality; (iii) you can show were in your lawful possession before you received such Confidential Information from us, or (iv) you can show were independently developed by you or on your behalf by personnel having no access to the Confidential Information at the time of its independent development. In addition, you agree that the Receiver may, in its sole discretion, withhold or provide information requested by you.

2. **Non-Disclosure and Restricted Use** – the Confidential Information will be kept confidential by Potential Bidder and will not, without the prior written consent of the Receiver or as permitted by this NDA, be disclosed by Potential Bidder or any of its Representatives in any manner whatsoever, in whole or in part, and will not be used by Potential Bidder or any of its Representatives, directly or indirectly, for any purpose other than evaluating, negotiating and consummating a Transaction (the "**Permitted Purpose**"). You will not use the Confidential Information so as to obtain any commercial advantage over the Debtors or in any way which is, directly or indirectly, detrimental to the Debtors. Neither you nor any of your affiliates will alter, decompose, disassemble, reverse engineer or otherwise modify any Confidential Information received hereunder that relates to the

research and development, intellectual property, processes, new product developments, product designs, formulae, technical information, patent information, know-how or trade secrets of the Debtors. Potential Bidder agrees to comply with any applicable privacy laws in respect of Confidential Information relating to individuals. Potential Bidder recognizes and acknowledges the competitive value and confidential nature of the Confidential Information and the damage that could result to the Debtors if any information contained therein is disclosed to any person.

3. **Storage and Records** – You shall store the Confidential Information properly and securely and ensure that appropriate physical, technological and organisational measures are in place to protect the Confidential Information against unauthorised or unintended access, use or disclosure. You will only reproduce or take such copies of any of the Confidential Information as is reasonably necessary for the Permitted Purpose. You shall keep a record of the Confidential Information furnished to you, in any medium other than oral, and of the location of such Confidential Information.

4. **Access Limited to Representatives** – Potential Bidder may reveal or permit access to the Confidential Information only to its agents, representatives (including lawyers, accountants and financial advisors), directors, officers and employees (each a "**Representative**") who need to know the Confidential Information for the Permitted Purpose, who are informed by Potential Bidder of the confidential nature of the Confidential Information, who are directed by Potential Bidder to hold the Confidential Information in the strictest confidence and who agree to act in accordance with the terms and conditions of this agreement. Potential Bidder will take all necessary precautions or measures as may be reasonable in the circumstances to prevent improper access to the Confidential Information or use or disclosure of the Confidential Information by Potential Bidder's Representatives and will be responsible for any breach of this agreement by any of its Representatives. You will, in the event of a breach of this agreement or any disclosure of Confidential Information by you or any of your Representatives, other than as permitted by this agreement, through accident, inadvertence or otherwise, notify the Receiver of the nature of the breach promptly upon your discovery of the breach or disclosure.

   You acknowledge that certain of the Debtors' books, records or information representing or containing Confidential Information to which you may be given access are books, records and information to which solicitor-client privilege and/or litigation privilege ("**Privilege**") attaches. You recognize and acknowledge that we have a material interest in the preservation of Privilege in respect of all Privileged material (collectively, the "**Privileged Material**"). You agree (acting on your own behalf and as agent for your Representatives) that: (a) such access is being provided solely for the Permitted Purpose; (b) such access is not intended and should not be interpreted as a waiver of any Privilege in respect of Privileged Material or any right to assert or claim Privilege in respect of Privileged Material. To the extent there is any waiver, it is intended to be a limited waiver in your favour, solely for the Permitted Purpose; (c) you shall keep the Privileged Material in strict confidence, and disclose such material solely to your legal counsel and to your directors, officers and employees and any affiliate and only to the extent required for the Permitted Purpose; (d) at our request, all copies of Privileged Material, and any notes that would disclose the contents of Privileged Material, will be destroyed or returned to the

owner thereof; and (e) at our request, you shall claim or assert, or co-operate to claim or assert, Privilege in respect of our Privileged Material.

5. **No Disclosure of Transaction** – Potential Bidder and its Representatives will not, without the Receiver's prior written consent, disclose to any person the fact that the Confidential Information has been made available, that this agreement has been entered into, that discussions or negotiations are taking place or have taken place concerning a possible Transaction or any of the terms, conditions or other facts with respect to any such possible Transaction.

6. **Contact Persons** – In respect of Confidential Information requests or any other matters concerning the Confidential Information or the Transaction, you agree to communicate only with _____, each from FTI Consulting Canada Inc.; or with such other individual or individuals as they may authorize in writing and on terms acceptable to the Receiver, acting reasonably. Without such prior written consent, neither you nor any of your Representatives will initiate or cause to be initiated or maintain any communication with any officer, director, agent, employee of the Debtors, or any affiliate, creditor, shareholder, customer, supplier or lender of the Debtors concerning their business, operations, prospects or finances, or the Confidential Information or the Transaction.

7. **Proprietary Rights** – You acknowledge that the Confidential Information is a proprietary asset of the Debtors and its affiliates and agree that the Debtors will retain proprietary rights in the Confidential Information and the disclosure of such Confidential Information shall not be deemed to confer upon you any rights whatsoever in respect of any Confidential Information.

8. **Return of Confidential Information –** If you determine not to pursue a Transaction, you will promptly advise the Receiver of that fact. At the time of such notice, or if, at any earlier time, the Receiver so directs (whether or not you determine to pursue a Transaction), you and your Representatives will, at your own expense, promptly return or destroy all copies of the Confidential Information upon our request (and, in any event, within five (5) business days after such request), except for that portion of the Confidential Information which consists of Derivative Information, which will be destroyed, and in the case of information stored in electronic form, it will be permanently erased. If requested by the Receiver, compliance with this Section 8 shall be certified in writing by an authorized officer of the Potential Bidder.

   Notwithstanding the foregoing, (i) you may retain a copy of the Confidential Information to the extent that such retention is required to demonstrate compliance with applicable law, regulation or professional standards, provided that it is kept strictly confidential; and (ii) Confidential Information that is electronically stored may be retained in back-up servers if it is not intentionally made available to any person, and is deleted in accordance with your normal policies with respect to the retention of electronic records. Notwithstanding the return or destruction of the Confidential Information, you and your Representatives shall continue to be bound by the confidentiality and other obligations hereunder.

9. **No Representation** – You acknowledge that neither we nor any of our Representatives makes any express or implied representation or warranty as to the accuracy or completeness of the Confidential Information, and agree that neither we nor our Representatives shall have any liability, direct or indirect, to you or your Representatives relating to or resulting from the Confidential Information or the use thereof, errors therein or omissions therefrom and except in accordance with any specific representations and warranties made in any definitive agreement entered into regarding the Transaction. Neither you nor we have any obligation to the other to negotiate a Transaction.

10. **Definitive Agreement** - You acknowledge and agree that no agreement relating to or providing for the Transaction shall exist unless and until a definitive agreement with respect to Transaction has been executed by you and us. It is agreed that unless and until such a definitive agreement has been executed and delivered pursuant to the terms of the SSP, neither we nor you shall have any legal obligation of any kind whatsoever with respect to the completion of the Transaction by virtue of this agreement. We and you further understand and agree that: (i) we are under no obligation to provide Confidential Information and any data room containing Confidential Information may be closed by us at any time; and (ii) neither we nor you shall have any claim whatsoever against the other (nor any of their respective affiliates or Representatives) arising out of or relating to the completion of the Transaction (other than as expressly set forth in a subsequent definitive written agreement entered into by us and you in connection with the Transaction and pursuant to the terms of the SSP). The process leading up to a Transaction shall be governed by the applicable terms of the SSP. Either party to this NDA may terminate discussions and negotiations with regard to the Transaction at any time for any reason.

11. **Required Disclosure** – In the event that you or any of your Representatives become legally compelled or are required by regulatory authorities having appropriate jurisdiction to disclose any of the Confidential Information, you will promptly provide us with written notice so that we may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this agreement. You will cooperate with us on a reasonable basis to obtain a protective order or other remedy. In the event that such protective order or other remedy is not obtained or we waive compliance with the provisions of this agreement, you will furnish only that portion of the Confidential Information which you are advised by counsel is legally required to be disclosed and will exercise all reasonable efforts to obtain reliable assurance that confidential treatment will be accorded the Confidential Information so furnished.

12. **Non-Solicitation; No-Hire** – Without prior written consent of the Receiver, for a period of eighteen (18) months from the date of this Agreement (the "**Restriction Period**"), Potential Bidder, its Representatives and affiliates will not, either directly or indirectly, solicit for employment, employ or otherwise contract for the services of (or cause or seek to cause to leave the employ of the Debtors or its affiliates) any person who is now employed or engaged (either as an employee or consultant) or becomes employed or engaged during the term of this agreement by the Debtors in their operations, other than persons whose employment or engagement shall have been terminated at least six (6) months prior to the date of such solicitation, employment or other contractual arrangements, providing however that the foregoing provision will not prevent you from

hiring any such person who contacts you on his or her own initiative without any direct or indirect solicitation by or encouragement from you. The prohibition contained in this paragraph does not extend to general solicitations of employment by you not specifically directed towards the employees or consultants of the Debtors.

13. **Standstill** – Potential Bidder agrees that during the Restriction Period, neither you nor any of your affiliates (including any person or entity directly or indirectly through one or more intermediaries controlling you or controlled by or under common control with you) will, without the prior written authorization of the Receiver, directly, indirectly, or jointly or in concert with any other person: (i) purchase, offer or agree to purchase any direct or indirect rights or options to acquire bank indebtedness, trade claims or other liabilities of the Debtors; (ii) enter into, offer or agree to enter into or engage in any discussions or negotiations with respect to any acquisition or other business combination transaction relating to the Debtors or their affiliates, or any acquisition transaction relating to all or part of the assets of the Debtors, any of our affiliates or any of their respective businesses, or propose any of the foregoing; (iii) form, join or in any way participate in any group acting jointly or in concert with respect to the foregoing; (iv) seek any modification to or waiver of your agreements and obligations under this agreement; (v) seek, propose or otherwise act alone or in concert with others, to influence or control the management, board of directors or policies of the Debtors or any of their affiliates; (vi) advise, assist or encourage, act as a financing source for or otherwise invest in any other person in connection with any of the foregoing activities; or (vii) disclose any intention, plan or arrangement, or take any action inconsistent with the foregoing.

14. **Amendment of Agreement** – This agreement may not be amended, modified or waived except by an instrument in writing signed on behalf of each of the parties hereto.

15. **Successors and Assigns; Assignability** – This agreement shall be binding upon, inure to the benefit of, and be enforceable by, the respective successors and permitted assigns of the parties hereto. This agreement may not be assigned by the Potential Bidder without the prior written consent of the Receiver. This agreement may be assigned by the Receiver without the prior written consent of the Potential Bidder. Any assignment or attempted assignment in contravention of this subsection shall be void ab initio and shall not relieve the assigning party of any obligation under this agreement.

16. **Certain Definitions** – In this agreement, the term "**affiliate**" shall mean a person directly or indirectly controlling, or controlled by, or under common control with, the Debtors or you, as the case may be, with "**control**" meaning direct or indirect ownership of more than 50% of the voting securities or similar rights or interests of such person. The term "**person**" shall be interpreted broadly to include, without limitation, any individual, corporation, company, partnership, limited partnership, limited liability company, joint venture, estate, association, trust, firm, unincorporated organization, or other entity of any kind or nature.

17. **Governing Law** – This agreement shall be governed by and construed in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable in the Province of Alberta. You hereby irrevocably (a) submit to the exclusive jurisdiction of the

Court in respect of any actions or proceedings ("**Proceedings**") relating in any way to this agreement and the transactions contemplated hereby (and you agree not to commence any Proceeding relating thereto except in such courts); and (b) waive any objection to the venue of any Proceeding relating to this agreement or the transactions contemplated hereby in the Court, including the objection that any such Proceeding has been brought in an inconvenient forum.

18. **Non-Waiver** – No failure or delay by the Receiver in exercising any right, power or privilege under this agreement will operate as a waiver thereof, nor will any single or partial exercise preclude any other or further exercise of any right, power or privilege under this agreement.

19. **Notice** – Any notice, consent or approval required or permitted to be given in connection with this agreement ("**Notice**") shall be in writing and shall be sufficiently given if delivered (whether in person, by courier service or other personal method of delivery), or if transmitted by facsimile or e-mail:

(a) to the Receiver at:

FTI Consulting Canada Inc.
Suite 1610, 520 Fifth Avenue S.W
Calgary, AB T2P 3R7

Attention: Hailey Liu / Brandi Swift
E-mail: hailey.liu@fticonsulting.com / brandi.swift@fticonsulting.com

With copy to:

Osler, Hoskin & Harcourt LLP
Brookfield Place, Suite 2700
225 6 Ave SW
Calgary, AB T2P 1N2

Attention: Randal Van de Mosselaer / Emily Paplawski
Email: RVandemosselaer@osler.com / EPaplawski@osler.com

(b) Potential Bidder at:

[●]

Any Notice delivered or transmitted as provided above shall be deemed to have been given and received on the day it is delivered or transmitted, provided that it is delivered or transmitted on a business day prior to 5:00 p.m. local time in the place of delivery or receipt. However, if the Notice is delivered or transmitted after 5:00 p.m. local time or if such day is not a business day then the Notice shall be deemed to have been given and

received on the next business day. Both you and we may, from time to time, change our respective addresses by giving Notice to the other in accordance with the provisions of this section.

20. **Indemnity** – Potential Bidder shall indemnify and hold harmless the Receiver and its Representatives from any damages, loss, cost or liability (including reasonable legal fees and the cost of enforcing this indemnity) arising out of or resulting from any breach of this agreement by Potential Bidder or any of its Representatives.

21. **Injunctive Relief** – You acknowledge that disclosure of the Confidential Information or other breach of this agreement would cause serious and irreparable damage and harm to the Debtors and that remedies at law would be inadequate to protect against breach of this agreement, and agree in advance to the granting of injunctive relief in the Debtors' favour for any breach of the provisions of this agreement and to the specific enforcement of the terms of this agreement, without proof of actual damages, and without the requirement to post a bond or other security, in addition to any other remedy to which the Receiver would be entitled.

22. **Term** – Except as otherwise provided herein, confidentiality and non-use obligations described in this agreement shall terminate on the earlier of (a) the date of completion of the proposed Transaction; and (b) the expiration of the Restriction Period. Notwithstanding the foregoing, you acknowledge that the confidentiality and non-use obligations in this agreement pertaining to Personal Information shall survive any termination or expiration of this agreement.

23. **Entire Agreement** – This agreement constitutes the entire agreement between the parties hereto and sets out all the covenants, promises, warranties, representations, conditions and agreements between the parties hereto in connection with the subject matter of this agreement and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, pre-contractual or otherwise. There are no covenants, promises, warranties, representations, conditions or other agreements, whether oral or written, pre-contractual or otherwise, express, implied or collateral, whether statutory or otherwise, between the parties hereto in connection with the subject matter of this agreement except as specifically set forth in this agreement.

24. **Counterparts** – This agreement may be executed and delivered by electronic transmission. An electronic signature shall have the same legal effect as a manual signature. This agreement may be validly executed in any number of counterparts, all of which taken together shall constitute one and the same agreement and each of which shall constitute an original.

***[Signature Page Follows]***

Please acknowledge your agreement to the foregoing by countersigning this letter in the place provided below and returning it to the undersigned.

Very truly yours,

**FTI CONSULTING CANADA INC.** in its capacity as Court-appointed receiver and manager of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc., and Balanced Energy Holdings Inc., and not in its personal or corporate capacity

Per: _____

**CONFIRMED AND AGREED** this day of _____, 2022.

Per: _____

Per: _____

**SCHEDULE 1- SSP**

*See attached*

**Schedule "D" to Sales Solicitation Process**

# ASSET PURCHASE AGREEMENT

**THIS AGREEMENT** has been entered into as of _____, 2022,

**BETWEEN:**

**FTI CONSULTING CANADA INC.**, in its capacity as receiver and manager of Balanced Energy Oilfield Services Inc. ("**BCAN**"), Balanced Energy Oilfield Services (USA) Inc. ("**BUSA**") and Balanced Energy Holdings Inc. ("**BEH**", and collectively with BCAN and BUSA, "**Balanced**"), and not in its personal or corporate capacity (the "**Vendor**")

- and -

_____

_____

("**Purchaser**")

**RECITALS:**

A. Pursuant to a Receivership Order of the Court of Queen's Bench (Alberta) (the "**Court**") made as of March 7, 2022 (the "**Appointment Order**"), Vendor was appointed as receiver and manager, without security, of all of Balanced's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof; and

B. The Vendor has agreed to sell and the Purchaser has agreed to purchase the Purchased Assets (as defined herein) upon the terms and conditions hereinafter set forth.

**NOW THEREFORE** in consideration of the mutual covenants and agreements contained herein, the parties hereby agree with each other as follows:

## ARTICLE 1
## INTERPRETATION

**1.1** Definitions.

The following terms and expressions shall have the meanings set forth below wherever used in this Agreement:

"**Affiliate**" means, in respect of a person, any other person, directly or indirectly, that controls, is controlled by or under common control with the first mentioned person, and for the purposes of this definition "control" means the possession, directly or indirectly, by a person or a group of persons acting in concert of the power to direct or cause the direction of the management and policies of the person, whether through the ownership of voting securities or otherwise;

"**Agreement**" means this Asset Purchase Agreement**;**

"**Appointment Order**" has the meaning ascribed thereto in the recitals to this Agreement;

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"**Approval and Vesting Order**" means an order to be granted by the Court which authorizes, approves and confirms this Agreement and the completion of the Transaction contemplated hereunder and vests the Purchased Assets in the Purchaser, free and clear of all encumbrances (other than Permitted Encumbrances), in a form acceptable to the Vendor and the Purchaser;

"**Assumed Obligations**" has the meaning set out in Section 2.6;

"**Balanced**" has the meaning ascribed thereto in the recitals to this Agreement;

"**BCAN**" has the meaning ascribed thereto in the recitals to this Agreement;

"**BEH**" has the meaning ascribed thereto in the recitals to this Agreement;

"**BUSA**" has the meaning ascribed thereto in the recitals to this Agreement;

"**Business**" means the business carried on by Balanced;

"**Business Day**" means any day other than a Saturday, Sunday or statutory holiday in the Province of Alberta;

"**Closing**" means the completion of the sale to and purchase by the Purchaser of the Purchased Assets under this Agreement;

"**Closing Date**" means that date that is five (5) Business Days after the grant of the Approval and Vesting Order, or such other date as the parties hereto may agree upon in writing;

"**Court**" has the meaning ascribed thereto in the recitals to this Agreement;

"**Deposit**" means a deposit in an amount equal to 10% of the Purchase Price provided to the Vendor;

"**Encumbrance**" means pledges, liens, charges, security interest, mortgages, or adverse claims or encumbrances of any kind or character except Permitted Encumbrances;

"**ETA**" means Part IX of the *Excise Tax Act* (Canada);

"**GST**" means all taxes payable under the ETA or under any provincial legislation similar to the ETA, and any reference to a specific provision of the ETA or any such provincial legislation shall refer to any successor provision thereto of like or similar effect;

"**ITA**" means the *Income Tax Act* (Canada), as amended;

"**Permitted Encumbrances**" means, with respect to the Purchased Assets, liens for taxes, assessments or governmental charges that are not due, or the validity of which is being contested in good faith by the Vendor;

"**Purchase Price**" has the meaning set out in Section 2.2;

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"**Purchased Assets**" means all of Balanced's right, title and interest in and to the assets listed on Schedule "A" attached hereto, together with all operating manuals, keys and codes in respect of the operation of the Purchased Assets;

"**Purchaser**" has the meaning ascribed thereto in the recitals to this Agreement;

"**Receivership Proceedings**" means the receivership proceedings commenced against Balanced pursuant to the order of the Court in Action No. 2201 - 02699;

"**Sales Tax**" means GST and all transfer, sales, excise, stamp, license, production, value-added and other like taxes (including any retail sales taxes and land transfer taxes), assessments, charges, duties, fees, levies or other governmental charges of any kind whatsoever, and includes additions by way of penalties, interest and other amounts with respect thereto;

"**Time of Closing**" has the meaning ascribed thereto in Section 3.1, or such other time as may be agreed to in writing between the Vendor and the Purchaser;

"**Transaction**" means the transaction of purchase and sale contemplated by this Agreement; and

"**Vendor**" has the meaning ascribed thereto in the recitals to this Agreement.

**1.2** **Headings, etc.** The division of this Agreement into articles, sections and paragraphs and the insertion of headings is for convenience of reference only and shall not affect the construction or interpretation hereof. Unless otherwise stated, all references herein to articles or sections are to those of this Agreement.

**1.3** **Including**. Where the word "including" or "includes" is used in this Agreement, it means "including (or includes) without limitation".

**1.4** **Plurality and Gender**. Words used herein importing the singular number only shall include the plural and vice versa and words importing gender shall include all genders and words importing individuals shall include corporations, partnerships, trusts, syndicates, joint ventures, governments and governmental agents and authorities and vice versa.

**1.5** **Governing Law**. This Agreement shall be construed and enforced in accordance with, and the rights of the parties shall be governed by, the laws of the Province of Alberta and the federal laws of Canada applicable therein, without regard to its conflict of law rules. Each of the parties hereto irrevocably submits to the exclusive jurisdiction of the courts of the Province of Alberta over any action or proceeding arising out of or relating to this Agreement or the Transaction and the parties hereto irrevocably agree that all claims in respect of such action or proceeding may be heard and determined in such courts of the Province of Alberta.

**1.6** **Currency**. Unless otherwise specified, all references to money amounts are to lawful currency of Canada.

**1.7** **Time**. Unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and, in the case of calculation

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of the Closing Date, by extending the period to the next Business Day following if the last day of the period is not a Business Day.

**1.8** **Schedules**. The following Schedules are incorporated herein and form part of this Agreement:

| | |
|---|---|
| Schedule "A" | Purchased Assets |
| Schedule "B" | General Conveyance |

## ARTICLE 2
## PURCHASE AND SALE

**2.1** **Sale of Purchased Assets**. Upon the terms and conditions stated herein (which conditions, for greater certainty, include the granting by the Court of the Approval and Vesting Order), effective as of the Closing Date, the Purchaser shall purchase from the Vendor, and the Vendor shall sell, assign, set over and deliver to the Purchaser, the Purchased Assets free and clear of all Encumbrances (other than Permitted Encumbrances) at and for the Purchase Price hereinafter described.

**2.2** **Purchase Price**. The aggregate purchase price payable by the Purchaser to the Vendor for the Purchased Assets shall be the amount of **CAD$_____** (the "**Purchase Price**").

**2.3** **Payment of Purchase Price**. Subject to this Agreement, on or prior to the Closing Date, the Purchaser shall pay the Purchase Price to the Vendor by paying the amount by which the Purchase Price exceeds the Deposit at the Time of Closing (the "**Balance**"). Unless otherwise agreed by the parties, all amounts payable to the Vendor in this Section 2.3 and Section 2.5 below shall be paid to the Vendor in Canadian funds and by wire transfer, or by cheque certified by, or draft of, a Canadian chartered bank.

**2.4** **Deposit.** The Deposit shall be released, and the Balance payable, at the Time of Closing.

**2.5** **Sales Taxes**. At Closing, the Purchaser shall be solely responsible for all Sales Taxes pertaining to their acquisition of the Purchased Assets including, but not limited to, GST. The Purchase Price does not include GST. The Vendor and the Purchaser shall, acting reasonably, mutually agree upon an allocation of the Purchase Price among the Purchased Assets in such a manner as will reduce transfer taxes payable by the Purchaser to the greatest extent possible. If GST is payable in respect of the purchase of the Purchased Assets pursuant hereto, the Purchaser shall be responsible for the payment of, and shall indemnify and save harmless the Indemnified Parties in respect of, the GST and all interest and penalties payable pursuant to the ETA in respect thereof.

**2.6** **Assumption of Obligations**.

(a) The Purchased Assets shall remain at the risk of the Vendor until the Closing Date and thereafter shall be at the sole risk of the Purchaser.

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(b) The Purchaser shall assume such liabilities and obligations arising on or after the Closing Date only to the extent that they relate to the Purchased Assets on or after the Closing Date not related to any default existing prior to or as a consequence of the closing of the Transaction contemplated by this Agreement or any breach or misrepresentation by the Vendor of a representation, warranty or covenant in this Agreement (the "**Assumed Obligations**"). For greater certainty, the Purchaser shall not assume and shall not be deemed to have assumed any liabilities, obligations, contracts (written or unwritten) or commitments of the Vendor or Balanced other than the Assumed Obligations and, except as expressly provided herein, shall have no obligation to discharge any liability or obligation of the Vendor or Balanced.

(c) The Purchaser shall indemnify and save harmless the Indemnified Parties in respect of any liabilities, debts and obligations of the Vendor forming part of the Assumed Obligations. The Purchaser, and its respective successors, assigns, and Affiliates, agree to and do hereby remise, release and forever discharge the Indemnified Parties from and against any and all actions, causes of actions, claims, damages, costs, expenses, interests and demands of every kind and nature whatsoever, whether at law or at equity, or under any statute, which either of them ever had, now have, or may in the future have against the Indemnified Parties, in connection with the Assumed Obligations. The covenants and agreements to indemnify made by the Purchaser in this Section 2.6 shall survive Closing.

## ARTICLE 3
## CLOSING

**3.1** **Time of Closing**. The closing of the Transaction shall occur at 9:00 a.m. (Calgary time) on the Closing Date (the "**Time of Closing**"), at the office of the Vendor's solicitor.

**3.2** **Mutual Condition to Closing.** The obligation of the Purchaser and the Vendor to proceed with the closing of the Transaction is subject to the Vendor obtaining the Approval and Vesting Order, which shall not have been stayed, varied, vacated or be subject to any pending appeal and no order shall have been issued which restrains or prohibits the completion of the Transaction.

**3.3** **Purchaser' Conditions**. The obligation of the Purchaser to complete the Transaction on the Closing Date is subject to the following conditions being fulfilled or performed at or prior to the time indicated:

(a) at or prior to the Time of Closing, all representations and warranties of the Vendor contained in this Agreement shall be true and correct in all material respects with the same effect as though made on and as of that date;

(b) prior to the Time of Closing, the Vendor shall have performed or complied with each of its agreements, covenants and obligations (including, without limitation, those set out in Section 8.1) under this Agreement to the extent required to be performed on or before the Closing Date; and

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(c) prior to the Time of Closing the Vendor shall have executed (as applicable) and delivered all deliverables required under Section 4.1.

The foregoing conditions are for the exclusive benefit of the Purchaser. Any condition may be waived by the Purchaser in whole or in part. Any such waiver shall be binding on the Purchaser only if made in writing. In the event that any of the foregoing conditions is not satisfied or waived by the Closing Date, the Purchaser shall be entitled to terminate this Agreement by notice in writing given to the Vendor on the Closing Date.

**3.4** **Vendor's Conditions**. The obligation of the Vendor to complete the Transaction on the Closing Date is subject to the following conditions being fulfilled or performed at or prior to the Time of Closing, as applicable:

(a) at or Prior to the Time of Closing, all representations and warranties of the Purchaser contained in this Agreement shall be true and correct in all material respects with the same effect as though made on and as of that date; and

(b) prior to the Time of Closing the Purchaser shall have performed or complied with, in all material respects, each of its agreements, covenants and obligations under this Agreement, to the extent required to be performed on or before the Closing Date; and

(c) prior to the Time of Closing the Purchaser shall have executed (as applicable) and delivered all deliverables required under Section 4.2.

The foregoing conditions are for the exclusive benefit of the Vendor. Any condition may be waived by the Vendor in whole or in part. Any such waiver shall be binding on the Vendor only if made in writing. In the event that any of the foregoing conditions is not satisfied or waived by the Closing Date, the Vendor shall be entitled to terminate this Agreement by notice in writing given to the Purchaser on the Closing Date.

## ARTICLE 4
## CLOSING DELIVERIES

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**4.1** **Deliveries by the Vendor at Closing**. At the Time of Closing the Vendor shall deliver, or cause to be delivered, the following to the Purchaser:

(a) a certified copy of the Approval and Vesting Order;

(b) such bills of sale, assignments, instruments of transfer, deeds, assurances, consents and other documents as shall be necessary or desirable to effectively transfer and assign to the Purchaser the Purchased Assets including the General Conveyance attached hereto as Schedule "B"; and

(c) such further and other documentation as is referred to in this Agreement or as the Purchaser may reasonably require to give effect to this Agreement.

**4.2** **Deliveries by the Purchaser at Closing**. At the Time of Closing the Purchaser shall deliver, or cause to be delivered, the following to the Vendor:

(a) an amount equal to the Purchase Price plus applicable GST;

(b) such bills of sale, assignments, instruments of transfer, deeds, assurances, consents and other documents as shall be necessary or desirable to effectively transfer and assign to the Purchaser the Purchased Assets including the General Conveyance attached hereto as Schedule "B"; and

(c) such further and other documentation as is referred to in this Agreement or as the Vendor may reasonably require to give effect to this Agreement.

## ARTICLE 5
## REPRESENTATIONS AND WARRANTIES OF THE VENDOR

**5.1** **Vendor's Representations and Warranties**. The Vendor represents and warrants, and acknowledges that the Purchaser is relying upon such representations and warranties in connection with the acquisition of the Purchased Assets, that, as at the Closing Date:

(a) the Vendor has been appointed by the Court as receiver of the assets, undertakings and properties of Balanced pursuant to the Appointment Order, a copy of which has been provided to the Purchaser;

(b) subject to the Appointment Order, the issuance of the Approval and Vesting Order and any further order made by the Court in the Receivership Proceedings, the Vendor has all necessary power and authority to enter into, execute and deliver this Agreement and all related documents and to carry out its obligations under this Agreement; and

(c) the Vendor is not a non-resident of Canada within the meaning of the ITA.

## ARTICLE 6
## REPRESENTATIONS AND WARRANTIES OF THE PURCHASER

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**6.1** **Purchaser' Representations and Warranties**.

(a) if the Purchaser is a corporation, partnership, unincorporated association or other entity, it has been duly incorporated, organized or formed, as the case may be, it is valid and subsisting under the laws of its jurisdiction of incorporation, organization or formation, as the case may be, and it has the legal capacity, power and authority to execute and deliver this Agreement and to perform its covenants and obligations hereunder and has obtained all necessary approvals in respect thereof, and upon acceptance by the Vendor, this Agreement will constitute a legal, valid and binding contract of the Purchaser in accordance with its terms;

(b) if the Purchaser is an individual, it is of the full age of majority in the jurisdiction in which this Agreement is executed and is legally competent to execute and deliver this Agreement and to perform its covenants and obligations hereunder, and upon

acceptance by the Vendor, this Agreement will constitute a legal, valid and binding contract of the Purchaser in accordance with its terms;

(c) the Purchaser is not a non-Canadian as defined in the *Investment Canada Act* (Canada) and that the completion of the within Transaction is not notifiable or reviewable under the said legislation; and

(d) the Purchaser is not a non-resident of Canada within the meaning of the ITA.

## ARTICLE 7
## LIMITATIONS ON REPRESENTATIONS AND WARRANTIES OF THE VENDOR

**7.1** **Limitations**. Except as set out herein, the Purchased Assets are being sold on an "as is, where is" basis as of the Closing and in their condition as of Closing with "all faults" and:

(a) neither the Vendor, its Affiliates, nor any of their respective officers, directors, employees or other representatives make, have made or shall be deemed to have made any other representation or warranty, express or implied, at law or in equity, in respect of the Purchased Assets, including but not limited to those with respect to title, encumbrances, description, fitness for purpose, merchantability, condition, assignability, collectability, quantity, outstanding amount, value or quality or in respect of any other matter or thing whatsoever concerning the Purchased Assets or the right of the Vendor to sell same and without limiting the generality of the foregoing, any and all conditions, warranties or representations expressed or implied pursuant to any sale of goods or similar legislation in any jurisdiction in Canada or the United States shall not apply hereto and shall be deemed to have been waived by the Purchaser to the maximum extent permitted by law; and

(b) neither the Vendor, its Affiliates, nor any of their respective officers, directors, employees or representatives will have or be subject to any liability or indemnification obligation to the Purchaser or to any other person resulting from the distribution to the Purchaser, its Affiliates or representatives of, or the Purchaser's use of, any information relating to the Purchased Assets, and any information, documents or material made available to the Purchaser, whether orally or in writing, in certain data rooms, management presentations, functional break-out discussions, responses to questions submitted on behalf of the Purchaser or in any other form in expectation of the Transaction. Any such other representation or warranty is hereby expressly disclaimed. The Purchaser warrants, covenants and expressly acknowledges that it has conducted its own independent inspection and investigation of the Purchased Assets and is satisfied with the Purchased Assets in all respects.

**7.2** **Indemnification Procedures for Third Party Claims.**

(a) In the case of claims made by a third party with respect to which indemnification is sought, the Vendor, its Affiliates, or any of their respective officers, directors, employees or representatives (each an "**Indemnified Party**") shall give prompt notice, and in any event within 10 days, to the other Party (the "**Indemnifying Party**") of any such claims made upon it including a description of such third party

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claim in reasonable detail including the sections of this Agreement which form the basis for such claim, copies of all material written evidence of such claim in the possession of the Indemnified Party and the actual or estimated amount of the damages that have been or will be sustained by an Indemnified Party, including reasonable supporting documentation therefor.

(b) The Indemnifying Party shall have the right, by notice to the Indemnified Party given not later than 30 days after receipt of notice described in Section 7.2(a) to assume the control of the defence, compromise or settlement of the claim, provided that such assumption shall, by its terms, be without cost to the Indemnified Party.

(c) Upon the assumption of control of any claim by the Indemnifying Party as set out in Section 7.2(b), the Indemnifying Party shall diligently proceed with the defence, compromise or settlement of the claim at its sole expense, including, if necessary, employment of counsel reasonably satisfactory to the Indemnified Party and, in connection therewith, the Indemnified Party shall co-operate fully, but at the expense of the Indemnifying Party with respect to any out-of-pocket expenses incurred, to make available to the Indemnifying Party all pertinent information and witnesses under the Indemnified Party's control, make such assignments and take such other steps as in the opinion of counsel for the Indemnifying Party are reasonably necessary to enable the Indemnifying Party to conduct such defence. The Indemnified Party shall also have the right to participate in the negotiation, settlement or defence of any claim at its own expense. The Indemnifying Party shall not, without the prior written consent of the Indemnified Party, settle, compromise or offer to settle or compromise any third-party claim if such settlement (i) does not include an unconditional written release by the claimant or plaintiff of the Indemnified Party from all liability in respect of such third-party claim or (ii) would result in (A) the imposition of a consent order, injunction or decree that would restrict the future activity or conduct of the Indemnified Party or any of its Affiliates or (B) a finding or admission of a violation of applicable laws, wrongdoing or violation of the rights of any Person by the Indemnified Party or any of its Affiliates.

(d) The final determination of any claim pursuant to this Section 7.2(b), including all related costs and expenses, shall be binding and conclusive upon the Parties as to the validity or invalidity, as the case may be of such claim against the Indemnifying Party.

(e) If the Indemnifying Party does not assume control of a claim as permitted in Section 7.2(b), the obligation of the Indemnifying Party to indemnify the Indemnified Party in respect of such claim shall terminate if the Indemnified Party settles such claim without the consent of the Indemnifying Party.

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**7.3** **General Indemnity**. The Purchaser shall be liable to the Indemnified Parties for and shall, in addition, indemnify the Indemnified Parties from and against, all losses, costs, claims, damages, expenses and liabilities suffered, sustained, paid or incurred by the Indemnified Parties which arise out of any matter or thing related to the Purchased Assets after the

Closing Date. The covenants and agreements to indemnify made by the Purchaser in this Section 7.2 shall survive Closing.

## ARTICLE 8
## COVENANTS

**8.1** **Vendor's Covenants**. Prior to the Time of Closing, the Vendor shall refrain from transferring, leasing, selling or otherwise disposing of any of the Purchased Assets.

## ARTICLE 9
## NOTICES

**9.1** **Notices**. Any notices or other communications required or given under this Agreement shall be in writing, shall be delivered in person or by facsimile and shall be deemed to have been given and received when delivered in person or when communicated by facsimile during normal business hours on a Business Day (and otherwise on the next Business Day):

if to the Vendor, addressed to:

**FTI CONSULTING CANADA INC.** in its capacity as receiver and manager of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc. and Balanced Energy Holdings Inc.
520 Fifth Avenue S.W.
Suite 1610
Calgary, AB T2P 3R7

Attn: Brett Wilson / Dustin Olver
Facsimile: 403-232-6116
Email: Brett.wilson@fticonsulting.com / dustin.olver@fticonsulting.com

with a copy to:

Osler, Hoskin & Harcourt LLP
Brookfield Place, Suite 2700
225 6 Ave SW, Calgary, AB T2P 1N2

Attention: Randal Van de Mosselaer
Facsimile: (403) 260-7024

if to the Purchaser, addressed to:

_____
_____
_____

Attention: _____
Facsimile: _____

with a copy to:

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_____
_____
_____

Attention: _____
Facsimile: _____

or at such other place or places or to such other person or persons as shall be designated in writing by a party to this Agreement in the manner herein provided.

## ARTICLE 10
## MISCELLANEOUS

**10.1** **Enurement**. This Agreement shall be binding upon and enure to the benefit of the parties hereto and their legal representatives, successors and permitted assigns.

**10.2** **Assignment**. The Purchaser shall not assign any right or interest in this Agreement without the Vendor's prior written consent, which consent may be withheld in the Vendor's sole and absolute discretion, provided that the Purchaser shall be entitled, upon giving notice to the Vendor at any time not less than two Business Days prior to the Closing Date, to assign all of their rights and obligations under this Agreement to any Affiliate of the Purchaser. Any such assignment will not release the Purchaser from any of their obligations or liabilities hereunder.

**10.3** **Severability**. In case any provision in this Agreement shall be prohibited, invalid, illegal or unenforceable in any jurisdiction, such provision shall be ineffective only to the extent of such prohibition, invalidity, illegality or unenforceability in such jurisdiction without affecting or impairing the validity, legality or enforceability of the remaining provisions hereof, and any such prohibition, invalidity, illegality or unenforceability shall not affect or impair such provision in any other jurisdiction.

**10.4** **Further Assurances**. Each of the parties hereto shall at the request and expense of the other party hereto so requesting execute and deliver such further or additional documents and instruments as may reasonably be considered necessary or desirable to properly reflect and carry out the true intent and meaning of this Agreement.

**10.5** **Survival**. In addition to the circumstances above where the survival of certain representations, warranties, covenants and agreements is expressly provided for, the representations, warranties, covenants and agreements made by the parties each to the other in or pursuant to this Agreement shall survive the Closing of the Transaction provided for herein.

**10.6** **Time of Essence**. Time shall be of the essence of this Agreement.

**10.7** **Waiver**. Failure by either party hereto to insist in any one or more instances upon the strict performance of any one of the covenants contained herein shall not be construed as a waiver or relinquishment of such covenant. No waiver by any party hereto of any such

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covenant shall be deemed to have been made unless expressed in writing and signed by the waiving party.

**10.8** **Amendment**. This Agreement may not be amended, modified or terminated except by an instrument in writing signed by the parties hereto.

**10.9** **Entire Agreement**. This Agreement and the agreements and other documents required to be delivered pursuant to this Agreement, constitute the entire agreement between the parties and set out all of the covenants, promises, warranties, representations, conditions and agreements between the parties in connection with the subject matter of this Agreement and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, pre-contractual or otherwise. There are no covenants, promises, warranties, representations, conditions, understandings or other agreements, whether oral or written, pre-contractual or otherwise, express, implied or collateral between the parties in connection with the subject matter of this Agreement except as specifically set forth in this Agreement and any document required to be delivered hereunder or thereunder.

***[Remainder of Page Intentionally Left Blank]***

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**10.10** **Counterparts and Facsimile**. This Agreement may be executed in counterparts, each of which when so executed shall be deemed to be an original and all counterparts together shall constitute one and the same instrument. A signed counterpart provided by way of facsimile transmission or by e-mail in PDF shall be as binding upon the parties as an originally signed counterpart.

**IN WITNESS WHEREOF** the parties hereto have caused this Asset Purchase Agreement to be executed and delivered by its duly authorized officer, to be effective as of the date first written above.

**FTI CONSULTING CANADA INC.**, in its capacity as receiver and manager of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc. and Balanced Energy Holdings Inc., and not in its personal or corporate capacity

Per: _____
Name:
Title:

_____
(***Insert name of Purchaser***)

Per: _____
Name:
Title:

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**SCHEDULE "A"**

**Purchased Assets**

(***To be inserted by Purchaser***.)

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**SCHEDULE "B"**

**General Conveyance**

**(see attached)**

Draft

# GENERAL CONVEYANCE

**THIS AGREEMENT** made the ___ day of _____, 2022.

BETWEEN:

**FTI CONSULTING CANADA INC.**, in its capacity as receiver and manager of Balanced Energy Oilfield Services Inc. ("**BCAN**"), Balanced Energy Oilfield Services (USA) Inc. ("**BUSA**") and Balanced Energy Holdings Inc. ("**BEH**", and collectively with BCAN and BUSA, "**Balanced**"), and not in its personal or corporate capacity (the "**Vendor**")

- and -

_____

_____

("**Purchaser**")

**WHEREAS** the Vendor and the Purchaser entered into an Asset Purchase Agreement made as of _____, 2022 providing, among other things, for the acquisition of the Purchased Assets by the Purchaser from the Vendor.

**NOW THEREFORE THIS AGREEMENT WITNESSES** that Vendor and Purchaser agree as follows:

**Definitions**

Unless otherwise defined in this General Conveyance, capitalized words when used in this General Conveyance have the meaning ascribed to them in the Asset Purchase Agreement.

**Conveyance**

Pursuant to and for the consideration provided for in the Asset Purchase Agreement, Vendor hereby sells, assigns, transfers, conveys and sets over to Purchaser the Purchased Assets (all of which are listed in Exhibit "A" hereto), and Purchaser hereby purchases and accepts the Purchased Assets, to have and to hold the same absolutely, together with all benefits and advantages to be derived therefrom, subject to the terms and conditions of the Asset Purchase Agreement.

**Effective Date**

The Vendor and the Purchaser agree that the effective date of this transaction shall be effective as the date first written above.

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**Subordinate Documents**

This General Conveyance is executed and delivered by the parties hereto pursuant to and for the purposes of the provisions of the Asset Purchase Agreement and the provisions of the Asset Purchase Agreement shall prevail and govern in the event of a conflict between the provisions of the Asset Purchase Agreement and this General Conveyance.

**Enurement**

This General Conveyance shall be binding upon and enure to the benefit of each of the parties hereto and their respective successors and permitted assigns.

**Further Assurances**

The Vendor and the Purchaser will each, from time to time and at all times hereafter, without further consideration, do such further acts and deliver all such further assurances, deeds and documents as shall be reasonably required in order to fully perform and carry out the terms of this General Conveyance.

**Merger**

Nothing contained in this General Conveyance shall in any way result in a merger of the terms and conditions of the Asset Purchase Agreement with the terms and conditions of this General Conveyance and the parties hereto specifically agree that all such terms and conditions of the Asset Purchase Agreement shall continue to apply to the within conveyance.

**Governing Law**

This General Conveyance shall, in all respects, be subject to, interpreted, construed and enforced in accordance with and under the laws of the Province of Alberta and the federal laws of Canada applicable therein and shall, in every regard, be treated as a contract made in the Province of Alberta.

**Counterpart Execution**

This General Conveyance may be executed in counterparts and delivered by one party hereto to the other by facsimile or other electronic means (including by portable document format "pdf"), each of which shall constitute an original and all of which taken together shall constitute one and the same instrument. If this is delivered by facsimile or other electronic means, the party thereto so delivering this General Conveyance shall within a reasonable time after such delivery, deliver an original executed copy to the other.

***[Remainder of Page Intentionally Left Blank]***

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**IN WITNESS WHEREOF** the parties have executed this General Conveyance as of the date first written above.

**FTI CONSULTING CANADA INC.**, in its capacity as receiver and manager of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc. and Balanced Energy Holdings Inc., and not in its personal or corporate capacity

Per: _____
Name:
Title:

_____
**(*Insert name of Purchaser*)**

Per: _____
Name:
Title:

Draft

**EXHIBIT "A"**

**LIST OF PURCHASED ASSETS**

(***To be inserted by Purchaser***.)

Draft

**SCHEDULE "B"**

**Receiver's SSP Certificate**

| | |
|---|---|
| COURT FILE NUMBER | 2201-02699 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | NATIONAL BANK OF CANADA |
| DEFENDANTS | BALANCED ENERGY OILFIELD SERVICES INC., BALANCED ENERGY OILFIELD SERVICES (USA) INC., BALANCED ENERGY HOLDINGS INC., MICHELLE THOMAS, NEIL SCHMEICHEL, DARREN MILLER, and CODY BELLAMY |
| DOCUMENT | **RECEIVER'S CERTIFICATE** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **OSLER, HOSKIN & HARCOURT LLP**<br>Barristers & Solicitors<br>Brookfield Place, Suite 2700<br>225 6 Ave SW<br>Calgary, AB T2P 1N2<br><br>Solicitors: Randal Van de Mosselaer / Emily Paplawski<br>Telephone: (403) 260-7060 / (403) 260-7071<br>Facsimile: (403) 260-7024<br>Email: RVandemosselaer@osler.com / EPaplawski@osler.com<br>File Number: 1230496 |

**RECITALS**

A. Pursuant to an Order of the Honourable Madam Justice A.D. Grosse of the Court of Queen's Bench of Alberta (the "**Court**"), dated March 7, 2022, FTI Consulting Canada Inc. was appointed receiver and manager (the "**Receiver**") of the undertaking, property and assets of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc. ("**BUSA**"), and Balanced Energy Holdings Inc. (the "**Debtors**").

B. Pursuant to an Order (Approval of Sales Solicitation Process, Stalking Horse Term Sheet and Receiver's Conduct and Activities) granted by the Honourable Mr. J.T. Neilson on March 30, 2022 (the "**Order**") the Court approved a binding term sheet between XDI Energy Solutions Inc. and the Receiver, dated March 21, 2022 (as amended, the "**Stalking**

**Horse Term Sheet**"), and a sales solicitation process. This Receiver's Certificate is the certificate referred to in paragraph 6 of the Order.

C. Capitalized terms not otherwise defined herein have the meanings given to those terms in the Order.

**THE RECEIVER CERTIFIES THE FOLLOWING:**

1. No Superior Offers were received by the Receiver in the SSP or, in the alternative, the Stalking Horse Bidder is the Successful Bidder in the SSP and, as a result, the Receiver is proceedings to close the transactions detailed in the Stalking Horse Term Sheet.

2. This Certificate was delivered by the Receiver at _____ on _____, 2022.

FTI Consulting Canada Inc., in its capacity as Receiver of the undertakings, property and assets of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc., and Balanced Energy Holdings Inc., and not in its personal or corporate capacity.

_____

Name:

Title:

# TAB 2

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
JAN 25 2024
ENTERED

**No. S-240259**
**Vancouver Registry**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF BLACK PRESS LTD., 311773 B.C. LTD., AND THOSE ENTITIES LISTED IN SCHEDULE "A"

PETITIONERS

**O R D E R MADE AFTER APPLICATION**

**(SISP APPROVAL ORDER)**

| | | |
|---|---|---|
| BEFORE THE HONOURABLE JUSTICE | ) ) ) | January 25, 2024 |

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 25th day of January, 2024 (the "**Order Date**"); AND ON HEARING Vicki Tickle and Stephanie Fernandes, counsel for the Petitioners and the non-petitioner affiliates of the Petitioners listed in Schedule "B" hereto (the "**Non-Petitioner Stay Parties**" and collectively with the Petitioners, the "**Black Press Entities**"), and those other counsel listed on Schedule "C" hereto; AND UPON READING the material filed, including the First Affidavit of Christopher Hargreaves made January 12, 2024 (the "**First Hargreaves Affidavit**"), the First Report of KSV Restructuring Inc. in its capacity as monitor of the Petitioners (the "**Monitor**") dated January 23, 2024 (the "**First Report**"); AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended (the "**CCAA**"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

**THIS COURT ORDERS AND DECLARES THAT:**

**SERVICE AND DEFINITIONS**

1. The time for service of this Notice of Application and supporting materials is hereby abridged such that the Notice of Application is properly returnable today.

2. Capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the Sale and Investment Solicitation Process in respect of the business and assets of the Black Press Entities, in the form attached hereto as Schedule "D" (the "**SISP**"), the Amended and Restated Initial Order of this Court dated January 25, 2024 (the "**ARIO**"), or the First Hargreaves Affidavit, as applicable.

**SALE AND INVESTMENT SOLICITATION PROCESS**

3. The SISP is hereby approved and the Petitioners and the Monitor are hereby authorized and directed to implement the SISP pursuant to the terms thereof. The Petitioners and the Monitor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder, subject to prior approval of the Court being obtained before completion of any transaction(s) under the SISP.

4. The Petitioners and the Monitor and their respective affiliates, partners, directors, officers, employees, legal advisors, representatives, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of the Petitioners or the Monitor, as applicable, in performing their obligations under the SISP, as determined by this Court in a final order that is not subject to appeal or other review.

5. In conducting the SISP, the Monitor shall have all of the benefits and protections granted to it under the CCAA, the ARIO and any other Order of this Court in the within proceeding.

**STALKING HORSE PURCHASE AGREEMENT**

6. The Petitioners are hereby authorized and empowered to enter into a definitive share purchase and subscription agreement with the Noteholders and CNL or one or more entities to be formed by the Noteholders and CNL (as applicable, the "**Stalking Horse Purchaser**"), which shall be substantially on the terms set out in the Stalking Horse Term Sheet attached as Appendix "A" to the Amended and Restated Transaction Support Agreement attached as Appendix "B" to the First Report and satisfactory to the Monitor (the "**Stalking Horse Transaction Agreement**"), such minor amendments as may be acceptable to each of the parties thereto, with the approval of the Monitor; provided that, nothing herein approves the sale and the vesting of any Property to the Stalking Horse Purchaser (or any of its designees) pursuant to the Stalking Horse Transaction Agreement and that the approval of any sale and vesting of any such Property shall be considered by this Court on a subsequent application made to this Court if the transaction set out in the Stalking Horse Transaction Agreement is the Successful Bid pursuant to the SISP.

7. As soon as reasonably practicable following the Petitioners and the Stalking Horse Purchaser executing the Stalking Horse Transaction Agreement, and in any event by no later than seven (7) Business Days prior to the Qualified Bid Deadline under the SISP, the Monitor shall post a copy thereof on its website, and the Petitioners shall: (a) serve a copy thereof on the Service List; and (b) provide a copy thereof to each SISP Participant (as hereinafter defined), excluding from the public record any confidential information that the Petitioners and the Stalking Horse Purchaser, with the consent of the Monitor, agree should be redacted.

**BID PROTECTIONS**

8. The Bid Protections are hereby approved and, subject to the entry of the Stalking Horse Transaction Agreement, the Petitioners are hereby authorized and directed to pay the Bid Protections to the Stalking Horse Purchaser (or to such other person as it may direct) in the manner and circumstances described in the Stalking Horse Transaction Agreement.

9. The Stalking Horse Purchaser shall be entitled to the benefit of and is hereby granted a charge (the "**Bid Protections Charge**") on the Property, which charge shall not exceed $1,750,000, as security for payment of the Bid Protections in the manner and circumstances described in the Stalking Horse Transaction Agreement.

10. The filing, registration or perfection of the Bid Protections Charge shall not be required, and that the Bid Protections Charge shall be valid and enforceable for all purposes, including against any right, title or interest filed, registered, recorded or perfected subsequent to the Bid Protections Charge, notwithstanding any such failure to file, register, record or perfect.

11. The Bid Protections Charge shall constitute a charge on the Property and the Bid Protections Charge shall rank in priority to all other Encumbrances in favour of any Person notwithstanding the order of perfection or attachment, other than the Charges.

12. Except for the Charges or as may be approved by this Court on notice to parties in interest, the Petitioners shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Bid Protections Charge, unless the Petitioners also obtain the prior written consent of the Monitor and the Stalking Horse Purchaser.

13. The Bid Protections Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Stalking Horse Purchaser in respect of the Bid Protections Charge shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings and the

declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Petitioners, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Bid Protections Charge nor the execution, delivery, perfection, registration or performance of the Stalking Horse Transaction Agreement shall create or be deemed to constitute a breach by any of the Petitioners of any Agreement to which any of the Petitioners is a party; and

(b) the payments made by the Petitioners pursuant to this Order, the Stalking Horse Transaction Agreement and the granting of the Bid Protections Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

14. The Bid Protections Charge created by this Order over leases of real property shall only be a charge in the applicable Petitioner's interest in such real property lease.

15. The Stalking Horse Purchaser, with respect to the Bid Protections Charge only, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the CCAA, or any proposal filed by the Petitioners under the BIA.

**PIPEDA**

16. Pursuant to section 18(10)(o) of the *Personal Information Protection Act* (British Columbia), and any similar legislation in any other applicable jurisdictions, the Petitioners or the Monitor and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants that are party to a non-disclosure agreement with the Petitioners (each, a "**SISP Participant**") and their respective advisors personal information of identifiable individuals, but only to the extent required to negotiate or attempt to complete a transaction pursuant to the SISP (a "**Transaction**"). Each SISP Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to the SISP Participant's evaluation for the purpose of effecting a Transaction, and, if a SISP Participant does not complete a Transaction, shall return all such information to the Petitioners or the Monitor, or, in the alternative, destroy all such information and provide confirmation of its destruction if requested by the Petitioners or the Monitor.

**GENERAL**

17. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body, wherever located, to give effect to this Order and to assist the Petitioners, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners, the Foreign Representative and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.

18. This Order and all of its provisions are effective as of 12:01 a.m. local Vancouver time on the Order Date.

19. Endorsement of this Order by counsel appearing on this application is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Vicki Tickle
Lawyer for the Petitioners

BY THE COURT

REGISTRAR

**SCHEDULE "A"**

**Petitioners**

**A. Canadian Petitioners**

Black Press Ltd.

311773 B.C. Ltd.

Black Press Group Ltd.

0922015 B.C. Ltd.

Central Web Offset Ltd.

**B. US Petitioners**

Sound Publishing Holding, Inc.

Sound Publishing Properties, Inc.

Sound Publishing, Inc.

Oahu Publications, Inc.

The Beacon Journal Publishing Company

WWA (BPH) Publications, Inc.

San Francisco Print Media Co.

## SCHEDULE "B"

## Non-Petitioner Stay Parties

Black Press (Barbados) Ltd.

Whidbey Press (Barbados) Inc.

Black Press Delaware LLC

Black Press Group Oregon LLC

## SCHEDULE "C"

## LIST OF COUNSEL

| Name of Counsel | Party Represented |
|---|---|
| Mary Buttery, KC | KSV RESTRUCTURING INC., the COURT-APPOINTED MONITOR |
| DAVID GRUBER + MICHAEL SHAKRA | CANSO INVESTMENT COUNSEL LTD. |
| SCOTT STEPHENS + HEATHER FRYDENLUND | VANCOUVER CITY SAVINGS CREDIT UNION + COAST CAPITAL SAVINGS FEDERAL CREDIT UNION |
| EAMONN WATSON | SERVUS CREDIT UNION LTD. |
| RYAN ~~LAIMY~~ LAITY | THE UNITED STATES OF AMERICA |

## SCHEDULE "D"
## SISP

See attached.

# Sale and Investment Solicitation Process

1. On January 15, 2024, the Supreme Court of British Columbia, Vancouver Registry (the "**CCAA Court**") issued an Order (the "**Initial Order**") granting certain relief to Black Press Ltd., 311773 B.C. Ltd., Black Press Group Ltd., 0922015 B.C. Ltd., Central Web Offset Ltd., Sound Publishing Holding, Inc., Sound Publishing Properties, Inc., Sound Publishing, Inc., Oahu Publications, Inc., The Beacon Journal Publishing Company, WWA (BPH) Publications, Inc., San Francisco Print Media Co. (collectively, the "**Petitioners**" and together with the Non-Petitioner Stay Parties (the "**Black Press Entities**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**" and the Petitioners proceedings thereunder, the "**CCAA Proceedings**").

2. Pursuant to the Initial Order, KSV Restructuring Inc. was appointed as monitor (in such capacity, the "**Monitor**") of the Petitioners in the CCAA Proceedings.

3. Pursuant to proceedings commenced in the United States Bankruptcy Court for the District of Delaware (the "**US Bankruptcy Court**") under Chapter 15, Title 11, of the United States Code, the Petitioners obtained, among other things, recognition of the CCAA Proceedings.

4. On January 25, 2024, the CCAA Court granted:

   (i) an Order amending and restating the Initial Order (the "**ARIO**"), and

   (ii) an Order (the "**SISP Approval Order**") that, among other things, authorized: (a) the Petitioners to implement a sale and investment solicitation process in respect of the Black Press Entities (the "**SISP**") in accordance with the terms hereof; (b) the Black Press Entities to negotiate and finalize a definitive Stalking Horse Transaction Agreement (the "**Stalking Horse Bid**") with the Stalking Horse Purchaser; (c) approved the Bid Protections subject to entry of the Stalking Horse Transaction Agreement; and (d) granted the Bid Protections Charge.

5. Capitalized terms that are not otherwise defined herein have the meanings ascribed to them in the ARIO or the SISP Approval Order, as applicable. Copies of the ARIO and the SISP Approval Order can be found at www.ksvadvisory.com/experience/case/black-press (the "**Monitor's Website**").

6. This SISP sets out the manner in which: (a) binding bids for executable transactions involving the business and/or assets of, or the equity interests in, the Black Press Entities will be solicited from interested parties; (b) any such bids received will be addressed; (c) any Successful Bid (as defined below) will be selected; and (d) CCAA Court approval of any Successful Bid will be sought.

7. The SISP shall be conducted by the Petitioners with the assistance and under the oversight of the Monitor and the Monitor shall be entitled to receive all information in relation to the SISP.

8. Parties who wish to have their bids considered must participate in the SISP.

9. The Black Press Entities and the Monitor, in accordance with section 10 below, shall:

a) disseminate marketing materials and a process letter to potentially interested parties identified by the Black Press Entities and the Monitor;

b) solicit interest from parties with a view to such interested parties entering into non-disclosure agreements (each an "**NDA**") (parties shall only obtain access to the virtual data room and be permitted to participate in the SISP if they execute an NDA, in form and substance satisfactory to the Black Press Entities; provided that those parties that have already executed a NDA with the Black Press Entities shall not be required to execute a further agreement unless such agreement has expired or will expire during the SISP);

c) provide applicable parties who have entered into an NDA with the Black Press Entities access to a virtual data room containing, among other things, diligence information; and

d) request that such parties submit a binding offer meeting at least the requirements set forth in Section 11 below, as determined by the Black Press Entities and the Monitor (each a "**Qualified Bid**"), by the Qualified Bid Deadline (as defined below).

10. The SISP shall be conducted subject to the terms hereof and the following key milestones, which milestones may be extended by the Black Press Entities, with the consent of the Monitor and the Stalking Horse Purchaser:[1]

a) the CCAA Court issues the SISP Approval Order by no later than January 25, 2024;

b) the Black Press Entities and the Monitor commence the solicitation process by no later than January 25, 2024, it being understood that the Black Press Entities and/or the Monitor shall be at liberty to contact, provide marketing materials and commence discussions with interested parties prior to such date as they consider appropriate;

c) deadline to submit a Qualified Bid – 5:00 p.m. Pacific Time on February 16, 2024 (the "**Qualified Bid Deadline**");

[1] To the extent any dates fall on a non-business day in British Columbia, they shall be deemed to be the first business day thereafter.

d) deadline to determine whether a bid is a Qualified Bid and, if applicable, to notify those parties who submitted a Qualified Bid of the Auction (as defined below) – by no later than 5:00 p.m. Pacific Time on February 21, 2024;

e) the Black Press Entities and the Monitor to hold an Auction (if applicable) and select the successful bid(s) (the "**Successful Bid**") – by no later than 10:00 a.m. Pacific Time on February 26, 2024 (the "**Definitive Agreement Deadline**");

f) Transaction Order (as defined below) hearing:

- (if there is no Auction) – by no later than March 1, 2024 subject to CCAA Court availability; or

- (if there is an Auction) – by no later than March 6, 2024, subject to CCAA Court availability; and

g) closing of the Successful Bid as soon thereafter as possible and, in any event, by no later than 5:00 p.m. Pacific Time on March 15, 2024 (the "**Outside Date**").

11. In order to constitute a Qualified Bid, a bid must comply with the following:

a) it provides for aggregate consideration, payable in cash in full on closing in an amount equal to or greater than (i) all outstanding obligations under the Senior Secured Notes (as defined in the First Hargreaves Affidavit), (ii) all outstanding obligations under the DIP Term Sheet, (iii) any obligations in priority to amounts owing under the DIP Term Sheet, including any Charges, (iv) the amount of $500,000 to fund any professional fees incurred in connection with the wind-up of the Petitioners' CCAA proceedings and any further proceedings or wind-up costs; and (v) the amount of $1,750,000 to satisfy the Bid Protections (the "**Consideration Value**"), and provides a detailed sources schedule that identifies, with specificity, the composition of the Consideration Value and any assumptions that could reduce the net consideration payable including details of any material liabilities that are being assumed or being excluded;

b) it contemplates closing of the proposed transaction by not later than the Outside Date;

c) it contains:

i. duly executed binding definitive transaction document(s);

ii. the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, and the name(s) of each of its equityholder(s);

iii. a redline to the Stalking Horse Transaction Agreement posted in the virtual data room;

iv. evidence of authorization and approval from the bidder's board of directors (or equivalent governing body) and, if necessary to complete the transaction, the bidder's equityholder(s);

v. disclosure of any past or current connections or agreements with the Black Press Entities or any of their affiliates, any known, potential, prospective bidder, or any current or former officer, manager, director, member or known current or former equity security holder of any of the Black Press Entities or any of their affiliates;

vi. such other information reasonably requested by the Black Press Entities or the Monitor;

vii. indicates whether any Transaction Order (as defined below) approving the bid will require recognition from the US Bankruptcy Court;

d) it includes a letter stating that the bid is submitted in good faith, is binding and is irrevocable until closing of the Successful Bid; provided, that if such bid is not selected as the Successful Bid or as the next-highest or otherwise best Qualified Bid as compared to the Successful Bid (such bid, the "**Back-Up Bid**") it shall only remain irrevocable until selection of the Successful Bid;

e) it provides that the bid will serve as a Back-Up Bid if it is not selected as the Successful Bid and if selected as the Back-Up Bid it will remain irrevocable until the earlier of: (i) closing of the Successful Bid; or (ii) closing of the Back-Up Bid;

f) it provides written evidence of a bidder's ability to fully fund and consummate the transaction (and satisfy its obligations under the transaction documents, including binding equity/debt commitment letters and/or guarantees covering the full value of all cash consideration and the additional items (in scope and amount) covered by the guarantees provided by affiliates of the bidder in connection with the Successful Bid;

g) it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;

h) it is not conditional upon:

i. approval from the bidder's board of directors (or equivalent governing body) or equityholder(s);

ii. the outcome of any unperformed due diligence by the bidder; or

iii. the bidder obtaining financing;

i) it includes acknowledgments and representations that the bidder: (i) has had an opportunity to conduct any and all required due diligence prior to making its bid, and has relied solely upon its own independent review, investigation and inspection in making its bid; (ii) is not relying upon any written or oral statements, representations, promises, warranties, conditions, or guaranties whatsoever, whether express or implied (by operation of law or otherwise), made by any person or party, including the Black Press Entities, the Monitor and their respective employees, officers, directors, agents, advisors and other representatives, regarding the proposed transactions, this SISP, or any information (or the

completeness of any information) provided in connection therewith, except as expressly stated in the proposed transaction documents; (iii) is making its bid on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Black Press Entities, the Monitor or any of their respective employees, officers, directors, agents, advisors and other representatives, except to the extent set forth in the proposed transactions documents; (iv) is bound by this SISP and the SISP Approval Order; and (v) is subject to the exclusive jurisdiction of the CCAA Court with respect to any disputes or other controversies arising under or in connection with the SISP or its bid;

j) it specifies any regulatory or other third-party approvals the party anticipates would be required to complete the transaction (including the anticipated timing necessary to obtain such approvals);

k) it includes full details of the bidder's intended treatment of the Petitioners' employees, customers, contracts, collective bargaining agreements, pension and benefit obligations and vendors under the proposed bid;

l) it is accompanied by a cash deposit (the "**Deposit**") paid by wire transfer of immediately available funds in an amount equal to at least 10% of the Consideration Value, which Deposit shall be retained by the Monitor in an interest-bearing trust account in accordance with the terms hereof;

m) it includes a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and

n) it is received by the Black Press Entities, with a copy the Monitor, by the Qualified Bid Deadline at the email addresses specified on Schedule "A" hereto.

12. The Black Press Entities, with the consent of the Monitor, may in their sole discretion waive compliance with any one or more of the requirements specified in Section 11 above and deem a non-compliant bid to be a Qualified Bid, provided that requirements 11(a), 11(b) and 11(l) may not be waived without the consent of the Stalking Horse Bidder.

13. Notwithstanding the requirements specified in Section 11 above, the transaction contemplated by the Stalking Horse Transaction Agreement (the "**Stalking Horse Bid**"), is deemed to be a Qualified Bid, provided that, for greater certainty, no Deposit shall be required to be submitted in connection with the Stalking Horse Bid.

14. If one or more Qualified Bids (other than the Stalking Horse Bid) has been received by the Black Press Entities on or before the Qualified Bid Deadline, the Black Press Entities shall proceed with an auction process to determine the successful bid(s) (the "**Auction**"), which Auction shall be administered in accordance with **Schedule "B"** hereto. The successful bid(s) selected pursuant to the Auction shall constitute the "**Successful Bid(s)**". Forthwith upon determining to proceed with an Auction, the Black Press Entities shall provide written notice to each party that submitted a Qualified Bid (including the Stalking Horse Bid) of which Qualified Bid is the highest or otherwise best bid (as determined by the Black Press Entities, in consultation with the Monitor) along with a copy of such bid.

15. If by the Qualified Bid Deadline, no Qualified Bid (other than the Stalking Horse Bid) has been received by the Black Press Entities, then the Stalking Horse Bid shall be deemed the Successful Bid and shall be consummated in accordance with and subject to the terms of the Stalking Horse Transaction Agreement.

16. Following selection of a Successful Bid, if any, the Black Press Entities, with the assistance of its advisors, and in consultation with the Monitor, shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bid in accordance with the milestones set out in Section 10. Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by the Black Press Entities in consultation with the Monitor, the Petitioners shall apply to the CCAA Court for an order or orders approving such Successful Bid and/or the mechanics to authorize the Petitioners to complete the transactions contemplated thereby, as applicable, and authorizing the Petitioners to: (a) enter into any and all necessary agreements and related documentation with respect to the Successful Bid; (b) undertake such other actions as may be necessary to give effect to such Successful Bid; and (c) implement the transaction(s) contemplated in such Successful Bid (each, a "**Transaction Order**"). If the Successful Bid is not consummated in accordance with its terms, the Black Press Entities shall be authorized, but not required, to elect that the Back-Up Bid (if any) is the Successful Bid.

17. The highest Qualified Bid may not necessarily be accepted by the Black Press Entities. The Black Press Entities, with the written consent of the Monitor, reserve the right not to accept any Qualified Bid or to otherwise terminate the SISP. The Black Press Entities, with the written consent of the Monitor, reserve the right to deal with one or more Qualified Bidders to the exclusion of others, to accept a Qualified Bid for different parts of the Black Press Entities business and assets or to accept multiple Qualified Bids and enter into definitive agreements in respect of all such bids, provide that the aggregate of such Qualified Bids satisfies the requirements of Section 11(a) and (b).

18. If a Successful Bid is selected and a Transaction Order authorizing the consummation of the transaction contemplated thereunder is granted by the Court, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Qualified Bid that is not selected as a Successful Bid will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten (10) business days) after the date upon which the Successful Bid is approved pursuant to a Transaction Order or such earlier date as may be determined by the Black Press Entities, in consultation with the Monitor; provided, the Deposit in respect of the Back-Up Bid shall not be returned to the applicable bidder until the closing of the Successful Bid.

19. The Black Press Entities shall be permitted, in their discretion, to provide general updates and information in respect of the SISP to legal counsel to any creditor (each a "**Creditor**") on a confidential basis, upon: (a) irrevocable confirmation in writing from such counsel that the applicable Creditor will not submit any bid in the SISP; and (b) counsel to such Creditor entering into confidentiality arrangements with the Black Press Entities, in form and substance satisfactory to the Black Press Entities and the Monitor.

20. The Interim Lender shall only be entitled to the consultation rights specified herein in its favour and confidential updates and information from the Black Press Entities and the

Monitor in respect of the SISP, including copies of any Qualified Bids, upon the Interim Lender (in its capacity as Stalking Horse Bidder) irrevocably confirming in writing to the Petitioners and the Monitor that it will not submit any bid in the SISP except for the Stalking Horse Agreement and will not participate in the Auction.

21. Any amendments to this SISP may only be made by the Black Press Entities with the written consent of the Monitor and the Interim Lender or by further order of the court.

## SCHEDULE "A": E-MAIL ADDRESSES FOR DELIVERY OF BIDS

To the counsel for the Black Press Entities:

vtickle@cassels.com; jenns@cassels.com; rjacobs@cassels.com; jbellissimo@cassels.com; jbornstein@cassels.com

and with a copy to the Monitor:

ngoldstein@ksvadvisory.com; jknight@ksvadvisory.com; ebrenner@ksvadvisory.com

## SCHEDULE "B": AUCTION PROCEDURES

1. **Auction.** If the Black Press Entities receive at least one Qualified Bid (other than the Stalking Horse Bid), the Black Press Entities will conduct and administer the Auction in accordance with the terms of the SISP. Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.

2. **Participation.** Only parties that provided a Qualified Bid by the Qualified Bid Deadline, including, for greater certainty, the Stalking Horse Bid (collectively, the "**Qualified Parties**" and each a "**Qualified Party**"), shall be eligible to participate in the Auction. No later than 5:00 p.m. Pacific Time on the day prior to the Auction, each Qualified Party must inform the Black Press Entities and the Monitor in writing whether it intends to participate in the Auction. The Black Press Entities will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party (including the Stalking Horse Purchaser) provides such expression of intent, the highest or otherwise best Qualified Bid as determined by the Black Press Entities, in consultation with the Monitor, shall be designated as the Successful Bid (as defined below).

3. **Auction Procedures.** The Auction shall be governed by the following procedures:

   a. **Attendance.** Only the Black Press Entities, the Qualified Parties and the Monitor, and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any Overbids (as defined below) at the Auction;

   b. **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (a) it has not engaged in any collusion with respect to the Auction and the bid process; and (b) its bid is a good-faith *bona fide* offer, it is irrevocable and it intends to consummate the proposed transaction if selected as the Successful Party (as defined below);

   c. **Minimum Overbid and Back-Up Bid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by the Black Press Entities, in consultation with the Monitor (the "**Initial Bid**"), and any bid made at the Auction by a Qualified Party subsequent to the Black Press Entities' announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional cash increments of $100,000, and all such Overbids shall be irrevocable until closing of the Successful Bid; provided, that if such Overbid is not selected as the Successful Bid or as the Back-Up Bid (if any) it shall only remain irrevocable until selection of the Successful Bid;

   d. **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video-conference, on an open basis, and all Qualified Parties will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each

subsequent Qualified Bid will be fully disclosed to all other Qualified Parties throughout the entire Auction; provided, however, that the Black Press Entities, in their discretion, may establish separate video conference rooms to permit interim discussions among the Black Press Entities, the Monitor and individual Qualified Parties with the understanding that all formal bids will be delivered in one group video conference, on an open basis;

e. **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit an Overbid with full knowledge and confirmation of the then-existing highest or otherwise best bid and no Qualified Party submits an Overbid; and

f. **No Post-Auction Bids**. No bids will be considered for any purpose after the Successful Bid has been designated, and therefore the Auction has concluded.

## Selection of Successful Bid

4. **Selection.** During the Auction, the Black Press Entities, in consultation with the Monitor, will: (a) review each subsequent Qualified Bid, considering the factors set out in Section 11 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in (i) above, (iii) the likelihood of the Qualified Party's ability to close a transaction by not later than the Outside Date (including factors such as: the transaction structure and execution risk; conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to the Black Press Entities and their stakeholders and (vi) any other factors the directors or officers of the Black Press Entities may, consistent with their fiduciary duties, reasonably deem relevant; and (b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").

5. **Acknowledgement.** The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by the Black Press Entities in their sole discretion, subject to the milestones set forth in Section 10 of the SISP.

# TAB 3

**COURT FILE NO.: 09-8482-00CL**
**DATE: 20091218**

2009 CanLII 72333 (ON SC)

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

**RE:** **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 BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC.**

**APPLICANTS**

**BEFORE:** **MORAWETZ J.**

**COUNSEL:** **Jay Swartz and Jim Bunting, for the Applicants**

**G. Moffat, for Deloitte & Touche Inc., Monitor**

**Joseph Bellissimo, for Roynat Capital Inc.**

**Peter J. Osborne, for R. N. Singh and Purchaser**

**Edmond Lamek, for the Toronto-Dominion Bank**

**D. Dowdall, for Noteholders**

**D. Ullmann, for Procom Consultants Group Inc.**

**HEARD & DECIDED:** **DECEMBER 11, 2009**

## E N D O R S E M E N T

[1] At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

[2] The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

[3] The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

[4] The Monitor recommends that the motion be granted.

[5] The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

[6] Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

[7] Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

[8] The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

[9] Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

[10] The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

[11] It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

[12] Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

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[13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp*. [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(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?

(d) Is there a better viable alternative?

[14] The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

[15] Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

[16] Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

[17] I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[18] In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

[19] In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

[20] With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue

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has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

[21] For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

[22] For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

[23] The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

[24] Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

[25] An order shall issue to give effect to the foregoing.

**MORAWETZ J.**

**DECIDED: December 11, 2009**

**REASONS: December 18, 2009**

2009 CanLII 72333 (ON SC)

# TAB 4

# SUPERIOR COURT OF JUSTICE
# COMMERCIAL LIST

# ENDORSEMENT

**COURT FILE NO.:**

**DATE: February 28, 2024**

**NO. ON LIST: 1 (4:30pm)**

**TITLE OF PROCEEDING:**

**IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP., AND FINAL BELL CORP.**

**BEFORE: JUSTICE OSBORNE**

## PARTICIPANT INFORMATION

**For Plaintiff, Applicant:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| ZWEIG, SEAN<br>SHAKRA, MIKE<br>FROH, ANDREW<br>ERNST, JAMIE | BZAM LTD.,<br><br>BZAM HOLDINGS INC.,<br><br>BZAM MANAGEMENT INC.,<br><br>BZAM CANNABIS CORP.,<br><br>FOLIUM LIFE SCIENCE INC.,<br><br>102172093 SASKATCHEWAN LTD.,<br><br>THE GREEN ORGANIC DUTCHMAN LTD.,<br><br>MEDICAN ORGANIC INC.,<br>HIGH ROAD HOLDING CORP.<br><br>FINAL BELL CORP. | zweigs@bennettjones.com<br>shakram@bennettjones.com<br>froha@bennettjones.com<br>ernstj@bennettjones.com |

**For Defendant, Respondent:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| CHAITON, HARVEY | STONE PINE CAPITAL | Harvey@chaitons.com |
| BELLISSIMO, JOSEPH<br>LEVINE, NATALIE | CORTLAND CREDIT LENDING CORPORATION | jbellissimo@cassels.com<br>nlevine@cassels.com |
| | | |
| | | |

**For Other, Self-Represented:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| | | |
| | | |
| YANG, PHILIP<br>KONYUKHOVA, MARIA<br>ROSENBERG, JEFF<br>HAMIDI, KAMRAN | FTI AS PROPOSED MONITOR | pyang@stikeman.com<br>mkonyukhova@stikeman.com<br>Jeffrey.rosenberg@fticonsulting.com<br>Kamran.hamidi@fticonsulting.com |

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**ENDORSEMENT OF JUSTICE OSBORNE:**

1. This is an Application for relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA") by BZAM Ltd. ("BZAM"), BZAM Holdings Inc., BZAM Management Inc., BZAM Cannabis Corp., Folium Life Science Inc., 102172093 Saskatchewan Ltd., The Green Organic Dutchman Ltd. ("TGOD"), Medican Organic Inc. , High Road Holding Corp., and Final Bell Corp. (collectively, the "Applicants" or the "Companies").

2. Following the hearing, I granted the initial order with reasons to follow. These are those reasons.

3. In particular, the Applicants seek:

    a. a declaration that they are companies to which the CCAA applies;

    b. the appointment of FTI Consulting Canada Inc. ("FTI") as Monitor;

    c. the approval for TGOD to borrow up to a principal amount of $2,400,000 by way of a debtor-in-possession ("DIP") credit facility (the "DIP Loan") to finance critical working capital requirements for the Applicants over the next 10 days;

    d. a stay in effect for an initial period of not more than 10 days;

    e. the extension of the benefit of the stay to the Non-Applicant Stay Parties (as defined in the materials) and their respective directors and officers;

    f. relief from certain securities reporting obligations until further order of this Court; and

g. approval of the Administration Charge, the DIP Lender's Charge, the Edmonton Property Charge and the Directors' Charge (each as defined in the motion materials) in the priorities as set out in the motion materials.

4. BZAM is the ultimate parent company to several entities in the cannabis industry in Canada (collectively, the "Company"). It is a reporting issuer listed on the Canadian Securities Exchange, and its shares trade in the United States on the OTCQX.

5. The Company engages in the production, cultivation, processing and distribution of cannabis and cannabis related products.

6. The Applicants are insolvent. One of their cannabis licences is set to expire imminently. Absent protection under the CCAA, as well as access to the proposed DIP financing, the Applicants lack sufficient cash to meet their obligations as they come due, their liabilities exceed the value of their assets, and they will be forced to immediately cease operations.

7. The Applicants seek protection from their creditors while they continue as a going concern to allow time to explore various restructuring options and possibilities for the benefit of stakeholders. Those options will likely include, it is submitted, a Court-supervised sale and investor solicitation process ("SISP").

8. The relief sought by the Applicants today is fully supported by the senior secured creditor, the subordinate creditor, and is recommended by the Proposed Monitor. The Applicants submit that it is also limited to what is reasonably necessary to allow them to maintain the status quo and continue operations during the initial 10 day stay of proceedings.

9. With this context in mind, the issues on this Application are:

    a. does the Court have jurisdiction to grant the relief requested under the CCAA and should a stay of proceedings be granted?

    b. should the Court approve the DIP Loan?

    c. should FTI be appointed as Monitor?

    d. should the benefit of the stay be extended to the Non-Applicant Stay Parties?

    e. should relief from the securities reporting obligation be granted? and

    f. should the Charges be approved, and approved in the proposed priority?

**Jurisdiction**

10. The Applicants rely on the Affidavit of Matthew Milich sworn February 28, 2024 together with the exhibits thereto, and the Pre-filing Report of the Proposed Monitor dated February 28, 2024. Defined terms in this Endorsement have the meaning given to them in the Application materials unless otherwise indicated.

11. Each of the Applicants is incorporated under Canadian corporate statute. All of the non-BZAM Applicants are wholly-owned, directly or indirectly, by BZAM except for Folium Life and BZAM Cannabis, in respect of which BZAM Holdings is the majority shareholder as to 80% and 80.3%, respectively.

12. Five of the Applicants are licenced with Health Canada and operate cannabis facilities in Ontario, Alberta and British Columbia. 102 Saskatchewan leases a retail store in Saskatchewan.

13. The majority of the Company's business is conducted out of Ontario. Two cannabis facilities of the Applicants, including its largest facility, are located in Ontario and approximately 256 of the 441 employees of the Applicants are employed in Ontario.

14. The Company's senior secured creditor, Cortland Credit Lending Corp. ("Cortland") is also headquartered in Toronto.

15. The majority of BZAM's directors reside in Ontario, and its Chief Financial Officer and Chief Executive Officer divide their time between the Company's offices in Ontario and British Columbia.

16. The Non-Applicant Stay Parties include four directly or indirectly wholly-owned subsidiaries of BZAM: 9430-6347 Québec Inc. ("943 Québec), a company incorporated under the QBCA; (ii) The Green Organic Beverage Corp. ("Green Organic"), a company based in Delaware; (iii) TGOD Europe B.V. ("TGOD Europe"), a company based in the Netherlands; and (iv) The Green Organic Dutchman Germany GmbH ("TGOD Germany"), a company based in Germany.

17. 943 Québec is a licensed entity with Health Canada operating out of a leased facility in Québec.

18. The evidence satisfies me that the Applicants are unable to meet their obligations as they become due. They have accrued payables in the ordinary course of business that they cannot meet and are unable to pay amounts owed to secured parties.

19. As at January 1, 2024, the Company had total consolidated assets with a book value of approximately $95,711,080 and liabilities with a book value of approximately $112,873,839. The Applicants anticipate having on hand only approximately $1,848,000 in cash at the close of business today, with the result that they face an urgent liquidity crisis.

20. Secured financing has been provided by Cortland pursuant to a credit agreement entered into on March 31, 2020 between Cortland as Agent for the Lenders and TGOD as borrower. It has been amended and restated including as recently as January 8, 2024 (as amended, the "Credit Agreement").

21. Pursuant to the Credit Agreement, Cortland provided TGOD with an interest-bearing revolving credit facility totaling $34 million. The guarantors under the Credit Agreement are TGOD, BZAM, Medican Organic, BZAM Holdings, BZAM Management, BZAM Cannabis, Folium Life, High Road and BZAM Labs (together, in such capacity, the "Cortland Obligors").

22. As of February 28, 2024, approximately $31,919,208.84 of principal is owing together with interest of an additional $362,916.21.

23. In addition, BZAM has entered into six (6) promissory notes (the "Stone Pine Promissory Notes") with Stone Pine Capital Ltd. ("Stone Pine"), an entity controlled by BZAM's largest shareholder and current Chairman. The Stone Pine Promissory Notes were all amended on January 4, 2024, to each be payable upon demand, provided that Stone Pine shall not be permitted to make a demand until the later of either: (i) the maturity date of the Cortland Credit Agreement; and (ii) March 31, 2025.

24. Contemporaneously with the execution of the Stone Pine Promissory Notes, BZAM and Stone Pine entered into general security agreements (the "Stone Pine GSAs") under which Stone Pine was granted security over all present and after-acquired property, assets and undertakings of BZAM. Additionally, BZAM, Stone Pine and Cortland entered into subordination and postponement agreements to subordinate the amounts loaned under the Stone Pine Promissory Notes to the amounts loaned under the Credit Agreement with Cortland.

25. As of February 28, 2024, approximately $8,515,000 of principal is owing to Stone Pine, and approximately an additional $509,755 of interest accrued month-to-date for a total amount owing of

$9,024,795.07. The Stone Pine Promissory Notes each carry an interest rate of 8% or 10% per annum, with interest being calculated monthly and payable on the last day of each month. No interest has ever been paid on the Stone Pine Promissory Notes.

26. BZAM Cannabis entered into a $5 million loan from for private lenders that is secured against the Edmonton Facility pursuant to a commitment letter dated May 19, 2021 as well as a general security agreement over all of the property of BZAM Cannabis and a corporate guarantee from BZAM Management.

27. In addition to the above, the Applicants have a number of unsecured obligations including a promissory note issued by BZAM to Final Bell Holdings International Inc. dated January 5, 2024 in the amount of $8 million and employee liabilities including monthly aggregate payroll obligations of approximately $2,344,764 related to both salaried and hourly employees. The Applicants also owe $1,103,860 and accrued and unpaid vacation pay and another $702,000 in unpaid bonuses.

28. The Applicants had accounts payable and accrued liabilities as at January 31, 2024 of approximately $28,211,004, and CRA liabilities as at February 15, 2024 of approximately $4,440,000 in excise tax arrears, $2,650,000 in sales tax arrears, and a modest amount in respect of unremitted payroll deductions. BZAM Management and TGOD have entered into payment plans with the CRA in respect of their excise and/or sales tax arrears.

29. It is clear that the current cash position of the Applicants is not sufficient to meet their obligations as they come due, particularly relating to ongoing and future payroll obligations and the cash required to maintain business operations while preventing the expiry of valuable (and required) cannabis licences.

30. The CCAA applies in respect of a "debtor company or affiliated debtor companies" whose liabilities exceed $5 million. The term "debtor company" is defined as "any company that: (a) is bankrupt or insolvent […]", and the term "company" is defined as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province […]".

31. The CCAA also specifies companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company. Each of the Applicants is a "company" within the meaning of the CCAA as each was incorporated under Canadian provincial or federal laws. All of the Applicants other than BZAM are direct or indirect subsidiaries of BZAM. Accordingly, the Applicants are all affiliated companies.

32. Each of the Applicants is a "debtor company" as defined in the CCAA. The insolvency of a debtor company is assessed as of the time of filing the CCAA application. Courts have taken guidance from the definition of "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act*, which, in relevant part, provides that an "insolvent person" is a person:

    a. who is for any reason unable to meet his obligations as they generally become due;
    b. who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
    c. the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

33. A company is also insolvent for the purposes of the CCAA "if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

34. The Applicants collectively have over $55,500,000 in debt and only approximately $1,848,000 of cash on hand. Absent the Stay of Proceedings and the approval of the DIP Loan, the Applicants will be unable to meet their obligations as they come due. As such, the Applicants are affiliated debtor companies to which the CCAA applies.

35. I am also satisfied that Ontario is the chief place of business of the Applicants, and as such this Application is properly made to this Court.

36. Section 9(1) of the CCAA provides that an application for a stay under the CCAA may be made to the court that has jurisdiction in the province in which the head office or chief place of business of the company in Canada is situated.

37. In *Nordstrom Canada Retail, Inc*. , this Court found that the company's "chief place of business" was Ontario despite the fact that Nordstrom Canada Retail was incorporated and had significant business operations in British Columbia. In determining whether the court had jurisdiction over the proceedings, this Court considered multiple factors, including the location of the company's assets, employees and sales.

38. The Court found that there was sufficient evidence establishing Ontario as the proper jurisdiction based on the following: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled $220 million, compared to $148 million in British Columbia and $77 million in Alberta.

39. The same analysis can be applied here. Approximately 58% of the employees of the Applicants are situated in Ontario. While the Applicants have two cannabis facilities in each of Ontario and British Columbia, the largest facility of the Company is in Hamilton, Ontario. The Company maintains corporate offices in both Ontario and British Columbia and a majority of the BZAM directors reside in Ontario. In addition, the principal place of business of the senior secured lender, Cortland, is Ontario.

**Stay of Proceedings**

40. Section 11.02(1) of the CCAA provides that the Court may order a stay of proceedings on an initial CCAA application for a period of not more than 10 days. Section 11.001 of the CCAA provides that relief granted on an initial CCAA application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day period.

41. A stay of proceedings is clearly necessary here if any form of restructuring process is to be successful. The relief sought today is limited to what is reasonably necessary.

**Non-Applicant Stay Parties**

42. I am also satisfied that the stay should apply to the Non-Applicant Stay Parties. The Court has authority to extend the stay to non-parties pursuant to sections 11 and 11.02(1) of the CCAA, which permits the Court to make an initial order on any terms imposed. In determining whether a stay should be extended to non-parties, courts have considered numerous factors, including whether the subsidiaries of applicants had guaranteed secured loans of the applicants, whether the non-applicants were deeply integrated into the business operations of the applicants, and whether the claims against the non-applicants were derivative of the primary liability of the applicants: See *MPX International Corporation*, 2022 ONSC 4348 ("*MPX*") at para 52, *Lydian International Limited, (Re),* 2019 ONSC 7473 at para 39; *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at paras 5, 18, and 31; at paras 28-29; and *Target Canada Co.,* 2015 ONSC 303 ("*Target*") at paras 49-50.

43. All of the Non-Applicant Stay Parties here are highly integrated into the business as wholly-owned subsidiaries (direct or indirect) of BZAM, or in the case of 943 Québec, as a soon to be acquired company. None carry on active business. The three entities other than 943 Québec also have tax attributes which could be beneficial to the objective of maximizing value for stakeholders.

44. I am satisfied that the stay should be extended to these parties to prevent uncoordinated realization and enforcement attempts from being made in different jurisdictions all of which would be counterproductive to the maximization and protection of value for stakeholders of the Applicants.

45. Moreover, the Applicants advise that they intend to seek approval of a SISP in this proceeding which will include the Non-Applicant Stay Parties with the result that the stay should apply to them to give comfort to potential bidders that enforcement actions against those parties will be stayed while a sales process is being conducted.

**Regulatory Stay of Licences**

46. CCAA courts have granted regulatory stays over licences where, absent such a stay, the applicable regulators were likely to suspend or cancel licences due to the commencement of the CCAA proceeding. Other courts have observed that permitting the immediate termination of the licenses of a debtor company would not avoid social and economic losses but rather would amplify them. See: *Re Just Energy* Corp., at para 87; *Abbey Resources Corp., Re, (29 July 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB); Original Traders Energy Ltd. et al., (30 January 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00693758-00CL* (Initial Order) at para 19.

47. Canadian courts have also granted stays to prevent the Canada Revenue Agency from seeking to enforce its rights through regulatory actions related to an excise licence for a cannabis company during the period in which it was under protection in an insolvency regime: *Tantalus Labs Ltd., Re*, 2023 BCSC 1450 ("*Tantalus*")and *Aleafa Health Inc*. SISP Approval Order August 22, 2023 [CV-23-00703350-00CL].

48. In *Tantalus,* the British Colombia Supreme Court granted an order as part of the BIA proposal maintaining the status quo of a cannabis excise licence during the course of the proposal proceeding. It did so, rejecting the submission of the CRA, which had submitted that a ministerial decision to not renew a licence could not be the subject of a stay under the *BIA*. The same principles apply to a CCAA proceeding.

49. The cannabis licences of the Applicants are among their most valuable assets. Just as importantly, they are required to permit the Applicants to continue operating their underlying business. The expiry or cancellation of licences will suspend or terminate completely the operation and delivery of products by the Applicants with the result that the ability of the Applicants to restructure or continue as a going concern business will in all probability be eliminated.

**Appointment of FTI as Monitor**

50. The Applicants propose to have FTI appointed as the Monitor. FTI is a "trustee" within the meaning of subsection 2(1) of the BIA, is established and qualified, and has consented to act as Monitor. The involvement of FTI as the court-appointed Monitor will lend stability and assurance to the Applicants' stakeholders. FTI is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

51. I am satisfied that FTI should be appointed as Monitor in these CCAA Proceedings.

**The DIP**

52. Pursuant to a DIP facility agreement dated February 28, 2024 (the "DIP Agreement"), Cortland as proposed DIP Lender, has agreed to provide TGOD as borrower with a super priority, non-revolving

credit facility up to a maximum principal amount not to exceed the lesser of $41 million and the Revolving Facility Limit (as defined in the Second ARCA) plus $7 million, subject to certain conditions. Each of the Applicants is a guarantor under the DIP Agreement.

53. The DIP Loan has a commitment fee of $98,000 and bears interest at the greater of the Toronto-Dominion Bank's floating annual rate of interest plus 8.05% per annum and 12% per annum (an interest rate that I observe is the same as that set out in the Second ARCA).

54. The DIP Loan is conditional on the granting of the DIP Charge.

55. The amount of the DIP Loan to be funded during the initial stay period of 10 days (up to $2,400,000) is only that portion necessary to ensure the continued operation of the business of the Applicants in the ordinary course for that period of time such that I am satisfied it is appropriate that it be approved at this time pursuant to section 11.2(5) of the CCAA, as was approved in *Mjardin Group, Inc., (Re),* 2022 ONSC 3338 at para. 31.

56. While the DIP Agreement contemplates what the Applicants describe as a "creeping-roll up" structure pursuant to which all post-filing receipts by the Applicants will be applied to repay pre-filing obligations owing to Cortland, it is important to note that the DIP Charge does not secure any obligation that existed prior to the granting of the Initial Order. This Court has previously approved DIP facilities that use receipts from operations post-filing to repay pre-filing amounts, pursuant to the jurisdiction found in section 11.2(1). The emphasis is on preserving the pre-filing status quo, so as to uphold the relative pre-stay priority position of each secured creditor: *Comark Inc., (Re)*, 2015 ONSC 2010 at paras. 40-41; and *Performance Sports Group Ltd*., 2016 ONSC 6800 at para. 22.

57. Moreover, and in accordance with section 11.2(1), notice has been provided to the secured creditors proposed to be primed by the DIP, and as noted above, the proposed DIP Charge does not secure any pre-filing obligations of the Applicants. Cortland, the proposed DIP Lender, is already in first position as the senior secured creditor in respect of all of the property of the Applicants save and except for the Edmonton Facility which is not proposed to be primed by the DIP in any event. Stone Pine Capital is supportive of the proposed DIP Loan.

58. Section 11.2(4) of the CCAA sets out a non-exhaustive list of criteria that the Court must consider in deciding whether to grant a DIP lender's charge. Those criteria include the period during which the Applicants are expected to be subject to CCAA proceedings, how the Applicants' business and financial affairs are to be managed during the proceedings, whether the Applicants' management has the confidence of its major creditors, whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants, the nature and value of the Applicants' property, whether any creditor would be materially prejudiced as a result of the security or charge, and whether the monitor supports the charge.

59. DIP financing may be approved even if it potentially prejudices some creditors, as long as the prejudice is outweighed by the benefit to all stakeholders.

60. It is important that an applicant meet the criteria in section 11.2(1) as well as those in section 11.2(4). (See *CanWest Publishing Inc., Re*, 2010 ONSC 222 ("*CanWest*") at paras. 42-44).

61. I am satisfied that the Applicants are facing a liquidity crisis and the Cash Flow Statement shows that financing even on an interim basis is required to fund these proceedings.

62. I am also satisfied that the terms of the proposed DIP Loan are appropriate. I recognize that the interest rate is at the very high end of the range within which DIP loans have been approved by this Court. However, I am satisfied that it is appropriate here. First, the rate is exactly the same as the rate applicable to the existing credit facilities of the senior secured creditor, Cortland, who is the proposed DIP Lender,

so there is no increase in the cost of borrowing relative to the current facilities. Second, the commitment fee is relatively modest as against the total funding be made available. The cost of borrowing necessarily involves a consideration of the commitment fee together with the applicable interest rate. Third, interest rates generally have increased materially over the last year, so one must proceed with caution in considering a previously established range of interest rates. Fourth, the cannabis sector generally has faced and continues to face significant challenges and risks, with the result that the cost of borrowing within the sector generally is expensive.

63. Finally, the Proposed Monitor is supportive of the DIP Loan and corresponding charge, and is further in agreement that those amounts proposed to be advanced during the initial 10 day period are required in order to preserve the status quo and the going concern operations of the Applicants.

**Administration Charge**

64. The Court has jurisdiction to grant an administration charge under s. 11.52 of the CCAA. It is to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge, and the position of the Monitor. (See *CanWest*, at para. 54).

65. The administration charge of $500,000 is appropriate. It is supported by the Proposed Monitor and the senior creditors.

**Directors' Charge**

66. The Court has jurisdiction to grant a directors' charge under section 11.51 of the CCAA, provided notice is given to the secured creditors who are likely to be affected by it. To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors and officers, who have considerable institutional knowledge and specialized expertise.

67. Here, I recognize that the proposed quantum of the Directors' Charge is very significant at $5,300,000. However, almost all of that is as a result of the excise tax obligations owing by the Applicants which are very material and which, I observe, will increase going forward.

68. The Monitor supports the Applicants' request for the Directors' Charge. I am satisfied it is appropriate here.

69. The Directors' Charge is approved.

**Relief from Securities Obligations**

70. The Applicants seek relief to dispense with certain securities filing requirements and in particular, the authority to incur no further expenses in relation to any filings, and that none of the directors or officers, employees or other representatives of the Applicants or the Monitor shall have personal liability with respect thereto.

71. This Court has previously granted such relief and I am satisfied that it is appropriate here. See: *Aleafa Health Inc*., amended and restated initial order issued August 4, 2023 [CV-23-00703350-00CL] paras 45-46; *MPX International Corporation*, amended and restated initial order issued July 25, 2022 [CV-22-00684542-00CL] at para 46-47; *CannTrust Holdings Inc., Re,* initial order issued March 31, 2021 [Court File No. CV-20-00638930] at paras 46-47; and *Pure Global Cannabis, Inc., Re*, initial order issued March 19, 2020 [CV-20-00638503-00CL] at para. 49.

**Authorization for Pre-Filing Payments**

72. The Applicants seek the authority but not the requirement to make payments for goods or services supplied to the Applicants prior to the date of the Initial Order, but in all cases only with the consent of the Monitor and the DIP Lenders, and only in circumstances where, in the opinion of the Applicants and the Monitor, the supplier or service provider is critical to preserve, protect or enhance the value of the business.

73. While section 11.4 of the CCAA gives the Court authority to declare a person to be a critical supplier and to grant a charge on the debtor's property to secure amounts owing for services provided post-filing, nothing in that section removes the inherent jurisdiction of the court to allow the payment of pre-filing amounts to suppliers who services are critical to the post-filing operations of the debtor, even where the debtor does not propose to secure the payment of post-filing goods or services with a critical supplier charge: See *Cline Mining Corp., Re,* 2014 ONSC 6998 at para. 38, and *MPX* at para. 70.

74. Such relief may be included in an initial order: see *Target*, at paras. 64-65.

75. I am satisfied that such relief is appropriate here, particularly given that the consent of the Monitor is required for such payments to be made.

**Comeback Hearing**

76. The comeback hearing shall take place on Friday, March 8, 2024 commencing at 2:00 PM via Zoom.

77. The order I have signed is effective immediately and without the necessity of issuing and entering.

Osborne, J.

# TAB 5

**CITATION:** Cannapiece Group Inc v. Carmela Marzili, 2022 ONSC 6379
**COURT FILE NO.:** CV-22-00689631-00CL
**DATE:** 20221114

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**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 CANNAPIECE GROUP INC., CANNAPIECE CORP., CANADIAN CRAFT GROWERS CORP., 2666222 ONTARIO LTD., 2580385 ONTARIO INC. AND 2669673 ONTARIO INC.

**RE:** **CANNAPIECE GROUP INC**, Plaintiff

**AND:**

**CARMELA MARZILI**, Defendant

**BEFORE:** Penny, J.

**COUNSEL:** *David S. Ward* and *Jennifer Quick* Counsel, for the Plaintiff

*Robert Kennedy* Counsel, for BDO Canada LLP

*Clifton Prophet* Counsel, for 2125028 Ontario Inc

*John Peddle* Counsel, for Carmela Marzilli

*Vincent Pion* Counsel, for Solid Packaging Robotik Group Inc

*Robert McDonald* Counsel, for 2726398 Ontario Inc.

*Philippe Tremblay* Counsel, for Solid Packaging Robotik

*Russell Bennett* Counsel, for certain unnamed investors

*Clark Lonergan*, trustee in bankruptcy at BDO, Canada Limited

*Rory McGovern* Counsel, to Cardinal Advisory Limited

**HEARD:** November 10, 2022

2022 ONSC 6379 (CanLII)

[1] On November 3, 2022, I made an Initial Order in this matter under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The relief granted in the Initial Order was limited to that which was reasonably necessary for continued operations during the initial ten-day stay of proceedings.

[2] At the comeback hearing on November 10, 2022, the applicants sought:

(a) an amended and restated initial order:

(i) extending the stay of proceedings granted pursuant to Initial Order to February 3, 2023;

(ii) extending the scope of the stay of proceedings to include claims against directors and officers in respect of their potential liability under personal guarantees of corporate obligations;

(iii) approving a key employee retention plan and authorizing the applicants to make payments in accordance with its terms;

(iv) authorizing the Company to make payments to certain third party suppliers for pre-filing expenses which are necessary to facilitate the applicants' ongoing operations; and

(v) approving an increase to the Administration Charge to the maximum amount of $500,000; and

(b) a sale process approval order:

(i) approving a sale and investment solicitation process;

(ii) authorizing a stalking horse purchase agreement; and

(iii) approving the payment of a break fee, professional fee, and the deposit repayment.

[3] On November 10, 2022 I issued an amended and restated initial order and took under reserve certain aspects of the proposed sales process order, with reasons to follow. These are my reasons on all issues.

Sales Process

*The Stalking Horse Agreement*

[4] Stalking horse agreements are recognized by the court as a reasonable and useful component of a sales process. Here, the 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

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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.

[5] The reasonableness of the break fee ($175,000) is subject to the exercise of the applicants' business judgment so long as it lies within a range of reasonable alternatives. In my view it does. The Monitor is satisfied that the break fee is reasonable in the circumstances. It has noted, among other things, that: (a) the applicants were insolvent and did not have sufficient cash to continue beyond the week of the Initial Order without the DIP Loan that was provided by the stalking horse bidder; (b) the applicants made significant efforts to improve their financial situation prior to commencing the CCAA proceedings; (c) the stalking horse bidder required the break fee as compensation for its efforts; and (d) the stalking horse bidder was the only party showing any interest in acquiring the applicants' business, funding the stalking horse sales process and these CCAA proceedings. I accept the Monitor's recommendations on this issue.

*The Sales Process*

[6] Both by way judicial precedent and under the CCAA, a number of factors have been developed to assist in deciding whether to approve a proposed sales process. Having regard to those factors, I am satisfied that the sales process contemplated here is appropriate.

[7] A sale transaction is warranted at this time. The applicants are insolvent and unable to continue operations without restructuring the Company's debt. A sale of the business is the only option available at this time.

[8] The sale transaction will benefit a wide range of stakeholders. The stalking horse agreement sets a minimum price and the bidding procedures in the stalking horse sales process is designed to test the market by soliciting the best bids available, thereby maximizing value for stakeholders. Importantly, it is anticipated under the stalking horse agreement that, if the stalking horse bidder is the ultimate purchaser in the process, the purchaser will maintain the employment of the vast majority of employees.

[9] The senior secured creditor of the applicants, Carmela Marzilli, and the equipment financer, 2125028 Ontario Inc., are supportive of the stalking horse sales process and no other creditor has indicated that they object.

[10] There is no other, better, or viable alternative. The applicants, in consultation with their advisors, pursued a number of strategic initiatives to improve their operations and financial position. Despite their attempts, no other alternative to the stalking horse sales process has materialized. The stalking horse bidder is the only party who showed any interest in acquiring the applicants' business to date.

[11] The Monitor was consulted about and will administer the stalking horse sales process in consultation with its sales agent and the applicants. The Monitor is supportive of the process, including the stalking horse agreement acting as the minimum bid. The Monitor will also have

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certain consent rights in connection with material decisions, including extending timelines, dispensing with bid requirements, and terminating the stalking horse sales process. The Monitor is not aware of any stakeholders who will be prejudiced by the stalking horse sales process.

[12] During the initial stay period, the applicants have communicated with various stakeholders, including secured and unsecured creditors, to provide information and answer questions. There is support from key customers and critical suppliers for a stalking horse sales process as well.

[13] On the evidence, the stalking horse sales process is the best and only value-maximizing option available to the debtor. The sales process is intended to avoid the value destruction that would follow from a cessation of manufacturing operations and customer order fulfilment. The process provides interested parties with sufficient time to evaluate the opportunity presented by the process and to submit a bid before the deadline.

*Critical Suppliers*

[14] The court may grant a request for approval of payment of pre-filing liabilities to critical suppliers. This is because one of the purposes of the CCAA is to permit an insolvent corporation to remain in business. The court has broad jurisdiction to make orders that will facilitate a restructuring of a business as a going concern. The Monitor supports the need for this order in the circumstances of this case.

[15] The applicants' request for an order granting approval to make payments to critical suppliers advances the goal of allowing the applicants to continue operating in the ordinary course of business throughout the stalking horse sales process. This will benefit the applicants' stakeholders.

*The KERP*

[16] The Court has jurisdiction to approve a key employee retention plan under s. 11 of the CCAA to make any order it considers appropriate.

[17] The purpose of a KERP is to retain employees who are important to the management or operations of the debtor company in order to keep their skills within the company at a time when, because of the company's financial distress, they might otherwise look for alternate employment. KERPs have been approved in numerous insolvency proceedings where the retention of certain employees was deemed critical to a successful restructuring.

[18] I accept that a KERP is warranted in the circumstances of this case. The eleven identified employees have senior level roles and responsibilities that are essential to ensure the stability of the business, enhance effectiveness of the sale process, and facilitate an effective restructuring. These key employees have specialized experience and unique knowledge about the operations of the Company. Their involvement in the sale process appears to be important to the success of the restructuring. The potential KERP beneficiaries may well seek other employment if the KERP is not authorized. The applicants developed the KERP with input from the Monitor and the Monitor supports the proposed KERP in this case.

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*Administration Charge*

[19] The amount of the Administration Charge in the Initial Order was limited to the estimated professional fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants during the initial stay period. The applicants seek to increase the Administration Charge from $250,000 to $500,000 in order to remain current with the projected fees and disbursements of the professionals during the proposed extended stay period.

[20] Section 11.52 of the CCAA provides for the grant of an administration charge. On the evidence, I find the increase in the Administration Charge is appropriate. The cannabis industry is complex, highly regulated and subject to many statutory and regulatory restrictions and requirements. Successful restructuring will require the extensive input of the professionals who have been retained. The beneficiaries of the Administration Charge have and will continue to contribute to these CCAA proceedings and assist the applicants with achieving the restructuring objectives. Each of the proposed beneficiaries of the Administration Charge is performing unique functions without duplication of roles. The quantum of the proposed increase to the Administration Charge appears to be fair and reasonable and is in line with the nature and size of the applicants' business and the involvement required by the professionals. The Monitor, the DIP Lender, and the applicants' senior secured lender, Ms. Marzilli, are supportive of the increase in the Administration Charge.

*Stay of Claims Against Directors*

[21] The applicants seek to extend the Initial Order stay to include a stay of an action on guarantees of unpaid Company debt given by three directors. The stay is opposed by the plaintiff/creditor in that action. This was the only issue of controversy before the Court on this motion. The controversy arises in the following context.

[22] 2726398 Ontario Inc. is an unsecured creditor of the Company, having originally loaned the principal sum of $7,000,000. As security for its loan, 272 received mortgage security over property as well as personal guarantees from certain officers and directors of the Company. This included guarantees from Ali Etemadi, Afshin Souzankar and Reza Khadem Shahreza. These three individuals are all founders, directors and senior officers of the Company.

[23] In August 2022 the Company sold the mortgaged property in Clarington, Ontario. However, the sale did not generate sufficient funds to pay the entire debt owing to 272. 272 agreed to accept the total sum of $7,000,000 in exchange for a discharge of its mortgage security, without prejudice to its right to claim the balance of the debt owing from the Company and the guarantors. Following the sale of the property, $7,000,000 was delivered to 272. 272 granted discharges of its mortgage security, leaving a balance owing to it of about $815,000.

[24] On October 18, 2022, 272 issued a statement of claim in the Superior Court of Justice for payment of the remaining balance on its loan plus additional accrued interest. The Company and each of the guarantors are named as defendants in that proceeding. I was advised that service on all defendants has not yet been completed, and that no defences have yet been filed.

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[25] The applicants started this proceeding on November 2, 2022. The supporting affidavit on the motion for the Initial Order acknowledged the existence of the guarantees given to 272, the shortfall 272 suffered when its mortgage security was discharged, and that 272's discharge of its mortgage security was without prejudice to its right to claim the balance outstanding to it.

[26] My Initial Order in this proceeding included a limited stay of proceedings against the Company's directors. The order stipulated that "*except as permitted by subsection 11.03(2) of the CCAA*, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants [emphasis added]" whereby the directors or officers were alleged to be liable for the payment or performance of the Company's obligations.

[27] The present motion seeks to extend the stay of proceedings by excluding the limitation contained in the "except as permitted by subsection 11.03(2) of the CCAA" proviso in the Initial Order. The issue turns on the interpretation of ss. 11, 11.02 and 11.03 of the CCAA.

## The CCAA Provisions

[28] Section 11 of the CCAA provides that, "subject to the restrictions set out in this Act" the court may "make any order that it considers appropriate in the circumstances".

[29] Section 11.02 provides that the court may make an order staying all proceedings taken "in respect of the company".

[30] Section 11.03(1) states that an order under s. 11.02 may prohibit "any action against a director of the company" that arose before the commencement of the CCAA proceedings and that relates to an obligation of the company "if directors are under any law liable *in their capacity as directors* for the payment of those obligations [emphasis added]". Section 11.03(2) contains an exception to 11.03(1), however. It provides that s. 11.03(1) "does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations".

[31] Thus, s. 11.03 distinguishes between proceedings based on the director's personal liability under "any law" in his or her "capacity as a director" (s. 11.03(1)) and proceedings based on the director's personal liability arising out of a personal contract that he or she gave to guarantee the obligations of the company (11.03(2)): *Re Magasin Laura (PV) inc.*,2015 Carswell Que 9722, 31 C.B.R. (6th) 168 (Que. Bktcy).

### Analysis

[32] The applicants submit that my jurisdiction to stay the action on the guarantees arises out of the broad general powers under s. 11. They further submit that this jurisdiction was exercised in *McEwan Enterprises Inc*., 2021 ONSC 6453, at para. 44(a), in parallel circumstances to those existing here.

[33] I am unable to accept these arguments.

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[34] In my view, the CCAA, by its own terms, limits the general powers in s. 11 by expressly making the scope of those powers "subject to the restrictions set out in this Act". Section 11.03(1) permits the court to extend the stay power in s. 11.02 (regarding claims against the debtor company) to the directors of the company, if the director's personal liability arises under any law in his or her capacity as a director. However, s. 11.03(2) limits the power to order a stay by stipulating that s. 11.03(1) "does not apply" to an action against a director on a guarantee relating to the company's obligations. The use of the phrase "does not apply to" in s. 11.03(2) means that, although the court *may* make an order in the circumstances covered by s. 11.03(1), the court *may not* make such an order in the circumstances covered by s. 11.03(2). Since the 272 action is a claim against the directors under a personal contract given to guarantee the obligations of the company, the provisions of s. 11.03(2) apply. Accordingly, I conclude that I do not have jurisdiction to order a stay in these circumstances. Such an order is prohibited by the express language of s. 11.03(2).

[35] *McEwan Enterprises Inc*. does not support the applicants' argument. The passage they rely on in that decision makes it clear that the parties and the court were concerned with a guarantee given by Mr. McEwan in connection with obligations owed by another company, not the applicant debtor (a "non-filing party" which did not fall within the language of s. 11.03(2)). Although it may be the case as a matter of fact that Mr. McEwan also guaranteed obligations of the applicant debtor and that actions on those guarantees were also stayed, there is no indication that s. 11.03(2) was even raised with the court, much less considered by the court in its decision. It is, for example, (given Mr. McEwan's overarching importance to the business -- he *was* the business and all stakeholders understood that), entirely possible that potential plaintiffs in any actions on Mr. McEwan's guarantees were content to have those potential actions stayed, wagering that this was their only hope of recovery in the long run in any event. And, as para. 44(c) makes plain, the obligations which Mr. McEwan guaranteed were not anticipated to be impacted by the CCAA proceedings as they were be assumed as part of the proposed restructuring transaction. I simply cannot found my jurisdiction to make the order sought in the face of s. 11.03(2) on a decision in which the point in issue was neither raised nor ruled upon.

[36] Accordingly, for these reasons, I decline to order a stay of the 272 action against Messrs. Etemadi, Souzankar and Shahreza.

[37] This does not end the matter, however. The stay was only being sought until the end of the sales process; that is, February 3, 2023. I agree with the applicants that Messrs. Etemadi, Souzankar and Shahreza will be heavily engaged in the restructuring effort until the contemplated closing of the sales process. 272 has not even completed the necessary service on all defendants. The proceeding is in its infancy. It is an action on a debt/guarantee. There is no suggestion of urgency. 272's action has been brought for the benefit of one creditor. The sales process in these proceedings is calculated to benefit many stakeholders, including other creditors, employees and customers. While I have declined, for jurisdictional reasons, to order a stay of 272's action, it is appropriate in these circumstances to make a procedural order in the 272 action that these three defendants shall have until February 10, 2023 (one week after the forecast close of the sales process) to deliver their statements of defence.

*The Temporal Extension of the Stay*

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[38] The Initial Order granted an initial 10-day stay of proceedings ending on November 10, 2022. The applicants seek an order extending the stay of proceedings to and including February 3, 2023. I am satisfied that the requested extension is justified. The evidence supports the conclusion that since the Initial Order, the applicants have acted and continue to act in good faith and with due diligence to communicate with stakeholders and to develop the sales process, while continuing to operate in the ordinary course of business to preserve the value of their business. The cash flow forecast appended to the Monitor's First Report shows sufficient liquidity during the extended stay period to fund obligations and the costs of the CCAA proceedings. The extension of the stay is required to complete the sales process without having return to Court to seek a further extension. There is no evidence that any creditor will suffer material prejudice as a result of the extension of the stay. And, the Monitor supports the requested extension of the stay of proceedings.

*Conclusion*

[39] For the forgoing reasons, the orders sought are approved and granted, other than the request for an order to extend the stay of proceedings to include the action on Messrs. Etemadi, Souzankar and Shahreza's personal guarantees, which is denied (subject to the procedural direction outlined in my reasons).

*Other Matters*

[40] Mr. Russell Bennett appeared on behalf of certain unnamed investors who claim to have invested in some aspect of this business. No material was filed on their behalf. Mr. Bennett described concerns these investors have about the propriety of Miller Thompson and BDO representing the applicants in these proceedings. He sought a two-week adjournment of the applicants' motion to enable the investors to decide whether to file material and pursue the matter. In the absence of any material and, given the highly time-sensitive nature of the proposed sales process/restructuring, I declined this request.

Penny J.

**Date:** November 14, 2022

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# TAB 6

Court File No. CV-20-00638930-00CL

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

| | | |
|---|---|---|
| THE HONOURABLE | ) | TUESDAY, THE 31ST |
| | ) | |
| MR. JUSTICE HAINEY | ) | DAY OF MARCH, 2020 |

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 CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Applicants

**INITIAL ORDER**

**THIS APPLICATION**, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the affidavit of Greg Guyatt sworn March 31, 2020 and the Exhibits thereto (the "**Guyatt Affidavit**"), the consent of Ernst & Young Inc. ("**EYI**") to act as the Monitor (in such capacity, the "**Monitor**"), and the Pre-Filing Report of EYI in its capacity as the proposed Monitor, and on hearing the submissions of counsel for the Applicants and the Monitor.

**SERVICE**

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

**APPLICATION**

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

**PLAN OF ARRANGEMENT**

3. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court one or more plans of compromise or arrangement (hereinafter referred to as the "**Plan**").

**POSSESSION OF PROPERTY AND OPERATIONS**

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their businesses (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, contractors, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business, to preserve the value of the Property or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize the central cash management system currently in place or, with the consent of the Monitor, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any

transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages, salaries, contract amounts, employee and pension benefits, vacation pay and expenses (including, without limitation, in respect of expenses charged by employees to corporate credit cards) payable on or after the date of this Order to employees or contractors, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Applicants, or retained by employees or officers of the Applicants that the Applicants have agreed to reimburse, in respect of these proceedings, at their standard rates and charges.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

(b) expenses required to ensure compliance with any governmental or regulatory rules, orders or directions; and

(c) payment for goods or services actually supplied to the Applicants following the date of this Order.

8. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes and all federal excise taxes and duties (collectively, "**Sales & Excise Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales & Excise Taxes are accrued or collected after the date of this Order, or where such Sales & Excise Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicants and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the

first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:

(a) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate; and

(b) pursue all avenues of refinancing or selling their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or sale,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

**NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY**

12. **THIS COURT ORDERS** that until and including April 9, 2020 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property (including, for greater certainty, any process or steps or other rights and remedies under or relating to any class action proceeding against any of the Applicants or in respect of the Property), except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all

Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

13. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14. **THIS COURT ORDERS** that, during the Stay Period, all rights and remedies of any Person against or in respect of Cannabis Coffee and Tea Pod Company Ltd., Cannatrek Ltd., Elmcliffe Investments [No. 2] Inc. and O Cannabis We Stand on Guard For Thee Corporation (each, an "**Affected Party**", and collectively, the "**Affected Parties**") arising out of, relating to, or triggered by the insolvency of any of the Applicants, the making or filing of these proceedings or any allegation, admission or evidence in these proceedings (collectively, the "**Cross-Default Matters**"), are hereby stayed and suspended except with the written consent of the relevant Applicants, the relevant Affected Party and the Monitor, or leave of this Court, and the operation of any provision of any agreement or other arrangement between any Person and any of the Affected Parties whether written or oral that purports to accelerate, terminate, cancel, suspend or modify such agreement or arrangement or create a right to purchase, a right of first refusal or a lien with respect to any property of an Affected Party as a result of any of the Cross-Default Matters is hereby stayed and restrained pending further order of this Court.

**NO INTERFERENCE WITH RIGHTS**

15. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right,

contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

**CONTINUATION OF SERVICES**

16. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

17. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

18. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their

capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

**DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

19. **THIS COURT ORDERS** that the Applicants shall indemnify their current and future directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

20. **THIS COURT ORDERS** that the current and future directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $550,000, as security for the indemnity provided in paragraph 19 of this Order. The Directors' Charge shall have the priority set out in paragraphs 40 and 42 herein.

21. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 19 of this Order.

**APPOINTMENT OF MONITOR**

22. **THIS COURT ORDERS** that EYI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

23. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) review and approve Intercompany Advances (as defined below);

(c) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(d) advise the Applicants in the preparation of the Applicants' cash flow statements, which information shall be reviewed with the Monitor;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(g) perform such other duties as are required by this Order or by this Court from time to time.

24. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

25. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of (i) any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law

respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), or (ii) any of the Property, the administration and control of which is subject to the provisions of any federal, provincial or other law respecting, among other things, the manufacturing, possession, processing and distribution of cannabis or cannabis products including without limitation, the *Cannabis Act* (Canada), the *Cannabis Regulations* (Canada) the *Controlled Drugs and Substances Act* (Canada), the *Excise Tax Act* (Canada), the *Cannabis Control Act* (Ontario), or other such applicable federal or provincial legislation ("**Cannabis Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation or Cannabis Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation or the Cannabis Legislation, unless it is actually in possession.

26. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

27. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

**APPROVAL OF CHIEF RESTRUCTURING OFFICER ENGAGEMENT**

28. **THIS COURT ORDERS** that the agreement dated as of March 27, 2020 pursuant to which the Applicants have engaged FTI Consulting Canada Inc. ("**FTI**") to act as Chief Restructuring Officer ("**CRO**") and provide certain financial advisory and consulting services to the Applicants, a copy of which is attached as Exhibit "G" to the Guyatt Affidavit (the "**CRO Engagement Letter**"), the execution of the CRO Engagement Letter by the Applicants, *nunc pro tunc*, and the appointment of the CRO pursuant to the terms thereof is hereby approved, including, without limitation, the payment of the fees and expenses contemplated thereby.

29. **THIS COURT ORDERS** that the CRO shall not be or be deemed to be a director, *de facto* director or employee of the Applicants.

30. **THIS COURT ORDERS** that the CRO shall not, as a result of the performance of its obligations and duties in accordance with the terms of the CRO Engagement Letter, be deemed to be in Possession of (i) any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to the Environmental Legislation, (ii) any of the Property, the administration and control of which is subject to the provisions of the Cannabis Legislation; however, if the CRO is nevertheless later found to be in Possession of any Property, then the CRO shall be entitled to the benefits and protections in relation to the Applicants and such Property as are provided to a monitor under Section 11.8(3) of the CCAA, provided however that nothing herein shall exempt the CRO from any duty to report or make disclosure imposed by applicable Environmental Legislation or Cannabis Legislation.

31. **THIS COURT ORDERS** that the CRO shall not have any liability with respect to any losses, claims, damages or liabilities, of any nature or kind, to any Person from and after the date of this Order except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct on the part of the CRO.

32. **THIS COURT ORDERS** that no action or other proceeding shall be commenced directly, or by way of counterclaim, third party claim or otherwise, against or in respect of the CRO, and all rights and remedies of any Person against or in respect of them are hereby stayed and suspended, except with the written consent of the CRO or with leave of this Court on notice

to the Applicant, the Monitor and the CRO. Notice of any such motion seeking leave of this Court shall be served upon the Applicants, the Monitor and the CRO at least seven (7) days prior to the return date of any such motion for leave.

33. **THIS COURT ORDERS** that the obligations of the Applicant to the CRO pursuant to the CRO Engagement Letter shall be treated as unaffected and may not be compromised in any Plan or proposal filed under *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") in respect of the Applicants.

**ADMINISTRATION CHARGE**

34. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, the CRO and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and in the case of the CRO in accordance with the CRO Engagement Letter, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, the CRO, and counsel for the Applicants on a bi-weekly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, the CRO and counsel to the Applicants, retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

35. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

36. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, the CRO and counsel to the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at their standard rates and charges, and in the case of the CRO in accordance with the CRO Engagement Letter, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 40 and 42 hereof.

**INTERCOMPANY FINANCING**

37. **THIS COURT ORDERS** that CannTrust Holdings Inc. (the "**Intercompany Lender**") is authorized to loan to each of CannTrust Inc., Elmcliffe Investments Inc. and CTI Holdings (Osoyoos) Inc. (each, an "**Intercompany Borrower**"), and each Intercompany Borrower is authorized to borrow, repay and re-borrow, such amounts from time to time as the Intercompany Borrower, with the approval of the Monitor, considers necessary or desirable on a revolving basis to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order (the "**Intercompany Advances**") up to an aggregate of $4.2 million (subject to increase in accordance with further Order of this Court), on terms consistent with existing arrangements or past practice or otherwise approved by the Monitor.

38. **THIS COURT ORDERS** that the Intercompany Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Intercompany Charge**") on all of the Property of each Intercompany Borrower, as security for the Intercompany Advances made to such Intercompany Borrower, which Intercompany Charge shall not secure an obligation that exists before the Initial Filing Date. The Intercompany Charge shall have the priority set out in paragraphs 40 and 42 hereof.

39. **THIS COURT ORDERS AND DECLARES** that the Intercompany Lender shall be treated as unaffected and may not be compromised in any Plan or any proposal filed under the BIA in respect of the Applicants, with respect to any Intercompany Advances made on or after the date of this Order.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

40. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Directors' Charge and the Intercompany Charge (the "**Charges**"), as among them with respect to any Property to which they apply, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – Directors' Charge (to the maximum amount of $550,000);

Third – Intercompany Charge.

41. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

42. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

43. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtains the prior written consent of the Monitor and the beneficiaries of the Charges, or further Order of this Court.

44. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Applicants pursuant to this Order and the granting of the Charges do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

45. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

**RELIEF FROM REPORTING OBLIGATIONS**

46. **THIS COURT ORDERS** that the decision by the Applicants to incur no further expenses in relation to any filings, 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, including, without limitation, the *Securities Act* (Ontario) and comparable statutes enacted by other provinces of Canada, the *Securities Act of 1933* (United States) and the *Securities Exchange Act of 1934* (United States) and comparable statutes enacted by individual states of the United States, the TSX Company Manual and other rules, regulations and policies of the Toronto Stock Exchange, and the NYSE Listed Company Manual and other rules, regulations and policies of the New York Stock Exchange (collectively, the "**Securities Provisions**"), is hereby authorized, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of the Applicants failing to make any Securities Filings required by the Securities Provisions.

47. **THIS COURT ORDERS** that none of the directors, officers, employees, and other representatives of the Applicants, the Monitor (and its directors, officers, employees and representatives), nor the CRO shall have any personal liability for any failure by the Applicants to make any Securities Filings required by the Securities Provisions.

**SERVICE AND NOTICE**

48. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in the Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, or cause to be sent, in the prescribed manner or by electronic message to the e-mail address as last shown on the records of the Applicants, a notice to every known creditor who has a claim against the Applicants of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

49. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: http://www.ey.com/ca/canntrust.

50. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

**GENERAL**

51. **THIS COURT ORDERS** that the balance of the relief sought by the Applicants in the Notice of Application dated March 31, 2020 be and is hereby reserved to be heard by this Court on April 9, 2020, or such other date as determined by this Court.

52. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

53. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

54. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory body or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

55. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that CannTrust Holdings Inc. is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in the United States and any other jurisdiction outside Canada.

56. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

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 CANNTRUST HOLDINGS INC. ET AL.

Court File No: CV-20-00638930-00CL

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

Proceeding commenced at Toronto

**INITIAL ORDER**

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# TAB 7

**COURT FILE NO.:** CV-09-8241-OOCL
**DATE:** 20091013

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

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

2009 CanLII 55114 (ON SC)

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
*Alan Merskey* for the Special Committee of the Board of Directors
*David Byers and Maria Konyukhova* for the Proposed Monitor, FTI Consulting Canada Inc.
*Benjamin Zarnett and Robert Chadwick* for Ad Hoc Committee of Noteholders
*Edmond Lamek* for the Asper Family
*Peter H. Griffin and Peter J. Osborne* for the Management Directors and Royal Bank of Canada
*Hilary Clarke* for Bank of Nova Scotia,
*Steve Weisz* for CIT Business Credit Canada Inc.

## REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

[2] The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

[3] No one appearing opposed the relief requested.

Backround Facts

[4] Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

[5] As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

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[6] Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

[7] Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

[8] The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

[9] Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

[10] In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six

[2] R.S.C. 1985, c.C.44.

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occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

[11] Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

[12] The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

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[13] On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

[14] On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

[15] Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

[16] The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to

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fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

[17] In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

[18] Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

[19] The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a

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support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

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[20] CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

[21] The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

[22] The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

[23] I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having

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reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

[24] This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

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(a) Threshhold Issues

[25] Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Re Stelco*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

[26] Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

[28] The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

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[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

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

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

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> (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.
>
> (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.

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

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$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

[34] Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

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is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

[36] For all of these reasons, I was prepared to approve the DIP facility and charge.

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(d) Administration Charge

[37] While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[38] I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

[39] As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

[40] Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

[41] The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that

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> the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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[42] Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

[44] The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

[45] Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

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> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[46] I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[47] The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

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believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

[49] Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

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[10] (2003), 39 C.B.R. (4th) 216.

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orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

[52] In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

[53] The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

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[54] CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

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Other

[55] The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

[56] Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

[57] Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

[58] This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

[59] I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

[60] Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Pepall J.

**Released:** October 13, 2009

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# TAB 8

**CITATION:** Canwest Publishing Inc., 2010 ONSC 222
**COURT FILE NO.:** CV-10-8533-00CL
**DATE:** 20100118

**ONTARIO**

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

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

2010 ONSC 222 (CanLII)

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
*Mario Forte* for the Special Committee of the Board of Directors
*Andrew Kent and Hilary Clarke* for the Administrative Agent of the Senior Secured Lenders' Syndicate
*Peter Griffin* for the Management Directors
*Robin B. Schwill and Natalie Renner* for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
*David Byers and Maria Konyukhova* for the proposed Monitor, FTI Consulting Canada Inc.

**PEPALL J.**

## REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

*Companies' Creditors Arrangement Act*[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

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[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

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[1] R.S.C. 1985, c. C. 36, as amended.

[2] On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

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principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year

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ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

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(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75

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[3] Subject to certain assumptions and qualifications.

[4] Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

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Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

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[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

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LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

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[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

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proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

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Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

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[5] 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6]and *Re Lehndorff General Partners Ltd*[7].

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

[6] 2009 CarswellOnt 6184 at para. 29 ( S.C.J.).

[7] (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

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addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

[8] 1999 CarswellOnt 4673 (S.C.J.).

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secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

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[9] Ibid at para. 16.

[10] (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

[11] Ibid at para. 34.

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(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

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[12] Supra, note 7 at paras. 31-35.

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consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

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[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

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[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

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counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

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[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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[13] This exception also applies to the other charges granted.

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

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

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of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

[14] Supra note 7 at paras. 44-48.

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restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

[15] Supra note 7.

[16] [2009] O.J. No. 3344 (S.C.J.).

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during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an

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[17] R.S.O. 1990, c. C.43, as amended.

[18] [2002] 2 S.C.R. 522.

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order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[65] In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

[19] Supra, note 7 at para. 52.

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any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

**Released:** January 18, 2010

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**CITATION:** CanWest Global Communications Corp., 2010 ONSC 222
**COURT FILE NO.:** CV-10-8533-00CL
**DATE:** 20100118

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**ONTARIO**

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

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

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**REASONS FOR DECISION**

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Pepall J.

**Released:** January 18, 2010

# TAB 9

**CITATION:** Re Chalice Brands Ltd., 2023 ONSC 3174
**COURT FILE NO.:** CV-23-00699872-00CL
**DATE:** 20230526

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**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 CHALICE BRANDS LTD.

**BEFORE:** Kimmel J.

**COUNSEL:** *Shawn Irving, / Marc Wasserman, / Kathryn Esaw, / Fabian Suárez-Amaya*, for Chalice Brands Ltd.

*Jeremy Bornstein*, Counsel for KSV Restructuring Inc., the Proposed Monitor

**HEARD:** May 23, 2023

**ENDORSEMENT**
**(CCAA- INITIAL ORDER)**

[1] Chalice Brands Ltd. brings this application for an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Having been satisfied that the preconditions were met, I signed the Initial Order on May 23, 2023 with a brief endorsement and reasons to follow. These are my reasons.

**Background – The Chalice Group and its Current Liquidity Crisis**

[2] Chalice Brands Ltd. ("Chalice" or the "Applicant") is the ultimate parent company of the Chalice Group, a vertically integrated group of cannabis companies operating primarily in Oregon's regulated adult-use market. The Chalice Group operates a farm-to-table cannabis business. They grow, process, distribute and sell their own cannabis and cannabis products.

[3] Chalice is incorporated and headquartered in Ontario.

[4] The Ontario Securities Commission issued a cease-trade order on May 6, 2022 ("CTO") after Chalice missed its 2021 annual filing deadline. Prior to the CTO, Chalice's common shares traded on the Canadian Securities Exchange ("CSE") as well as over the counter on the OTCQX®.

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[5] Chalice's assets are comprised of cash and its direct and indirect ownership of the remaining entities in the Chalice Group. Chalice has five bank accounts in Canada. Chalice is the 100 percent owner of Greenpoint Holdings Inc. ("Greenpoint Holdings"), a Delaware company. Greenpoint Holdings is the 100 percent owner of each operating company in the Chalice Group.

[6] All entities in the Chalice Group, other than Chalice, are United States based direct and indirect subsidiaries of Chalice with no assets in Canada (the "Non-Filing Affiliates"). Most of the operating entities are in Oregon.

[7] The Chalice Group has twenty-one active bank accounts in the United States. The Chalice Group leases certain properties in Oregon, including its 16 retail stores, 3 production facilities and its cultivation location. Chalice has guaranteed some of those leases.

[8] The Chalice Group does not own any real property in Canada or the United States.

[9] The Chalice Group holds 32 regulatory licenses in Oregon related to producing, processing, wholesaling and retailing cannabis and cannabis products. While all these licenses are in good standing, four are on temporary closure status under the licensing regime. In Nevada, the Chalice Group holds four licenses related to cultivation and product manufacturing of medical marijuana. All four licenses are in good standing but are currently inactive.

[10] The Chalice Group has 134 full-time employees and 37 part-time employees, all of whom work in the United States. All employees of the Chalice Group are employed and paid by one of Chalice's subsidiaries, Greenpoint Workforce, Inc. ("Greenpoint Workforce").

[11] Employee retention tax credits are an important asset of the Chalice Group. In 2020, the U.S. Congress passed the *Coronavirus Aid, Relief, and Economic Security (CARES) Act* which, among other things, created a new employee retention tax credit ("ERTCs"). The ERTCs are a refundable tax credit created to encourage employers to keep their employees on the payroll during the months in 2020 affected by the pandemic.

[12] To date, Greenpoint Workforce has received $2,700,000 worth of ERTCs. Greenpoint Workforce anticipates receiving another $2,300,000 of ERTCs in the near future.

[13] The Chalice Group's most recent financial statements are its unaudited, consolidated financial statements as at December 31, 2021. These statements disclosed that its liabilities exceeded its assets and that it had a net loss of almost $17 million. The evidentiary record indicates that its financial situation has deteriorated since 2021.

[14] The current financial circumstances of the Chalice Group appear to be the result of its premature pursuit of an expansion plan. Anticipating that cannabis would be legalized on a Federal level in the United States, in 2021, the Chalice Group undertook an acquisition-based strategy, taking on debt to acquire retail stores and production facilities in Oregon to support its vertical integration. However, Federal deregulation did not occur.

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[15] In the meantime, capital investments in the cannabis industry have become more difficult to secure and Chalice's inability to finalize its 2021 (and subsequently, its 2022) audited financial statements and the subsisting CTO prevent the Chalice Group from raising funds through issuing securities. This, combined with supply chain issues, inflation, oversupply in the retail cannabis market driving retail prices down and detrimental tax treatment of controlled substances in the United States have reduced the Chalice Group's gross margins, profitability and cash flows.

[16] Chalice's primary assets are inter-company receivables from the Non-Filing Affiliates. Its principal liabilities consist of outstanding debt obligations under three notes and two series of unsecured debentures with an aggregate outstanding principal of $10,259,297 (USD). Four of its subsidiaries also have funded debt obligations of $8,864,616 (USD). Chalice and certain of the Non-Filing Affiliates are alleged to be, or are, in default under their respective debt obligations.

[17] These circumstances have led to the urgent liquidity crisis that the Chalice Group now faces. Chalice and its operating subsidiaries are unable to satisfy their obligations as they come due. The Chalice Group cannot pay its trade creditors, its landlords or its employees. At present, the Chalice Group owes approximately $6 million in trade payables, including over $1 million in missed rent.

[18] Of immediate concern is that:

a. One of the lenders has threatened to move forward with nonjudicial foreclosure on the collateral and has written directly to the Oregon's cannabis regulator (the "OLCC") advising that they were purportedly taking steps to foreclose on assets of the Chalice Group and seeking approval for temporary authority to operate five of the Chalice Group's cannabis licenses; and

b. Chalice's subsidiaries have also fallen behind on making lease payments to certain of their landlords, which may entitle the landlords to declare a default under the lease and lock them out. This, in turn, would put the Chalice Group's store-based cannabis licenses at risk since, in Oregon, cannabis licenses are specific to a particular retail location. Therefore, the licenses risk being suspended or terminated if the retail location ceases operating.

[19] Chalice and its subsidiaries (the Non-Filing Affiliates) need "breathing space" from their creditors to pursue a going-concern sale. Chalice seeks to extend the benefit of the *CCAA* stay in this proceeding to its Non-Filing Affiliates, all of which are integral to the operations of the Chalice Group. If proceedings were taken against the Non-Filing Affiliates, it would be highly detrimental to the Chalice Group's ability to achieve a going-concern solution.

[20] Chalice has prepared a Cash Flow Forecast for the period from the week ending May 22, 2023 to the week ending August 18, 2023 (the "Period"). It indicates that Chalice requires $1,030,000 cash flow to meet anticipated obligations during the Period. Chalice's ability to do so is based on it having already received, or receiving, partial repayments of intercompany loans owing to it using proceeds from the recent ERTCs received by Greenpoint Workforce. Based on

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this Cash Flow Forecast, Chalice is not expecting to require a debtor-in-possession facility. Chalice intends to use these funds, in addition to certain other anticipated receipts, to fund Chalice's operations during this *CCAA* proceeding.

[21] KSV Restructuring Inc. is the proposed monitor (the "Proposed Monitor" or "KSV"). The Proposed Monitor's pre-filing report reflects its understanding that, aside from Chalice, Greenpoint Workforce's only other creditors are three bridge lenders (the "Bridge Lenders") that advanced Greenpoint Workforce approximately $831,250 in aggregate loans (together the "Bridge Loans") to fund working capital requirements until it received the ERTCs from the Internal Revenue Service. The Proposed Monitor further reports, based on discussions with Scott Secord, the Chief Restructuring Officer ("CRO"), that the Chalice Group intends to repay the Bridge Lenders during the *CCAA* proceeding. The receipts in the Cash Flow Forecast represent the repayment of the intercompany debt from the anticipated receipt of the second round of ERTC payments less the repayment of the Bridge Loans.

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**The Planned Oregon Receivership – the Intended Co-ordinated Going Concern Solution**

[22] Since cannabis has not been legalized Federally in the United States, the Chalice Group is unable to seek protection under the U.S. Bankruptcy Code, irrespective of its compliance with state cannabis laws. As such, concurrently with the filing of this Application, proceedings were commenced in Oregon to place certain Non-Filing Affiliates which are formed or have assets in Oregon (the "Oregon Subsidiaries") into state receivership (the "Oregon Receivership"). Should the Oregon Subsidiaries be placed in receivership, there shall be an automatic stay of proceedings against those entities and their property in Oregon; however, there was no such stay as of May 23, 2023 when the Initial *CCAA* Order was granted.

[23] Chalice seeks to have the *CCAA* stay of proceedings extended to all the Non-Filing Affiliates, with a carve-out for the Oregon receivership proceedings and the potential for a parallel stay in that jurisdiction. Subsidiaries in other states, such as Delaware, California and Nevada, will remain subject to the *CCAA* proceedings.

[24] It is intended that Chalice, together with the CRO and the proposed Monitor, will work in a coordinated manner with the receiver appointed in Oregon (the "Oregon Receiver") to conduct a sales process to achieve a going concern solution.

**Issues**

[25] The following issues raised by the relief sought are whether:

a. The Applicant meets the criteria for *CCAA* protection;
b. The *CCAA* stay should be extended to the Non-Filing Affiliates; and
c. The Administration Charge should be granted.

**Analysis**

*Is the Applicant Eligible for CCAA Protection?*

[26] Section 9(1) of the *CCAA* provides that an application under the *CCAA* may be made to the court that has jurisdiction in the province where the debtor company has its "head office or chief place of business." The *CCAA* applies to a "debtor company" or "affiliated debtor companies" where the total claims against the debtor or its affiliates exceeds $5 million.

[27] Chalice is incorporated in Ontario, with assets in Ontario (its bank accounts and shareholdings) and with total claims against it exceeding $5 million.

[28] Chalice is in default under various secured debt obligations and does not have sufficient liquidity to make payments on unsecured debentures when the next interest payments come due on June 30, 2023. Given the CTO and the lack of interest in the capital markets for cannabis companies, Chalice's only immediate sources of funds are its subsidiaries. Those subsidiaries are struggling to pay retail landlords and employees.

[29] Chalice has established that it is unable to meet its obligations as they become due and that it has ceased paying its current obligations in the ordinary course of business. It is an "insolvent person" within the meaning of s. 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and under the expanded concept of insolvency accepted by this court in *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.), leave to appeal to ONCA ref'd, 2004 CarswellOnt 2936, leave to appeal to SCC ref'd, [2004] S.C.C.A. No. 336.

[30] Chalice fits within the definition of a debtor company under s. 2 of the *CCAA* and is eligible to make this application under the *CCAA*.

[31] Under s. 11.7 of the *CCAA*, when an Initial Order is made in respect of a *CCAA* debtor company, the court shall at the same time appoint a monitor. Chalice proposes to have KSV appointed as the monitor. KSV has consented to act as such.

[32] KSV is a "trustee" within the meaning of subsection 2(1) of the *BIA*, it is established and qualified and has consented to act as monitor. KSV's involvement as the court-appointed monitor will lend stability and assurance to the Chalice Group's stakeholders. KSV is not subject to any of the restrictions set out in s. 11.7(2) of the *CCAA*.

*Should the Stay of Proceedings be Extended to the Non-Filing Affiliates?*

[33] Section 11.02(1) of the *CCAA* permits this court to grant an initial stay of up to 10 days on an application for an initial order, provided the applicant establishes that such a stay is appropriate and that the applicant has acted with due diligence and in good faith (s. 11.02(3)(a-b)). The primary purpose of the *CCAA* stay is to maintain the *status quo* for a period while the debtor company consults with its stakeholders with a view to continuing its operations for the benefit of its creditors.

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[34] I am satisfied that the Applicant requires a stay of proceedings in order to provide it with the breathing room necessary to obtain the required funding to continue operations while pursuing various restructuring options.

[35] Chalice seeks to extend the stay of proceedings to the Non-Filing Affiliates. The court's authority to grant such an order is derived from the broad jurisdiction under s. 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. The court has, on other occasions, extended the initial stay of proceedings to non-applicants, including foreign non-applicant affiliates. See for example, *Re Tamerlane Ventures Inc.*, 2013 ONSC 5461, 6 C.B.R. (6th) 328, at para. 2; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Re Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422, at para. 42; *In the matter of a plan of compromise or arrangement of Lydian Group*, Court File No. CV-19-00633392-00CL (SCJ: Toronto, Commercial List) Order of Morawetz J. (Initial Order) dated December 23, 2019, at paras. 2, 10.

[36] Further, in proceedings under Part IV of the *CCAA*, this court routinely extends a *CCAA* stay over non-applicants subject to foreign main insolvency proceedings. See for example, *In the matter of Hollander Sleep Products, LLC*, CV-19-620484-00CL (SCJ: Toronto, Commercial List) Order of Hainey J. (Initial Recognition Order) dated May 23, 2019, at para. 4; *In the matter of Brooks Brothers Group, Inc.*, Court File No. CV-20-00647463-00CL (SCJ: Toronto, Commercial List) Order of Hainey J. (Initial Recognition Order) dated September 14, 2020, at para. 4.

[37] It has been held to be just and reasonable to extend a stay of proceedings to non-applicant affiliates when:

a. The applicant and its subsidiaries are "highly integrated … and indispensable to the Applicants' business and restructuring… Failure to [extend the stay] would undermine the intent of the stay." See *Re Imperial Tobacco Canada Limited, et al*, 2019 ONSC 1684, 68 C.B.R. (6th) 322, at para. 12);
b. Without the benefit of a stay, the Non-Filing Affiliates would "run out of liquidity before the time that would reasonably be required to implement a restructuring." See *Re Urbancorp Toronto Management Inc.*, 2016 ONSC 3288, 37 C.B.R. (6th) 44, at para. 44.

[38] The Proposed Monitor explains that the extension of the stay over the Non-Filing Affiliates is critical to the stabilization of the Chalice Group's operation and ensuring a co-ordinated restructuring process, for a variety of reasons, including:

a. The vertically integrated nature of the Chalice Group's business, in which most key decision making is done through the Canadian parent company;
b. Greenpoint Workforce acts as the only employer within the Chalice Group and funds payroll;
c. The Non-Filing Affiliates hold the cannabis licences, operate the cultivation and production facilities and operate the sixteen retail stores;
d. Certain creditor and landlord-driven enforcement action is being pursued against certain Non-Filing Affiliates that may put the licences at risk; and

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e. If enforcement steps are taken against the Non-Filing Affiliates, it is expected to materially destroy value and negatively impact a going-concern sale of the Chalice Group's assets or business.

[39] These are among the factors described in *Re JTI-Macdonald Corp.*, 2019 ONSC 1625 at para. 15, as well as factors identified in the other case law cited above, that exist in this case in support of the extension of the stay to the Non-Filing Affiliates. The Applicant summarizes these factors in their factum as follows:

a. The business and operations of the Non-Filing Affiliates are significantly intertwined with those of the Applicant. The Chalice Group operates as a vertically integrated business and most key decision-making is done through the Applicant.
b. Not extending the stay to the Non-Filing Affiliates could jeopardize the success of a potential going concern sale of the business. Creditors are already pursuing enforcement action against the Non-Filing Affiliates that may put the Chalice Group's cannabis licenses at risk.
c. Failure of the restructuring would be more detrimental than extending the stay to the Non-Filing Affiliates. Enforcement action against the Non-Filing Affiliates, in Canada or elsewhere, would be detrimental to the Applicant's efforts to pursue a going concern sale of the Chalice Group and would undermine a process that would otherwise benefit the stakeholders of the Chalice Group as a whole.
d. The Non-Filing Affiliates will run out of liquidity before this proceeding can be completed. The Non-Filing Affiliates do not have enough cash to maintain regular operations, and cannot even independently fund the proposed Oregon Receivership.
e. The balance of convenience favours extending the stay. Extending the *CCAA* stay, concurrent with the stay of proceedings pursuant to the Oregon Receivership, will protect the Applicant's creditors by protecting the investment in its subsidiaries, as well as the stakeholders including employees, suppliers, customers, and lenders.
f. The Proposed Monitor supports extending the stay to the Non-Filing Affiliates.

[40] Federal laws in the United States have precluded Chalice from pursuing a coordinated U.S. *Bankruptcy Code* proceeding. Any stay granted pursuant to the Oregon Receivership may not have effect beyond Oregon. In the circumstances, where protection under the U.S. *Bankruptcy Code* is not available to the Chalice Group, extending the *CCAA* stay to the Non-Filing Affiliates is the best option to achieve the breathing space necessary to preserve the value of the Chalice Group while efforts are co-ordinated between the Monitor, the CRO and the Oregon Receiver in the Oregon Receivership (if granted) for a going concern transaction.

[41] No authority was cited for the precise situation in this case, of the *CCAA* stay being extended over Non-Filing Applicants that include some entities over which it is expected that a stay may be granted in another jurisdiction (the Oregon Receivership). However, it is not expected to be a conflicting or competing stay, but rather one that will be complementary and utilized in the co-ordinated efforts of the Monitor, the CRO and the Oregon Receiver.

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[42] The commencement of a *CCAA* proceeding to address the significant issues the Chalice Group faces represents the only realistic path forward at this time. An inability to restructure in a coordinated, court-supervised manner would be potentially disastrous for many stakeholders of the Chalice Group, including the employees and creditors of Chalice and its Non-Filing Affiliates.

*Should the Administration Charge be Granted?*

[43] The proposed Initial Order creates a first-ranking Administration Charge of $400,000 CAD over Chalice's assets to secure the fees and expenses disbursements of the Proposed Monitor and its counsel and of Chalice's counsel. The services of these advisors are critical to the Applicant's ability to restructure. The Chalice Group requires the expertise of these professionals who will have distinct roles in the cross-border restructuring efforts of the Chalice Group. The Proposed Monitor has reviewed the Administration Charge and considers it to be reasonable and appropriate in the circumstances given the anticipated services to be provided by the professionals involved.

[44] The Cash Flow Forecast anticipates professional fees payable as of June 2, 2023 of $300,000, with a similar monthly amount payable in early July and August. The initial anticipated payment of professional fees reflects the fact that pre-filing efforts have been undertaken to organize a co-ordinated restructuring plan which have brought the Applicants to the point they are in the current proceedings. The court expects that the payment of any professional fees will be subject to the usual review requirements in *CCAA* proceedings.

[45] Section 11.52 of the *CCAA* gives this court the jurisdiction to grant a charge for the fees and expenses of financial, legal and other advisors or experts. Such charge can rank in priority to the claims of existing secured creditors. I am satisfied that the Administration Charge is necessary in the circumstances, is appropriately sized given the nature and complexity of the proceeding and should be granted.

**The Initial Order and the Comeback Hearing**

[46] Chalice has worked with its advisors and the Proposed Monitor to limit the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its businesses within the initial stay period. I am satisfied that the requested relief is necessary for the immediate stabilization of Chalice's businesses and to protect it and the interests of its various stakeholders. Additional authorizations must be addressed at the comeback hearing.

[47] For the foregoing reasons the Initial Order was granted on May 23, 2023.

[48] The "come back" hearing shall take place before me on June 1, 2023 at 2:00 p.m. on Zoom.

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Kimmel J.

**Date:** May 26, 2023

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# TAB 10

CANADA

CONSOLIDATION

CODIFICATION

# Companies' Creditors Arrangement Act

# Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to February 20, 2024

Last amended on April 27, 2023

À jour au 20 février 2024

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### Form of applications

**10 (1)** Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

### Documents that must accompany initial application

**(2)** An initial application must be accompanied by

**(a)** a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

**(b)** a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

**(c)** copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

### Publication ban

**(3)** The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

### 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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

### Relief reasonably necessary

**11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

### Forme des demandes

**10 (1)** Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

### Documents accompagnant la demande initiale

**(2)** La demande initiale doit être accompagnée :

**a)** d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

**b)** d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

**c)** d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

### Interdiction de mettre l'état à la disposition du public

**(3)** Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

### Pouvoir général du tribunal

**11** Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

### Redressements normalement nécessaires

**11.001** L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

### Rights of suppliers

**11.01** No order made under section 11 or 11.02 has the effect of

**(a)** prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

**(b)** requiring the further advance of money or credit.

2005, c. 47, s. 128.

### Droits des fournisseurs

**11.01** L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

**a)** d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

**b)** d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

### Stays, etc. — initial application

**11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

**(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

**(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

**(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

### Suspension : demande initiale

**11.02 (1)** Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

**a)** suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

**b)** surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

**c)** interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

### 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

### Suspension : demandes autres qu'initiales

**(2)** Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

**a)** suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

**b)** surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

**(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**c)** interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

**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.

**Preuve**

**(3)** Le tribunal ne rend l'ordonnance que si :

**a)** le demandeur le convainc que la mesure est opportune;

**b)** dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

**Restriction**

**(4)** Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

**Restriction**

**(4)** L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

**Stays — directors**

**11.03 (1)** An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

**Suspension — administrateurs**

**11.03 (1)** L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

**Exception**

**(2)** Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

**Exclusion**

**(2)** La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

**Persons deemed to be directors**

**(3)** If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

**Présomption : administrateurs**

**(3)** Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

**Persons obligated under letter of credit or guarantee**

**11.04** No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

**Suspension — lettres de crédit ou garanties**

**11.04** L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la

establishes a *provincial pension plan* as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 128; 2009, c. 33, s. 28.

province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 128; 2009, ch. 33, art. 28.

### Meaning of *regulatory body*

**11.1 (1)** In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

### Définition de *organisme administratif*

**11.1 (1)** Au présent article, ***organisme administratif*** s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

### Regulatory bodies — order under section 11.02

**(2)** Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

### Organisme administratif — ordonnance rendue en vertu de l'article 11.02

**(2)** Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

### Exception

**(3)** On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

**(a)** a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

**(b)** it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

### Exception

**(3)** Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

**a)** il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

**b)** l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

### Declaration — enforcement of a payment

**(4)** If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may,

### Déclaration : organisme agissant à titre de créancier

**(4)** En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à

is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

**Filling vacancy**

**(2)** The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

**Security or charge relating to director's indemnification**

**11.51 (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

**Priority**

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

**Restriction — indemnification insurance**

**(3)** The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

**Negligence, misconduct or fault**

**(4)** The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

**Court may order security or charge to cover certain costs**

**11.52 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

**Vacance**

**(2)** Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

**Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants**

**11.51 (1)** Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

**Priorité**

**(2)** Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

**Restriction — assurance**

**(3)** Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

**Négligence, inconduite ou faute**

**(4)** Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

**Biens grevés d'une charge ou sûreté pour couvrir certains frais**

**11.52 (1)** Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

**(a)** the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

**(b)** any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

**(c)** any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

**Priority**

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

### *Bankruptcy and Insolvency Act* matters

**11.6** Notwithstanding the *Bankruptcy and Insolvency Act*,

**(a)** proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

**(b)** an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

**(i)** the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

**(ii)** the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

### Court to appoint monitor

**11.7 (1)** When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

**a)** les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

**b)** ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

**c)** ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

**Priorité**

**(2)** Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

### Lien avec la *Loi sur la faillite et l'insolvabilité*

**11.6** Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

**a)** les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

**b)** le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

**(i)** de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

**(ii)** du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

### Nomination du contrôleur

**11.7 (1)** Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

# TAB 11

**CITATION:** Danier Leather Inc. (Re), 2016 ONSC 1044
**COURT FILE NO.:** 31-CL-2084381
**DATE:** 20160210

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**IN THE MATTER OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC.**

**BEFORE:** Penny J.

**COUNSEL:** *Jay Swartz* and *Natalie Renner* for Danier

*Sean Zweig* for the Proposal Trustee

*Harvey Chaiton* for the Directors and Officers

*Jeffrey Levine* for GA Retail Canada

*David Bish* for Cadillac Fairview

*Linda Galessiere* for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge

*Clifton Prophet* for CIBC

**HEARD:** February 8, 2016

## ENDORSEMENT

### The Motion

[1] On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

[2] Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to :

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

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(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

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**Background**

[3] Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

[4] Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

[5] In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

[6] As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

[7] Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow

negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

[8] Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

**The Stalking Horse Agreement**

[9] The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

[10] On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

[11] The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

[12] The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

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[13] The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

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**The SISP**

[14] Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

[15] Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

[16] Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

[17] The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

[18] The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

[19] Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

[20] The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies*, 2012 ONSC 1750 at para. 7 [Commercial List].

[21] The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 22-26 (S.C.J.).

[22] A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

[23] In *Re Brainhunter*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

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*Re Brainhunter*, 2009 CarswellOnt 8207 at paras. 13-17 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 at para. 49 (S.C.J. [Commercial List]).

[24] While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60 at para 24; *Re Indalex Ltd.*, [2013] 1 S.C.R. 271 at paras. 50-51.

[25] Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Re Mustang GP Ltd.*, 2015 CarswellOnt 16398 at paras. 37-38 (S.C.J.).

[26] These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

[27] The SISP is warranted at this time for a number of reasons.

[28] First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

[29] Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

[30] Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

[31] Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

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(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

[32] There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

[33] Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

[34] Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[35] In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

[36] The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

[37] The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

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[38] The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

[39] A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

[40] Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

**The Break Fee**

[41] Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

[42] Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Re Nortel Networks Corp.*, [2009] O.J. No. 4293 at paras. 12 and 26 (S.C.J. [Commercial List]); *Re W.C. Wood Corp. Ltd.*, [2009] O.J. No. 4808 at para. 3 (S.C.J. [Commercial List], where a 4% break fee was approved.

[43] The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

[44] In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

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(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

[45] I find the break fee to be reasonable and appropriate in the circumstances.

**Financial Advisor Success Fee and Charge**

[46] Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

[47] Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

*Re Sino-Forest Corp.*, 2012 ONSC 2063 at paras. 46-47 [Commercial List]; *Re Colossus Minerals Inc.*,*supra*.

[48] The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

[49] The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

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[50] In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

[51] Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

[52] Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

[53] Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

[54] A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

**Administration Charge**

[55] In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

[56] Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

[57] Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.).

[58] This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

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**D&O Charge**

[59] The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

[60] Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

[61] Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

[62] Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

[63] The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

[64] The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

[65] In *Colossus Minerals* and *Mustang, supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

[66] I approve the D&O Charge for the following reasons.

[67] The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

[68] The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

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[69] The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

[70] The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

[71] Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

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**Key Employee Retention Plan and Charge**

[72] Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

[73] Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

[74] Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

[75] Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Re Nortel Networks Corp. supra.*

[76] In *Re Grant Forest Products Inc.*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

*Re Grant Forest Products Inc.*, [2009] O.J. No. 3344 at paras. 8-22 (S.C.J. [Commercial List]).

[77] While *Re Grant Forest Products Inc*. involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

[78] The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

**Sealing Order**

[79] There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

[80] Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

[81] In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

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(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 at para. 53 (S.C.C.).

[82] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, *supra*.

[83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

[84] The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

[85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

[86] As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Penny J.

**Date:** February 10, 2016

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# TAB 12

**CITATION:** Fire & Flower Holdings Corp., et al., 2023 ONSC 4048
**COURT FILE NO.:** CV-23-00700581-00CL
**DATE:** 20230625

**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 ARRANGEMNT OF FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC., 13318184 CANADA INC., 11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER HOLDINGS CORP., PINEAPLE EXPRESS DELIVERY INC., and HIFYRE INC, Applicants

**BEFORE:** Peter J. Osborne J.

**COUNSEL:** Dan Murdoch and Philip Yang, Counsel for the Applicants
Larry Ellis, Patrick Corney and Sam Massie, Counsel for Green Acre Capital LP
Christopher Yung, Counsel for Trevor Fencott
Haddon Murray, Counsel for Turning Point Brands (Canada) Inc.
Max Starnino, Counsel for David Gordon
Rebecca Kennedy, Counsel for the Monitor
Natalie Renner and Christian Lachance, Counsel for the DIP Lender
Michael A. Katzman, Counsel for commercial landlord 431-441 Spadina Investments Inc. and for commercial landlord Queen and Brock Holdings Inc.

**HEARD:** June 25, 2023

## SUPPLEMENTARY ENDORSEMENT

1. On June 21, 2023, I granted an order approving the SISP proposed by the Applicants and dismissing the cross-motion of Green Acre and I released a short Endorsement that stated reasons would follow. These are those reasons.

2. The background and context for this matter is set out in the endorsement of Steele, J. made when the Initial Order was granted, and in my Endorsements of June 15 and June 21, 2023. Defined terms in this Endorsement have the meaning given to them in the motion materials or my earlier Endorsements unless otherwise stated.

3. As I previously noted, I had adjourned the Applicants' motion on its original return date of June 15, 2023 until the hearing of this motion at the request of Green Acre. As further described below, I granted other relief on June 15, 2023 which was not opposed by any stakeholder. That included approval of a DIP Facility provided to the Applicants by ACT.

4. The adjournment of the SISP approval motion last week was granted at the request of Green Acre in part on the basis that it wished to cross-examine on the Trudel Affidavit relied upon by the Applicants. Green Acre subsequently advised that it did not intend to do so, and instead, as noted above, served its cross-motion materials.

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5. The proposed SISP was developed by the Applicants, with the assistance and oversight of the Court-appointed Monitor with a view to maximizing the value of the business assets of the Applicants. As is clear from the motion materials, the SISP was designed to be flexible and broad, 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; and/or b) an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Applicants or their Business.

6. The SISP includes a Stalking Horse Agreement between the Applicants and ACT. ACT is a significant shareholder of the Applicants, holding approximately 35.7% of the issued and outstanding common shares, in addition to warrants. It is also the senior secured creditor, and an unsecured creditor, and the DIP Lender.

7. The terms of the proposed SISP and the timeline for key milestones are set out in the Affidavit of Stephane Trudel sworn June 14, 2023 together with exhibits thereto, and the First Report of the Monitor and the Supplement to the First Report, all of which is relied upon by the Applicants.

8. Green Acre is a minority shareholder with approximately 5% of the equity. Counsel advised the Court at the hearing of this motion that over the course of last weekend, it also purchased certain debt of the Applicants (there is no evidence before me as to the quantum or size) with the result that it is now also a creditor.

9. All parties are in agreement about the dire circumstances in which the Applicants find themselves, and about the necessity for fundamental change. Very material operating losses have been incurred and continue. Similar challenges to those facing the Applicants are facing other operators in the retail cannabis sector as well.

10. At its core, the position of Green Acre is that the business of the Applicants is viable and needs to be recapitalized and restructured, but not sold. It submits that ACT, as senior secured creditor and also proposed stalking horse bidder, will obtain an unfair advantage if the relief sought is approved, and all potentially available options will not be available for consideration.

11. Accordingly, Green Acre opposes the motion of the Applicants for approval of the SISP, and submits that approval of a SISP should be adjourned *sine die*. It also now brings a cross-motion for approval of a new DIP facility to be approved to replace the DIP Facility approved last week in this proceeding, which would be paid out and cancelled. It relies on the Affidavit of Shawn Dym sworn June 19, 2023 together with exhibits thereto.

12. Green Acre submits in its cross-motion that ACT is "improperly using its influence over the Applicants to force the Applicants into a premature SISP" (Notice of Motion, para. 8). Green Acre submits that since ACT has advised that it will not advance further funds under the DIP until a SISP is commenced, and since a SISP is not in the best interest of the Applicants since it will not maximize stakeholder value, the DIP facility approved last week will not maximize stakeholder value and should be replaced.

13. Green Acre, recognizing the problem created if, as it requests, the proposed SISP is not approved, in that the DIP Facility already approved will not, according to its terms, provide the

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liquidity and funding required by the Applicants to carry on operations and fun restructuring costs, therefore proposes a replacement DIP facility.

14. Green Acre submits that the DIP Facility should be replaced with the alternative DIP facility now proposed by Green Acre on behalf of a newly formed syndicate of lenders which, it submits, "has no interest in the immediate sale of the Applicants". Instead, the syndicate "supports a restructuring of the business of the Applicants with a view to continuing operations as a going concern, or, if necessary, allowing the business of the Applicants to be marketed at a later date as an EBITDA-generating asset."

15. Green Acres submits that its alternative proposed DIP facility contains a more favourable interest rate (10% as opposed to 12%) and a lower exit fee ($300,000 as opposed to $400,000) and provides for funding of up to $9.8 million.

16. Fundamentally, I am not persuaded that the potential strategic options and alternatives that Green Acre submits that it wishes to pursue are precluded or foreclosed by the relief being sought by the Applicants.

17. On the contrary, 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. It is not as restrictive as is submitted by Green Acre and is specifically intended to solicit interest in, and opportunities for, the Applicants through a variety of different avenues or transaction structures. I do not accept the submission of Green Acre that the result will inevitably be a sale of the assets of the Applicants to the exclusion of all other alternatives. That may well be the result, but the SISP will canvass the market for all possible transactions and/or recapitalization alternatives.

18. The evidence in the Record supports this conclusion. These alternative structures may include a sale, or successive sales of the Property and/or the Business of the Applicants, in whole, or alternatively, in part. The alternative structures may also include an investment in, restructuring, recapitalization, and/or refinancing or other form of reorganization of the Applicants or their Business (Trudel Affidavit, para. 23).

19. The Court-appointed Monitor, in recommending approval of the SISP, confirmed in its First Report that all of these possible alternatives were available and would be available as part of the SISP, if approved (paragraph 22). The Monitor confirms that potential bidders may include local and international strategic and financial parties (paragraph 23).

20. There is no prohibition on any stakeholder, specifically including Green Acre, from participating in the process and submitting such proposal or proposals as it may see fit. As further described below, however, there is downside protection for the most economically affected stakeholders, in the form of the proposed stalking horse bid.

21. It is principally as a result of my conclusion that the proposed SISP does not prohibit or foreclose the exploration and development of alternative transactions, including but not limited to recapitalization transactions, that I also conclude that the concerns expressed by the Court in the principal authority relied upon by Green Acre, *Quest University Canada (Re)*, 2020 BCSC 318, do not assist Green Acre here.

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22. In that case, the Court was rightly concerned in the circumstances that the proposed SISP would likely foreclose other possible solutions that would better serve stakeholders, and that the imposition of an SISP at that time would be antithetical to the purposes and objectives of the CCAA, which is intended to afford financially troubled companies with the breathing room to address, within appropriate constraints, its financial difficulties (paras. 104 -109).

23. It is important to remember that no approval of a stalking horse transaction is being sought or granted on this motion. That may be for another day, depending upon the manner in which circumstances unfold. In particular, and at the risk of stating the obvious, the appropriateness, or lack thereof, of approval of the stalking horse transaction will depend on what other proposals are received as part of that SISP. If there is a superior bid, it may very well be that application of the *Soundair* Principles would militate in favour of approval of an alternative transaction.

24. The mechanics of the proposed SISP are fully set out in the motion materials and the First Report of the Monitor. The timelines and key dates are relatively concise, with Phase 1 Bid Deadline of July 13 and the possibility of a Phase 2, if other qualified Bids are received, to take place through August, 2023 with the proposed outside date for closing of September 15. The relatively tight timeline is necessitated by the dire financial circumstances facing the Applicants, and the availability of DIP funding to sustain operations and restructuring costs.

25. I am satisfied that the factors identified by the Court to be considered in a determination of whether to approve a sales process as contemplated by ss. 11 and 36 of the CCAA are met here: *Nortel Networks Corporation (Re),* 2009 CanLII at paras. 47 – 48.

26. 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: *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 ("*CCM*") at paras. 6-14.

27. 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. (See *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
b. the interests of all parties;
c. the efficacy and integrity of the process by which the party obtained offers; and
d. whether the working out of the process was unfair.

28. 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. (See *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20).

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29. I observe again that the transaction contemplated by the Stalking Horse Agreement is not being approved today. 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.

30. I recognize that the Stalking Horse Agreement includes a break fee. This is one of the terms to which Green Acre points in support of its argument that the relief sought by the Applicants is not in the best interest of stakeholders.

31. That break fee has been reduced from that originally proposed, as noted above and confirmed by the Affidavit of Philip Yang sworn June 18, 2023. At the original return of the motion, I had expressed some concern with respect to the appropriateness of the quantum of the break fee, particularly in circumstances here where the transaction being proposed was a credit bid, meaning that there was no new capital at risk. While I recognize that whether a proposed transaction is a credit bid is only one of several factors to be taken into account, it certainly is a factor to be considered.

32. I am satisfied that the quantum of the break fee, as revised, is both within a reasonable range as has been accepted previously by this Court (see, for example, *CCM* at paras. 12 -14), and is appropriate in the particular circumstances of this case.

33. The First Report of the Monitor is also of assistance with respect to the break fee. At paragraph 44, the Monitor confirms that it, together with its counsel, have reviewed all stalking horse processes valued at over $5 million and approved in CCAA and BIA proceedings between January, 2019 and April 2023 in order to assess the reasonableness of break fees approved by the Court.

34. The Monitor conducted the same analysis for all credit bids approved by the Courts and the First Report attaches as Appendix “B” a chart of observed fees which range from 0.9% to 3.4% and break fees ranging from 2.8% to 3.4%. The Monitor specifically supports the proposed break fee and opined that it is reasonable in the circumstances.

35. The SISP, including the Stalking Horse Agreement, is appropriate and is approved.

36. It follows that I am not persuaded that the replacement DIP facility proposed by Green Acre should be approved. It was proposed by Green Acre to fill the funding vacuum that would be created if, as that party requested, the SISP was not approved. That is, now, not the situation.

37. Moreover, the ACT DIP Facility already in place was approved less than one week ago, and that approval was not opposed by Green Acre. There may well be circumstances in which an existing DIP facility should be replaced, even so soon after it was approved, but in my view Courts should consider carefully when and in what circumstances that should occur. There is inevitable disruption and therefore increased uncertainty and instability created by substituting one DIP lender for another. While, as noted, there may very well be circumstances in which this disruption is warranted, instability and uncertainty are to be minimized to the greatest extent possible during a restructuring period.

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38. Green Acre relies on caselaw setting out the factors to be considered in approval of a DIP facility, and submits that those factors are equally applicable in deciding who (i.e., which proposed DIP lender, if there is more than one) ought to be the approved DIP lender, and on what terms the DIP financing ought to be provided (see, for example, *Great Basin Gold Ltd. Re*, 2012 BCSC 1459).

39. That those factors are generally applicable is not at the core of the dispute here. However, in my view, they do not militate, in the particular circumstances of this matter, in favour of replacing a DIP facility approved (without opposition from anyone, including but not limited to the party now proposing the alternative DIP) less than one week ago.

40. I am also cognizant of the cautionary note in *Great Basin* to the effect that courts must scrutinize interim financing proposals to ensure that they are reasonable and appropriate in the circumstances and that they do not inappropriately advantage one party over another to the detriment of that party and the stakeholders generally.

41. The slightly more favourable interest rate in the proposed alternative DIP does not, in my view justify the introduction of additional instability and uncertainty at this stage, less than a week after the DIP Facility was approved without opposition. I accept the submission of counsel for the Applicants that the dollar value of the interest savings to be realized by the alternative DIP is relatively minor - in the order of approximately $50,000.

42. The uncertainty and instability that would be increased by replacing the DIP lender is compounded by the fact that the proposed alternative DIP would extend the maturity date to December 15 although the cash flow forecasts in the record show that the Applicants would be out of funds to continue to be able to operate by October. Counsel for Green Acre submits that it is likely that the syndicate on whose behalf Green Acre advances its cross-motion would likely be prepared to invest additional funds. However, I must base my decision on the committed terms as reflected in the record before me.

43. Both DIP facilities contemplate funding in the amount of up to $9,800,000. However, as noted, the cash flow forecasts reflect that these funds would be sufficient for the applicants the Applicants through the restructuring period only until October.

44. In addition, I recognize that the approved DIP Facility contemplates an exit fee to which Green Acre takes objection today. I also recognize, however, that that term was in the materials served more than two weeks ago and was fully disclosed to all parties when the DIP Facility was approved last week.

45. Moreover, the alternative DIP Facility includes a covenant compelling the Applicants to engage in good faith discussions with Green Acre and then if, and only if, those discussions do not bear fruit, (in the words of Mr. Dym, the affiant for Green Acre), the “parties will pivot to a SISP strategy by July 15, 2023 and market themselves from a position of financial stability” (Dym Affidavit, para. 52).

46. I am concerned that this effectively gives Green Acre a period of exclusivity for negotiations with the Applicants to the exclusion of other parties, but which has the result of shortening by the same period of time (approximately one month) the period of time within which

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alternative transactions or structures (with an unlimited and unrestricted number of potential strategic partners or investors), might be explored.

47. One of the factors persuading me that the SISP should be approved today is the desire to maximize the period within which options and alternatives can be explored. As stated above, there is no reason why Green Acre cannot participate fully in that SISP process, and propose, if it (or the syndicate of arm's length lenders with which it is working and who, it is said, oppose a sale at this time) wishes, a recapitalization of the business of the Applicants rather than a sale.

48. For all of these reasons, I granted the order approving the SISP (with the Stocking Horse Bid Agreement), declined to adjourn the SISP approval *sine die*, and dismissed the cross-motion of Green Acre for approval of the alternative DIP facility.

Osborne J.

**Date:** June 25, 2023

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# TAB 13

**CITATION:** IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., 2020 ONSC 3565
**COURT FILE NO.:** CV-20-00641220-00CL
**DATE:** 20200617

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| 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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED | ) | *Ashley Taylor* and *Sanja Sopic*, for the Applicants |
| | ) | *Marc Wasserman* and *Mary Paterson*, for the Monitor |
| | ) | *Wael Rostom, Stephen Brown-Okruhlik, Guneev Bhinder*, for All Js Greenspace LLC |
| | ) | *Wojtek Jaskiewicz*, for the Capital Transfer Agency, ULC |
| Applicants | ) | *Graham Phoenix* and *Thomas Lambert*, for WMB Resources LLC and Green Ops Group LLC |
| | ) | *Lou Brzezinski*, *Stephen Gaudreau*, *Eric Golden* and *Varoujan Arman*, for Michael D. Horvitz Revocable Trust |
| | ) | *Joe Groia* and *Martin Mendelzon*, for Chiron Ventures Inc. |
| | ) | **HEARD:** May 29 and June 1, 2020 |

## ENDORSEMENT

**MCEWEN J.**

[1] On May 20, 2020 I granted the Initial Order sought by the Applicants, Green Growth Brands Inc. ("GGB"), GGB Canada Inc., Green Growth Brands Realty Ltd., and Xanthic Biopharma Limited (collectively, "the Applicants"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, As Amended ("*CCAA*"). The Initial Order provided for,

amongst other things, a stay of proceedings to allow GGB, the parent entity, an opportunity to market the sale of its business.

[2] At that time, I also appointed Ernst & Young Inc. as the Monitor (the "Monitor") and approved a stay of proceedings for the initial 10-day period. I further approved certain court ordered charges and interim financing (the "DIP Financing") to be provided by All Js Green Space LLC ("All Js").

[3] The comeback motion was scheduled for May 29, 2020 and ultimately was heard on May 29 and June 1, 2020.

[4] Due to the COVID-19 crisis, the comeback motion proceeded by way of video conference. It was held in accordance with the Notices to the Profession issued by Morawetz C.J. and the Commercial List Advisory.

[5] At the comeback motion, I granted the orders sought, being an Amended and Restated Initial Order, and a Sale and Investment Solicitation Process ("SISP") Order, the latter of which approved the SISP and the fully binding and conditional Acquisition Agreement dated May 19, 2020 (the "Stalking Horse Agreement"). I further granted a sealing order with respect to a Term Sheet and the Florida LOI that will be referred to in the body of this endorsement, on an unopposed basis, as the criteria set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, were met. I dismissed the cross-motion brought by Mr. Michael D. Horvitz.

[6] I indicated at the comeback motion that I would provide a more detailed endorsement. This is my endorsement.

**BACKGROUND**

[7] The Applicants are part of a corporate group ("GGB Group"). The GGB Group is in the business of growing, processing and selling cannabis. GGB is the parent entity of the GGB Group.

[8] The GGB Group, until recently, operated two distinct lines of business. The first involves cannabis cultivation, processing, and production, and the distribution of certain tetrahydrocannabinol (commonly referred to as THC) products through wholesale and retail channels in medical and adult-use dispensaries in Florida, Massachusetts and Nevada (the "MSO Business"). The second concerned cannabidiol (commonly referred to as CBD)-infused consumer product production, wholesale and retail operations online and through a mall-based kiosk shop system (the "CBD Business").

[9] The MSO Business continues to operate through indirect, wholly-owned subsidiaries of GGB. Operations of the CBD Business, however, were indefinitely suspended at the outset of the COVID-19 crisis. Thereafter, an Ohio court appointed a Receiver over the CBD Business to wind-down their operations.

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[10] I note from the outset that Mr. Horvitz, an investor in GGB, makes significant allegations against the GGB Group and other significant stakeholders, particularly Jay, Joseph and Jean Schottenstein and Wayne Boich.

[11] In order to put this dispute between Mr. Horvitz, GGB and some of the other stakeholders in context, it is important to understand the relationship between the relevant stakeholders with respect to the secured debt that was in place at the time of the Initial Order, which secured debt included:

- A promissory note issued by GA Opportunities Corp. (the "GAOC Note") in the amount of CAD $39,000,000. It was held by an arm's-length investor, Aphria Inc. Shortly before the May 20, 2020 motion the GAOC Note was acquired by Green Ops Group LLC ("Green Ops").

- Secured convertible debentures issued in May 2019 in the aggregate principal amount of US $45,500,000 (the "May Debentures"). The May Debentures were issued pursuant to the terms of a Debenture Indenture (the "May Debenture Indenture") between GGB and Capital Transfer Agency, ULC ("CTA").

- Secured convertible debentures issued pursuant to equity commitment letters with All Js and Chiron Ventures Inc. ("Chiron") (the "Backstop Debentures"). All Js and Chiron committed to subscribe for the Backstop Debentures in the aggregate principal amounts of US $57,350,000 and US $10,000,000, respectively, although not all of these funds had been fully drawn. The Backstop Debentures, too, were issued pursuant to the terms of a Debenture Indenture (the "Backstop Debenture Indenture") between GGB and CTA.

- Two promissory notes issued to All Js in May 2020, each in the amount of US $400,000.

[12] Mr. Horvitz, as Grantor and Trustee for and on behalf of the Michael D. Horvitz Revocable Trust, owns US $5 million of the May Debentures.

[13] Mr. Wayne Boich, generally speaking, controls Green Ops, which purchased the GAOC Note. He also controls WMB Resources LLC ("WMB"), which owns US $5 million in the May Debentures. In addition to the above, Green Ops also acquired the "Spring Oaks Notes" from GGB Florida LLC ("GGB Florida") in May 2020. I will comment more about this transaction later in this endorsement.

[14] Jay Schottenstein and his sons, Joseph and Jean Schottenstein, generally speaking, control a trust that owns All Js. As noted, All Js owns a majority of the Backstop Debentures. All Js also owns a significant number of shares in GGB and is the Debtor-in-possession ("DIP") Lender.

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[15] Messrs. Schottenstein also control LS Green Investments LLC and Delancey Financial LLC, which own US $20 million and US $10 million of the May Debentures, respectively.

[16] As can be seen from the above, Messrs. Schottenstein and Mr. Boich, through companies controlled by them, own a great deal of GGB's debt (and, in fact, the majority of that debt) with All Js also being a significant shareholder in GGB.[1]

[17] The Stalking Horse Agreement contemplates the purchase of GGB's assets, as defined, by All Js and CTA, in its capacity as the Debenture Trustee of the May Debentures and the Backstop Debentures (collectively, the "Stalking Horse Bidder"). The purchase is comprised of a credit bid of all of the secured debt held by All Js, the May Debentures, the Backstop Debentures and certain assumed liabilities totaling approximately US $106 million. It does not involve any cash consideration.

[18] The Schottensteins' and Mr. Boich's controlled companies, All Js and Green Ops, respectively, have entered into a Term Sheet for the capitalization of a company ("AcquireCo") to ultimately purchase the shares and inter-company debt of GGB as set out in the Term Sheet. Accordingly, the Term Sheet, amongst other things, sets out how the May Debentures will be treated.

[19] Mr. Horvitz' complaints essentially surround two events. The first was an Extraordinary Resolution that was passed by the holders of the May Debentures on May 3, 2020 without notice to him, which permitted the incurrence of new senior indebtedness and related security which allowed the All Js Secured Notes to rank in priority to the security held by the holders of the May Debentures. The second event involves another Extraordinary Resolution that was passed on May 18, 2020, again without notice, which approved the provisions of the Term Sheet that further diluted the value of his ownership in the May Debentures by removing any priority the May Debentures had over the Backstop Debentures (amongst other things). Mr. Horvitz also submits that provisions of the Term Sheet ensure that the Stalking Horse Bid is unbeatable.

[20] As a result, Mr. Horvitz raised a number of objections to the proposed SISP and the Stalking Horse Agreement. Mr. Horvitz' position was not supported by any of the other stakeholders. All of the significant stakeholders who attended at the comeback motion supported the relief sought by GGB. The Monitor also supported the relief sought.

[21] I also pause to note that Mr. Horvitz' counsel in his submissions conceded that the provisions of the May Debentures allowed the requisite majority to pass the Extraordinary Resolutions without notice to Mr. Horvitz. Mr. Horvitz' submission, however, is that the majority of the holders of the May Debentures, the corporations controlled by Messrs.

[1] The exact nature of Messrs. Schottensteins' and Mr. Boich's involvement in the above companies was not disclosed. No one, however, objected to the above general description.

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Schottenstein, failed to act in good faith towards Mr. Horvitz as did others, notably companies controlled by Mr. Boich, with respect to the creation of AcquireCo and the related Term Sheet.

## THE RELIEF SOUGHT BY THE APPLICANTS AND MR. HORVITZ

### The Applicants

[22] As noted, the Applicants sought an extension of the stay period to August 15, 2020 as well as approval of the SISP and the Stalking Horse Agreement entered into between GGB and CTA/All Js.

### Mr. Horvitz

[23] Mr. Horvitz, at the initial return of the motion on May 29, 2020, sought the following relief:

- an order setting aside my Initial Order of May 20, 2020 granting the Applicants protection under the *CCAA* for failure to make full and fair disclosure;

- an order adjourning the comeback motion of GGB for 14 days so that he could obtain an order pursuant to s. 11.9 of the *CCAA* requiring the production of financial records of several persons and corporations including GGB, Jay, Joseph and Jean Schottenstein, Mr. Boich, All Js, WMB, Chiron and others;

- compliance, within three days, with a Request to Inspect he served on May 25, 2020 and with a cross-examination of GGB's interim chief executive officer, Raymond Whitaker III; and

- an order requiring, within seven days, Messrs. Schottenstein and Mr. Boich to attend a r. 39.03 examination.

[24] After hearing submissions, I adjourned the motion to June 1, 2020 and ordered that the examination of Mr. Whitaker (which GGB had agreed to) take place in the interim and that there be fulsome production of relevant documents without ordering any particular documents be produced (All Js agreed to produce the Term Sheet on a confidential basis).

[25] Mr. Whitaker's examination was completed and documents produced to Mr. Horvitz. When the matter returned before me on June 1, 2020, Mr. Horvitz, as per para. 3 of his Supplementary Factum, pursued only the following relief:

- an order dismissing the Applicants' motion approving the SISP, the Stalking Horse Agreement and DIP Financing;

- an order requiring the Applicants to resubmit a revised process that is fair and meets the purpose and policies of the *CCAA*;

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- an order directing the Monitor to investigate the following: Green Ops' acquisition of the GAOC Note; the Term Sheet (as being a preference); Green Ops' purchase of the Spring Oaks Notes (as being a preference); the Spring Oaks Forbearance Agreement (as being a preference); and whether certain of these transactions should be set aside; and

- additional disclosure of documentation and examination of witnesses, as requested.

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**ANALYSIS**

**The Abandoned Relief**

[26] I wish to deal briefly with the relief originally sought by Mr. Horvitz but that was abandoned upon the return of the motion on June 1, 2020.

[27] At the return of the motion, Mr. Horvitz did not pursue the relief originally sought setting aside the Initial Order on the basis that the Applicants failed to act in good faith. This is a serious accusation, however, that merits comment.

[28] Had Mr. Horvitz continued to pursue this relief, such a request would have been dismissed.

[29] The Applicants, at the initial hearing, provided the court with the necessary information needed to consider whether the Initial Order should be granted. All relevant agreements were attached. Mr. Horvitz' complaints concerning lack of good faith and disclosure deal with his own disputes with Messrs. Schottenstein and Mr. Boich, the companies they control and how he was treated with respect to his ownership of the May Debentures and the provisions of the Term Sheet. They do not involve the Applicants. While knowledge of the interaction between the investors and GGB would have helped add context it would not have affected the granting of the Initial Order.

[30] Mr. Horvitz' complaints concerning his treatment, as I will outline below, constitute inter-creditor disputes and ought to be dealt with outside of the parameters of this *CCAA* proceeding.

**Discovery**

[31] As noted, Mr. Whitaker was examined and documentary discovery was made in advance of the June 1, 2020 hearing date. The documentary production that was made, or refused, is set out in the Second Report of the Monitor dated May 31, 2020 (the "Second Report") at paras. 65-78. No further documentation was requested on the return of the motion. In any event, it is my view that adequate production was made to Mr. Horvitz.

[32] With respect to the examinations, Mr. Horvitz did not pursue the examinations of Messrs. Schottenstein or Mr. Boich. I would not have granted the order in any event. They were not properly served with the motion record and reside in the United States of America. They were not represented at the motion. At the May 29, 2020 motion, I questioned Mr. Horvitz' counsel as

to whether I had jurisdiction to make the orders sought and whether letters rogatory were appropriate. Mr. Horvitz did not take the necessary steps to attempt to comply with the letters rogatory process. I therefore considered this issue to be at an end.

**Mr. Horvitz' Complaints Concerning the May Debentures and the Term Sheet**

[33] In my view, as noted, Mr. Horvitz' objections with respect to the way his investment in the May Debentures was treated, and the provisions of the Term Sheet, are inter-creditor issues that fall outside of the context of this *CCAA* proceeding.

[34] Notwithstanding the fact that counsel conceded at the motion that the other May Debentures holders had the legal right to pass the Extraordinary Resolutions, without notice to Mr. Horvitz, Mr. Horvitz nonetheless alleges that the May Debentures holders who passed the Extraordinary Resolutions failed to act in good faith. He makes the same claim with respect to the parties to the Term Sheet.

[35] This issue was considered by the Court of Appeal for Ontario in *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (C.A.), at para. 32, wherein the court stated:

> First, as the supervising judge noted, the CCAA itself is more compendiously styled "An Act to facilitate compromises and arrangements between companies and their creditors." There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (QL), 110 A.C.W.S. (3d) 259 (B.C.S.C.), at para. 24 (after referring to the full style of the legislation):
>
> > [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, **it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company**. [Emphasis added.]

[36] The objections raised by Mr. Horvitz concerning the May Debentures and the Term Sheet all constitute inter-creditor disputes. The terms of the May Debentures and the capitalization of AcquireCo, set out in the Term Sheet, do not involve the Applicants. Accordingly, these *CCAA* proceedings are not the proper venue for Mr. Horvitz to seek these remedies.

[37] As I have noted, Mr. Horvitz conceded at this motion that the Extraordinary Resolutions were passed in accordance with the terms of the May Debenture Indenture. Similarly, the terms of the AcquireCo Term Sheet involved matters concerning the May Debentures holders that have

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been determined by the aforementioned requisite majority. While All Js owns a significant amount of GGB shares, Mr. Horvitz' complaints, with respect to the May Debentures and the Term Sheet, do not lie with GGB but rather with the way he feels he has been treated by the other investors, primarily Messrs. Schottenstein and Mr. Boich.

**Mr. Horvitz' Request for the Monitor's Investigation**

[38] I am not prepared to order that the Monitor conduct investigations concerning Green Ops' acquisition of the GAOC Note, the Term Sheet (as being a preference) and Green Ops' purchase of the Spring Oaks Notes (as being a preference). This relief was not contained in the Notice of Motion and only arose in Mr. Horvitz' Supplementary Factum. While I would not dismiss the request for this relief on this ground alone, it typifies the shifting nature of the relief that Mr. Horvitz sought during the hearings.

[39] These investigations, sought by Mr. Horvitz, relate to inter-creditor issues between Mr. Horvitz and others. None of the proposed investigations involve the Applicants. The focus of this motion should be on the *CCAA*-related issues, primarily the SISP and the Stalking Horse Agreement. The issues surrounding the May Debentures and the Term Sheet should only be considered to the extent that they are germane to the *CCAA* proceeding.

[40] The Monitor does not believe that it is appropriate to carry out these investigations based on the materials that it has reviewed. I accept the Monitor's submission that it would not be appropriate in a *CCAA* proceeding to have it carry out an investigation of transfers for value between American corporations which are non-debtors. I further agree with the Monitor that the case upon which Mr. Horvitz relies, *Cash Store Financial Services, Re*, 2014 ONSC 4326, 31 B.L.R. (5th) 313, is entirely distinguishable since it dealt with a transfer of value from the debtor to an unsecured creditor.

[41] I also do not believe the Monitor ought to conduct the investigation requested by Mr. Horvitz with respect to the Spring Oaks Forbearance Agreement (as being a preference).

[42] Mr. Horvitz' complaint in this regard essentially involves two issues. The first being that the SISP should include the Florida Assets to maximize value. The second involves his complaint concerning Mr. Boich. Mr. Boich's company, Green Ops, as noted, purchased the Spring Oaks Notes which holds unsecured debt as security for the Florida Assets. Mr. Horvitz claims that this is another example of self-dealing and lack of transparency.

[43] While I agree that the Florida Assets would add value to the *CCAA* process, it is not practicable to add them to the SISP. Prior to the Initial Order being granted Green Ops could have foreclosed on the debt. GGB looked for another solution and has obtained an LOI from a third-party buyer in excess of the debt held by Green Ops. If the transaction is not completed by mid-June, Green Ops has the right to foreclose. While the situation is not ideal, the mid-June deadline precludes rolling the Florida Assets into the SISP. It seems to me, however, that GGB has followed a reasonable path to deal with the Florida Assets, which is subject to its agreement with Green Ops which had the right to foreclose and granted a Forbearance Agreement to see if the Florida Assets can be sold. The Monitor concurs. In this regard, I am reminded of the

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observation in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115, at para. 5, that "insolvency proceedings typically involve what is feasible, not what is flawless".

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[44] I will now turn to the complaints Mr. Horvitz makes concerning the SISP and the Stalking Horse Agreement.

**The SISP**

[45] Mr. Horvitz makes a number of complaints concerning the SISP and I will deal with each in turn.

[46] First, Mr. Horvitz complains that the SISP does not include the retention of an investment banker to market the assets of GGB. A separate investment banker is not required. It is certainly not unusual for the Court-appointed Monitor to run a SISP. The Monitor has the necessary experience and has acted in this capacity as Monitor in at least one other cannabis case before this court, AgMedica Bioscience Inc. As set out at para. 28 of the Second Report, the Monitor is well-qualified to run the SISP in this case.

[47] Second, Mr. Horvitz complains that the SISP does not include the preparation of a "teaser" or other short description of the proposed acquisition opportunity. As noted by the Monitor in para. 29 of the Second Report, it is, in fact, in the process of forming such a document which will be made available along with other information included in a data room. It is virtually complete at this time.

[48] Third, Mr. Horvitz complains that the Monitor has failed to develop a list of likely strategic and financial buyers. This has, in fact, been done, with 243 potential parties being identified. This includes all of the typical types of businesses one would expect in the cannabis space.

[49] Fourth, Mr. Horvitz complains about the lack of Non-disclosure Agreements, telephone calls, "transparent and market-based compensation arrangements", preliminary indications of interest and management presentations. In my view, all of these complaints are unfounded and the Second Report, once again, deals with these complaints comprehensively in paras. 29-34.

**The Stalking Horse Agreement**

[50] Mr. Horvitz raises a number of issues with respect to the Stalking Horse Agreement.

[51] First, he complains of a number of features that are typical in Stalking Horse Agreements. Particularly, he objects to the US $2 million Break Fee; the US $150,000 Expense Reimbursement to All Js; the overbid increment of US $250,000; and a refundable 5 percent deposit that has to be paid by bidders. In my view, none of these provisions in the Stalking Horse Agreement are problematic.

[52] While the Break Fee and Expense Reimbursement are not itemized, they represent approximately 1.9 percent of the purchase price that is set out in the Stalking Horse Agreement. This is well within the range of payments that have been approved by this court on numerous occasions. The fees, in addition to compensating Stalking Horse purchasers for the time, resources and risk taken in developing the agreement, also represent the price of stability. Therefore, some premium over simply providing for expenses may be expected: *Danier Leather Inc. (Re)*, 2016 ONSC 1044, 33 C.B.R. (6th) 221, at paras. 40-42; *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750, 90 C.B.R. (5th) 74. This *CCAA* process, given the nature, size and location of GGB's operations, has been and will continue to be significant.

[53] Similarly, the overbid increment, which is typical in a large auction, is well within the range of reasonableness. Insofar as the 5 percent deposit is concerned, Mr. Horvitz complains that such an obligation is not placed upon the Stalking Horse Bidder. This is not surprising since the Stalking Horse Agreement provides for a credit bid of the secured debt held by All Js and the holders of the May Debentures and the Backstop Debentures, as well as some certain assumed liabilities. It does not involve cash consideration and therefore it is not necessary to seek a deposit.

[54] Second, Mr. Horvitz further complains that a third-party bidder can impose no conditions which are not in the Stalking Horse Agreement and that overall the DIP Financing and Stalking Horse Agreement make it impractical, if not impossible, for any arm's-length party to make a bid that would properly reflect the market value of the cannabis licence that GGB holds through its subsidiaries. Mr. Horvitz further complains that an outside bidder must pay off the GAOC Note in full, whereas the Stalking Horse Bidder can assume the obligation for later payment.

[55] With respect to the complaint concerning the inability to impose conditions, I do not read the SISP in this way. There is nothing in the SISP that prevents an alternative transaction from containing conditions that are not in the Stalking Horse Agreement. The SISP provides for a range of different transaction structures and it is designed to find the highest and/or best offer for a restructuring or refinancing of GGB. The wording of the SISP does not prevent a bidder from attempting to propose different terms or conditions than those found in the Stalking Horse Agreement. The Monitor has opined that the conditions in the SISP dealing with alternative transactions are standard in SISPs to protect the debtor's estate and ensure that the outside buyer has limited exit rights from the deal, all of which is reasonable. I accept this view.

[56] I also do not accept Mr. Horvitz' allegation that the DIP Financing and the Stalking Horse Agreement make it impractical, if not impossible, to reflect the market value of the cannabis licences and in particular the valuable Nevada licences. The Stalking Horse Agreement is structured in such a way that the successful purchaser would obtain the shares of GGB and the relevant licences, including the Nevada licences. This assists in the sale price process since it would help facilitate the transfer of the cannabis licences, which is difficult to do, and help facilitate a sale. Further, the value of the Nevada licences (and indeed all licences) are subject to a fluctuating market. The best way to determine the value is to run the SISP and determine if there is interest in the marketplace. In any event, a credit bid need not be limited to the fair market value of the corresponding encumbered assets; otherwise it would require an evaluation

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of such encumbered assets which is a difficult, complex and costly exercise which can also result in unwarranted delay: see *Whitebirch Paper Holding Co., Re*, 2010 QCCS 4915, 72 C.B.R. (5th) 49, at para. 34. In order to facilitate this process, the Monitor has included, in its First Report, a table entitled "Illustrative Value of the Stalking Horse Agreement" to assist bidders in understanding the value of the consideration contained in the Stalking Horse Agreement.

[57] Further, in response to Mr. Horvitz' complaint that the SISP treats the Stalking Horse Bidder and Qualified Bidders differently with respect to the GAOC Note, GGB has revised the proposed SISP, which now allows Qualified Bidders to negotiate an agreement with Green Ops, which holds the GAOC Note. Now, both the Stalking Horse Bidder and Qualified Bidders may assume the GAOC Note while at the same time not precluding a Qualified Bidder from proposing to pay off the GAOC Note. Mr. Horvitz complains that Green Ops would be more likely to strike a deal with the Stalking Horse Bidder. This may prove to be the case but, of course, much depends on the offer put forth by the Qualified Bidder. The structure proposed by GGB, however, presents a level playing field.

[58] Similarly, I do not see any difficulty with the proposed DIP Financing. It is not unique to this case and the amount proposed is reasonable. It will help support the SISP process which, in my view, provides the best possible chance for a sale and the potential retention of approximately 170 employees. Further, insofar as the DIP Financing is concerned, Mr. Horvitz also complains that it is being used, in part, to pay for prefiling GGB debt contrary to s. 11.2 of the *CCAA*. When one looks closely at GGB's operations, however, it is clear that GGB has not paid any of the prefiling expenses in Canada. The DIP Financing has been used to pay some relatively modest prefiling expenses for the operating companies in the United States of America that cannot avail themselves of relief given the nature of the cannabis industry in that country. Further, in any event, it is in everyone's best interest that these expenses be paid since the value of GGB exists in these licences and, obviously, in keeping those licences current for the purposes of the SISP.

[59] Last, Mr. Horvitz makes a number of what I would consider to be lesser, additional complaints including a vague closing date, a requirement that Qualified Bidders hold cannabis licences (since removed from the SISP), "bad faith inclusive arrangements" and other related arguments. I have considered each and every one of these arguments and do not find them to be persuasive.

[60] Clearly, Mr. Horvitz does not like the way he has been treated with respect to his ownership of the May Debentures. He is particularly upset with the provisions of the Term Sheet. At the same time, Mr. Horvitz proposes no alternative to the existing process. It bears noting that the Monitor has been significantly involved in the process and agrees that there is no better, viable alternative. As I have noted, Mr. Horvitz' complaints largely involve inter-creditor disputes and only become relevant if the Stalking Horse Bidder is the successful bidder. Mr. Horvitz, presumably, retains his legal rights and can bring an action against those whom he believes have caused him legal harm.

2020 ONSC 3565 (CanLII)

[61] In the interim, in my view, the SISP and the Stalking Horse Agreement satisfy the criteria set out in s. 36(3) of the *CCAA* and the factors set out by this court in *Nortel Networks Corporation (Re)*, 55 C.B.R. (5th) 229 (Ont. S.C.), at para. 49. The process is supported by the Monitor and no other creditor, aside from Mr. Horvitz, objects. For all of the reasons above, I believe Mr. Horvitz' complaints are misplaced.

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**DISPOSITION**

[62] For these reasons I granted the Amended and Restated Initial Order and the SISP Order approving the SISP and the Stalking Horse Agreement on June 2, 2020 and dismissed Mr. Horvitz' motion.

**McEwen J.**

**Released:** June 17, 2020

**CITATION:** IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., 2020 ONSC 3565
**COURT FILE NO.:** CV-20-00641220-00CL
**DATE:** 20200617

2020 ONSC 3565 (CanLII)

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Applicants

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**ENDORSEMENT**

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**McEwen J.**

**Released:** June 17, 2020

# TAB 14

**CITATION:** JTI-Macdonald Corp., Re, 2019 ONSC 1625
**COURT FILE NO.:** CV-19-615862-00CL
**DATE:** 2019/03/12

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**- COMMERIAL LIST**

**RE:** **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 JTI-MACDONALD CORP.**

**Applicant**

**BEFORE:** Hainey J.

**COUNSEL:** *Robert I. Thornton, Leanne M. Williams, Rachel Bengino and Mitch Grossell*, for the Applicant

*Scott A. Bomhof and Adam M. Slavens,* for Respondents JT Canada LLC, and PWC, in its capacity as Receiver of JTI-MacDonald TM

*Pamela L.J.Huff, Linc A. Rogers and Christopher Burr*, for the Proposed Monitor, Deloitte Restructuring Inc.

**HEARD:** March 8, 2019

**ENDORSEMENT**

**Background**

[1] On March 8, 2019 JTI-Macdonald Corp. ("JTIM" or "Applicant") sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* ("CCAA"). I granted the Initial Order and endorsed the record as follows:

> I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

[2] These are my Reasons.

**Facts**

2019 ONSC 1625 (CanLII)

[3] As a result of a judgment of the Quebec Court of Appeal released on March 1, 2019 in a class proceeding ("Quebec Class Action"), JTIM and two other defendants are liable for damages totaling $13.5 billion ("Quebec Judgment"). If this judgment is not stayed, its enforcement could destroy the company because JTIM does not have sufficient funds to satisfy the judgment.

[4] According to JTIM, enforcement of the Quebec Judgment would destroy the company's value for its 500 employees and 1,300 suppliers. It would also impact approximately 28,000 retailers that sell JTIM's products and 790,000 consumers of its products. Enforcement of the Quebec Judgment would also jeopardize federal and provincial taxes and duties in excess of $1.3 billion paid annually in connection with JTIM's operations (of which $500 million per year is paid directly by JTIM and another $800 million per year is paid by third parties and consumers).

[5] JTIM is also a defendant in a number of significant health care costs recovery actions ("HCCR Actions"). The total claims in the HCCR Actions exceed $500 billion.

[6] JTIM wishes to seek a "collective solution" to the Quebec Judgment and the HCCR Actions for the benefit of all of its stakeholders. It is for this reason that it seeks a stay of all proceedings in its application for an Initial Order pursuant to the CCAA.

[7] In its application JTIM seeks protection from its creditors and the following additional relief under the CCAA:

(a) declaring that it is a company to which the CCAA applies;

(b) granting a stay of proceedings against it, and the Other Defendants in the Pending Litigation, as defined and described in the Notice of Application;

(c) appointing Deloitte Restructuring Inc. ("Proposed Monitor") as Monitor in these CCAA proceedings;

(d) granting an Administrative Charge, Directors' Charge and Tax Charge;

(e) authorizing the Applicant to pay its pre-filing and post-filing obligations in respect of suppliers, trade creditors, taxes, duties, employees (including outstanding and future pension plan contributions, other post-employment benefits and severance packages) and royalty payments and to pay post-filing interest of certain of its secured obligations in the ordinary course of business in order to minimize any disruption of the Applicant's business;

(f) approving the engagement letter dated April 23, 2018 (the "CRO Engagement Letter") appointing Blue Tree Advisors Inc. as the Applicant's Chief Restructuring Officer ("CRO");

(g) authorizing it to apply for leave and, if successful, to appeal the Quebec Judgment to the Supreme Court of Canada; and

2019 ONSC 1625 (CanLII)

(h) sealing Confidential Exhibit "1" of Robert Master's affidavit.

**Issues**

[8] I must decide the following issues:

(a) Should the Court grant protection to JTIM under the CCAA?

(b) Is it appropriate to grant the requested stay of proceedings?

(c) Should the Proposed Monitor be appointed as Monitor in these proceedings?

(d) Should the Court grant the requested charges?

(e) Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

(f) Should Blue Tree Advisors be appointed as CRO?

(g) Should JTIM be authorized to continue its application for leave to appeal of the Quebec Judgment to the Supreme Court of Canada?

**Analysis**

**Should the Court grant protection to JTIM under the CCAA?**

[9] The CCAA applies to an insolvent company whose liabilities exceed $5 million.

[10] JTIM is a company incorporated pursuant to the *Canada Business Corporations Act*.

[11] JTIM's liabilities clearly exceed $5 million. It faces a judgment for $13.5 billion. According to Robert McMaster, JTIM's Director, Taxation and Treasury, the company does not have sufficient funds to satisfy the Quebec Judgment which is currently payable. Accordingly, JTIM is an insolvent company to which the CCAA applies.

**Is it appropriate to grant the requested stay of proceedings?**

[12] The Court may grant a stay of proceedings pursuant to s. 11.02 of the CCAA in respect of a debtor company if it is satisfied that circumstances exist that make the order appropriate. In order to determine whether a stay order is appropriate the Court should consider the purpose behind the CCAA. The primary purpose of the CCAA is to maintain the *status quo* for a period while the debtor company consults with its creditors and stakeholders with a view to continuing the company's operations for the benefit of the company and its creditors.

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[13] JTIM cannot pay the amount of the Quebec Judgment. Any steps to enforce the judgment could cause serious harm to JTIM's business to the detriment of all of its stakeholders. In my view, it is appropriate for this reason to grant the requested stay of proceedings in favour of JTIM.

[14] JTIM also requests a stay of proceedings in favour of the other defendants in other litigation relating to tobacco claims in which JTIM is a defendant, including the Quebec Class Action and the HCCR Actions. The Court has discretion under s. 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties. In *Tamerlane Ventures Inc., Re,* 2013 ONSC 5461, Newbould J stated as follows at para. 21:

> Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, where it is just and reasonable to do so.

[15] I came to the same conclusion in *Pacific Exploration & Production Corp., Re,* 2016 ONSC 5429, where at para. 26 I set out the following list of factors that courts have considered in deciding whether to extend a stay of proceedings to non-applicant third parties:

(a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

(b) extending the stay to the third party would help maintain stability and value during the CCAA process;

(c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party.

[16] Having considered these factors, I am satisfied that granting the requested stay of proceedings to the other defendants will allow JTIM to attempt to arrive at a collective solution with respect to the Quebec Class Action and the HCCR actions. If these actions continue to

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proceed against the other defendants but not JTIM there could be significant economic harm for all of JTIM's stakeholders.

[17] Accordingly, I have concluded that the balance of convenience favours exercising my discretion under the CCAA to grant a stay of proceedings to the other defendants.

**Should the Proposed Monitor be appointed as the Monitor?**

[18] I am satisfied that Deloitte Restructuring Inc. ("Deloitte") should be appointed the Monitor in these proceedings pursuant to s. 11.7 of the CCAA. Deloitte regularly acts as the Monitor in CCAA proceedings and it is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

**Should the requested charges be granted?**

*Administrative Charge*

[19] JTIM requests that I grant an administrative charge in favour of JTIM's counsel, the CRO, the Monitor and its legal counsel in the amount of $3 million.

[20] The Court has jurisdiction to grant an administrative charge pursuant to s. 11.52 of the CCAA. In *Canwest Global Publishing Inc.*, 2012 ONSC 633, Pepall J. set out the following list of factors the Court should consider when granting an administrative charge:

(a) the size and the complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[21] Having considered these factors, I am satisfied that the requested administration charge should be granted for the following reasons:

(a) JTIM's restructuring will require extensive involvement by the professional advisors who are subject to the administrative charge;

(b) the professionals subject to the administration charge have contributed, and will continue to contribute, to the restructuring of JTIM;

(c) there is no unwarranted duplication of roles so that the professional fees associated with these proceedings will be minimized;

2019 ONSC 1625 (CanLII)

(d) the administrative charge will rank in priority to the directors' charge and the tax charge. The only secured creditors that will be affected by the administrative charge are JTIM's parent companies and certain other secured related party suppliers, each of which support the granting of the administrative charge; and

(e) the Proposed Monitor believes that the amount of the administration charge is reasonable

*Directors' Charge*

[22] I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of $4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

*Tax Charge*

[23] JTIM is also seeking a third-ranking super-priority charge in the amount of $127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

**Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?**

[24] In *Cinram International Inc., Re,* 2012 ONSC 3767 Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

(a) whether the goods and services were integral to the business of the applicants;

(b) the debtors' need for the uninterrupted supply of the goods or services;

(c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and

(d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[25] JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing

2019 ONSC 1625 (CanLII)

obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

**Should Blue Tree Advisors be appointed as CRO?**

[26] According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and necessary skills to oversee and assist JTIM with its complex negotiations during the CCAA proceedings. With the assistance of the CRO, JTIM's management can focus on the company's operations which should maximize value for its stakeholders.

[27] I am satisfied that Mr. Aziz should be appointed as CRO pursuant to the terms of the CRO Engagement Letter which the Monitor supports.

[28] JTIM requests an order sealing the unredacted copy of the CRO Engagement Letter. Section 137(2) of the *Courts of Justice Act* gives the Court jurisdiction to order that a document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[29] The CRO Engagement Letter sets out the commercial terms of the CRO's engagement. This is commercially sensitive information. In my view JTIM's request for a sealing order meets the test set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 because it will protect a commercial interest and the salutary effects of sealing the CRO's Engagement Letter outweighs any deleterious effects since this is the type of information that a private company outside of a CCAA proceeding would treat as confidential.

**Should JTIM be authorized to continue its appeal to the Supreme Court of Canada?**

[30] At para. 75 of its Factum, JTIM submits as follows:

> 75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

[31] In my view, based on this submission it is reasonable to permit JTIM to continue its leave to appeal application to the Supreme Court of Canada.

**Conclusion**

2019 ONSC 1625 (CanLII)

[32] For the reasons set out above the Application is granted.

HAINEY J.

**Date Released: March 12, 2019**

2019 ONSC 1625 (CanLII)

# TAB 15

Court File Number: CV-21-00658423-00CL

**Superior Court of Justice**
Commercial List

# FILE/DIRECTION/ORDER

In the Matter of... Just Energy Group Inc et al
Plaintiff(s)

AND

Defendant(s)

Case Management ☑ Yes ☐ No by Judge: McEwen J.

| Counsel | Telephone No: | Facsimile No: |
|---|---|---|
| See participants list | attached | |
| | | |

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

The Applicants seek a Sales Process Approval Order. The Applicants are supported by the DIP Lenders, Credit Facility Lenders and Shell at the motion.

The Monitor also supports the relief sought.

While there is generally no opposition to the order sought

18 August 22
Date

Judge's Signature

☑ Additional Pages 29 in total

Court File Number: _____

**Superior Court of Justice**
Commercial List

## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

U.S. Class Counsel on behalf of the U.S Class Actions raise five discrete objections. They are supported by the Omarali Class Action, the Mass Tort Claims and Parivedal.

Given the extreme time sensitivity surrounding this CCAA matter I am releasing my reasons via this handwritten endorsement. I have reviewed all of the facta, filed affidavits, motion records and the Monitor's Eleventh Report.

In providing these reasons I do not propose to review all submissions made, but will focus on those submissions that I consider to be most germane. I have, however, reflected on all of the submissions made at the motion.



Judges Initials TM

1. All as defined in my June 21/22 endorsement.

Court File Number: _____

**Superior Court of Justice**
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## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

Before I analyse the five issues in dispute, I will review the overall structure of the Sales Process proposed by the Applicants, and then review the issues not in dispute that were raised at the motion.

Insofar as the Sales Process is concerned, the Applicants seek a sale and investment solicitation process ("SISP") which, amongst other things, seeks Court authorization, nunc pro tunc, to enter into a Stalking Horse Transaction Agreement between the Applicants and the Sponsor (as defined, essentially the related group of companies under the Pimco umbrella, in the Applicants' Factum).

The Applicants also, in this regard, seek approval of the SISP Support



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**Superior Court of Justice**
Commercial List

# FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

Agreement.

As noted, there is no general opposition; and I agree that subject to the determination of the five discrete disputes the SISP Support Agreement and SISP, which includes the Stalking Horse Transaction, ought to be approved.

The SISP Support Agreement is similar to the previous Plan Support Agreement that I previously approved before the Plan was terminated subsequent to my previous orders in June/22. Unlike the Plan Support Agreement, however, the SISP Support Agreement contains no restriction on the Applicants to solicit superior offers to the Stalking Horse Transaction.

I agree that s. 11 of the CCAA provides this Court with the authority



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**Superior Court of Justice**
Commercial List

## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

to approve the SISP Support Agreement. I further agree that the SISP Support Agreement is a critical component of the Applicants' going concern restructuring to allow them to market their assets, obtain value and operate in the normal course in the meantime.

This Court has approved similar support agreements in prior cases: Re Stelco (2005) 78 OR (3d) 254 and U.S. Steel Canada Inc 2016 ONSC 7899.

With respect to the SISP, I accept the Applicants' submissions that the criteria as set out in Nortel Networks Corp (Re) (2009) 55 CBR (5th) (Ont SCJ) at para 48 have been met, insofar as they ought to be considered at this stage of the proceeding.



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**Superior Court of Justice**
Commercial List

## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

Amongst other reasons is the fact that, at present, no other viable options have been presented; other superior proposals can be accepted; and the Stalking Horse Transaction sets a "floor price" and creates the certainty of a going concern sale.

I pause here to note that the Stalking Horse Transaction contemplates a Reverse Vesting Order ("RVO"). In this regard, however, it is important to note that at this stage I am not being asked to grant the RVO (which have been viewed as an extraordinary remedy - see Harte Gold Corp (Re) 2022 ONSC 653 at para 38), nor am I being asked to approve the Stalking Horse Transaction.

Approvals in this regard, if

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**Superior Court of Justice**
Commercial List

# FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

The Stalking Horse Transaction is the successful bid, will be dealt with at the conclusion of the SISP.

Turning now to the specific unopposed relief I grant the following relief: ✓

- The stay period is extended to Oct 31/22. There is sufficient liquidity. The Applicants are proceeding in good faith and the extension is fair and reasonable given the ongoing Sales Process. ✓
- The KERP is also approved. Previous KERPs have been approved by this Court. As set out in Mr Carter's affidavit (the CFO of Just Energy) the proposed KERP, for non-executive key employees, is justified as previously ordered payments will soon end and there is a genuine concern that non-



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**Superior Court of Justice**
Commercial List

## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

executive key employees may resign at this important stage of the proceedings. This would prejudice not only the Applicants, but other stakeholders. The proposed amounts are fair and reasonable.

- The Monitor's Tenth and Eleventh Reports are approved as are the activities, conduct and decisions described therein.
- The Sealing Orders shall go with respect to the KERP order and the SISP Support Agreement which contains, amongst other things, the holding percentages of the various entities comprising the DIP Lenders' Claim.

In both instances the Sierra Club test, as recast in Sherman Estate, has been met. The orders are



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**Superior Court of Justice**
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## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

made on an interim basis. Prior sealing orders have been made concerning KERP Orders. This protects the personal information of the relevant employees.

The interim Sealing Order Concerning the SISP Support Agreement is also necessary given the ongoing Sales Process and the commercially sensitive material it contains.

I now turn to the five disputed issues:

① The first deals with the U.S. Class Actions allegation that the Sponsor will have "inside information" regarding other bids and other bidders' communications with the Applicants in the absence of the other bidders' consent. This could result in proprietary or competitive



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**Superior Court of Justice**
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## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

information going to the Sponsor. They argue that this would provide an unfair advantage and could chill the market.

The Applicants submit, as do the supporting stakeholders, that all they seek is an equal playing field.

The Stalking Horse Transaction Agreement has been finalized and disclosed to all potential bidders. The Sponsor, in particular, seeks the same information from other bidders prior to the auction.

At the motion the parties agreed that symmetrical information sharing was sensible and would assist in the Sales Process.

The only potential mischief concerned disclosure, ~~to potential~~ to competitors of proprietary or competitive information. It is frankly difficult to analyse this risk in the



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**Superior Court of Justice**
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## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

abstract.

It was agreed that the symmetrical bidding information should be exchanged. The Monitor agreed to stay involved in the information sharing process. Further, the Sponsor submits that it is not seeking proprietary information, but rather wants to see the exact type of information that it has provided.

In all of these circumstances I therefore order that the parties/ stakeholders engage in the fair, equitable and symmetrical sharing of information concerning bids. The Monitor will continue to engage and monitor the exchange of information to ensure no bidder, including the Sponsor, enjoys an advantage



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**Superior Court of Justice**
Commercial List

## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

that is unfair and/or could chill the market.

(2) I now turn to the US Class Actions submission that the SISP should not automatically default to the proposed auction. They are currently working with a financier to attempt to present a plan of arrangement.

Counsel for the US Class Actions submit that the SISP should contain a provision that the matter return to Court, before an auction, to determine whether their Plan should be put to a vote of unsecured creditors (or any other plan that surfaces).

I do not agree and agree with the submissions of the Applicants wherein they submit that such



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**Judges Endorsment Continued**

an attendance is unnecessary and detrimental to the SISP process.

There is nothing preventing the US Class Actions from submitting their plan into the auction. No stakeholder disputes their right to do so.

In my view this is the preferred path and upon the conclusion of the auction[2] I will determine whether the successful bid ought to be approved.

At that time all relevant issues will be reviewed, including if necessary a proposed RVO.

In the usual way, the relevant issues concerning whether or not the successful bid ought to be approved, including why the successful bid is superior, or not, can be put forth.



Judges Initials JM

2. Assuming the SISP proceeds to auction.

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**Judges Endorsment Continued**

Parties are free to put forth all relevant, unfettered arguments. As stated by Monitor's Counsel, this Court is "not a rubber stamp" at the motion for approval.

This single track, as opposed to the motion proposed by counsel for the U.S. Class Action, is preferable and provides greater certainty in the marketplace. I am concerned that a return to Court before an auction could chill the sales process, as potential bidders would be concerned that their efforts may never make it to auction resulting in wasted time and expense.

(3) The third issue involves whether the evaluation of the US Class Action ought to be suspended.

TM



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**Judges Endorsment Continued**

The US Class Actions want to proceed as per my earlier order, that the Contingent Litigation Claims (which included the US Class Actions, the Omarati Class Action, the mass Tort Claims and the Pariveda claim[3]) ought to be evaluated, in advance of a meeting of creditors when the Meeting Order was sought. Subsequent to that Order being made the sponsor withdrew from the proposed plan and all parties, including the Contingent Litigation Claims agreed to suspend the evaluations to determine the validity and value of the claims.

A letter was provided to me by the Monitor in this regard.

Unbeknownst to me, later in July, the US Class Actions advised

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Judges Initials TM

3. Pariveda was not part of the defined term but I ordered it be valued.

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**Judges Endorsment Continued**

the Monitor and others that it, again, wished to carry out the valuation. The matter did not return to me and no valuations were conducted.

At the motion, the Omnibus Class Action, the Mass Tort Claims and Pacheda also requested that their claims be valuated.

They all generally submit that in order to formulate and negotiate a plan they (the US Class Actions took the lead here) need to know the creditor pool for the purpose of voting.

The US Class Actions proposed a process by way of letter dated May 4/22 which proposes a very aggressive, approximate two week process that has either the Honourable D. O'Connor or I



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**Judges Endorsment Continued**

conduct the valuations (although they use the word "estimation"). This would now presumably involve valuation of all of the aforementioned claims.

The Applicants submit that such an exercise is wasteful, unnecessary and lacks utility. They further submit that the expedited schedule is unachievable, particularly where the additional claims would also need to be valued.

I agree with the Applicants. Currently, the only transaction before the Court is the Stalking Horse Transaction which would not result in any recoveries to general unsecured creditors. Further, I agree with the Applicants that the volatile nature of the



Judges Initials DM

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**Judges Endorsment Continued**

industry and the Sales Process are placing a strain on resources and personal (as referenced above concerning the KERP).

I further accept the submissions of the Monitor that a valuation can be considered, if and when, a transaction is likely to provide recovery for secured creditors. Otherwise it is a costly distraction.

Insofar as the argument of counsel for the US Class Actions is concerned, that it is necessary to formulate and negotiate a plan, this may be of some assistance, but their presence is well known in this proceeding and this desire does not outweigh the above countervailing factors raised by the Applicants and supported by

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## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

The Master,

Last, unlike the valuation ordered with respect to the abandoned plan, here we are dealing with a SISP which, in the ordinary course, should have some value determined before considering a valuation. I also note that the Omarali Class Action submitted that its claim has unique features that further warrant a valuation. Again, I do not accept that those features outweigh the concerns of the Applicants.

(4) The fourth issue concerns the break-up fee contained in the Stalking Horse Transaction, in the amount of US$14.66 million in favour of the Sponsor.

Counsel for the U.S. Class Actions submits that the break-up fee is



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**Judges Endorsment Continued**

anti-competitive and unfairly prejudices the unsecured creditors.

They add that the Sponsor has had its fees paid throughout these proceedings and the Sponsor is committed to purchasing the asset. Additionally, they argue that the Applicants/Sponsor have adduced no evidence to support the quantum sought and the breakup fee results in other bidder having to raise additional funds to compete.[4]

Insofar as the law is concerned, counsel for the US Class Actions point out that this Court has a gatekeeping function and ought not simply act as a "rubber stamp", or merely rely upon the business judgment rule and the seller's discretion.[5]

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4. See Mecachrome Canada Inc, Re, 2009 QCCS 6355
5. at para 64 for support of this submission
Boutique Euphoria Inc, Re 2007 QCCS 7129 at para 65

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**Judges Endorsment Continued**

Last, they submit that each case must be considered in the context of its own unique circumstances and the mere fact that the proposed break-up fee is within the range of reasonableness as determined in other cases does not mean it is reasonable in the given case.[6]

The Applicants/Sponsor argue that the stalking horse bid provides stability and a framework for competitive bidding. In this context break-up fees are almost always required in exchange for the stalking horse setting the floor, exposing its bid, providing other bidders access, and committing funding.

Further, they argue that the Stalking Horse is tying up a significant amount of capital (in the $200 million



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6. Quest University Canada (Re) 2020 BCSC 1845 at para 58; Leslie + Irene Dube Foundation Inc v P218 Enterprises Ltd 2014 BCSC 1855 at para 36

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**Judges Endorsment Continued**

range) and the resulting loss of opportunity cost must be taken into account.

The Sponsor particularly point out that the break-up fee is not anti-competitive, but rather allows the competitive bidding to occur to the benefit of all stakeholders, including the over 1000 employees and approximate 1,000,000 customers.

The Applicant/Sponsor further submit that the break-up fee is well within the accepted range (3.4%) and rely on the evidence of Mr. Carter (paras 60-63 of his affidavit) and their expert Mark Caiger. Mr. Caiger opines that the break-up fee is in-line with market terms, consistent with market practice and reasonable in the circumstances of



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## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

this case.

Mr Caiger was engaged by Just Energy to advise and assist it. In his May 12/22 affidavit he thoroughly sets out the basis of his analysis (see paras 32-38).

Further, the Applicants point to the fact that the previously approved Termination Fee, in connection with the abandoned Plan, was in the same range and was not opposed.

In support of the Applicants, the Monitor also emphasizes that break-up fee is in no way a gratuitous offering but is part of a complicated arms length agreement, that resulted in the Stalking Horse Transaction. This transaction provides certainty to all stakeholders of a going concern transaction that can



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**Judges Endorsment Continued**

close in a timely fashion. The Monitor too is of the view that the break-up fee will not chill the market and its review also has found that it is consistent with break-up fees in similar sales transactions carried out under the CCAA and in the U.S.

I agree that the break up fee ought to be granted. It is a critical feature of the proposed transaction. The 3.4% is within the range of acceptibility.

Although the actual fee, at first glance may seem high, the SISP involves a significant, complicated process involving a complex and large scale business model with secured claims of approximately $1 billion.

The risks and stakes here are



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## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

extremely high and the break-up fee is reasonable when one considers all the factors - including the price of stability.[7]

In the very unique and complex circumstances of this case I do not accept the US Class Actions' submission that no break-up fee is warranted - this is not realistic.

Rather the proposed break-up fee recognizes, amongst other things, the effort expended by the Sponsor, the capital committed and the benefits of the Stalking Horse Transaction within the SISP as set out in the record filed by the Applicants. Specifically, it also allows the transaction to proceed and attempt to attract other bidders.

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7. Green Growth Brands (Re) 2020 ONSC 3561 at pp 51-52.

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**Judges Endorsment Continued**

(5) The last issue involves the request of the U.S. Class Actions to extend the timeline under the SISP by three weeks.

They primarily submit that there are no liquidity issues and the existing timelines are very tight. For example the NOI is due Aug 25/22.

The Applicants, prior to the motion, maintained that the timelines were appropriate based on its unchallenged evidence, which includes the volatility of the market and effect on employees.

They also submit that the process commenced on Aug 4/22, not as of the date of the motion.

The Applicants conceded liquidity. At the hearing the Applicants met, off the record, with their key



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secured stakeholder and advised that they would agree to a one week extension.

As I alluded to at the motion, I believe that a two week extension to the milestones is fair and reasonable. As a result of my previous orders the proposed Sales Process is proceeding essentially as proposed by the Applicants / Sponsor including the break-up fee.

Further, as the Applicants and their supporters have stated the Sales Process is extremely complex and involves significant debt and funding.

By allowing an extra week (over and above the concession at the motion) I see no prejudice



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to the Applicants. The matter has been evolving for many months and it must be remembered that it took the Applicants some time to formulate the prior Plan.

The extra two weeks provides a clear, court ordered structure and path to a definitive auction date.

In my view, this provides a reasonably quick timetable, but allows some breathing room for other bidders. which is to be benefit of stakeholders.[8]

I coming to this conclusion I have not ignored the Applicants' prior marketing efforts.

A two week extension is granted

Orders shall go with respect to the foregoing reasons.

DM

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8. see PCAS Patient Care Automation Services Inc. (Re) 2012 ONSC 2840 at paras 17, 18 for support of this proposition.

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**Judges Endorsment Continued**

If problems arise with respect to the Issuance of the Sales Process Approval Order I can be spoken to.

McEwen



Judges Initials TM

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# TAB 16

Court File No. CV-21-00658423-00CL

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

| | | |
|---|---|---|
| THE HONOURABLE MR. | ) | THURSDAY, THE 18TH |
| | ) | |
| JUSTICE MCEWEN | ) | DAY OF AUGUST, 2022 |

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant**", and collectively, the "**Applicants**")

**SISP APPROVAL ORDER**

**THIS MOTION**, made by the Applicants (together, the Applicants and the partnerships listed on **Schedule "A"** hereto, the "**Just Energy Entities**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an order, *inter alia*, approving the Sale and Investment Solicitation Process in respect of the Just Energy Entities attached hereto as **Schedule "B"** (the "**SISP**") and certain related relief, was heard on August 17, 2022 by judicial videoconference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

**ON READING** the affidavit of Michael Carter sworn August 4, 2022 and the Exhibits thereto (the "**Carter Affidavit**"), the Eleventh Report of FTI Consulting Canada Inc. (the "**Eleventh Report**"), in its capacity as monitor (the "**Monitor**"), dated August 13, 2022, and on hearing the submissions of counsel for the Just Energy Entities, the Monitor, the Sponsor (as hereinafter defined), and such other counsel who were present, no one else appearing although duly served as appears from the affidavits of service of Emily Paplawski sworn August 5, August 8, August 11 and August 16, 2022.

**SERVICE AND DEFINITIONS**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion was properly returned on August 17, 2022 and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP, the Second Amended and Restated Initial Order of this Court dated May 26, 2021 (the "**Second ARIO**"), the Claims Procedure Order of this Court dated September 15, 2021 (the "**Claims Procedure Order**"), or the Support Agreement attached as Exhibit "I" to the Carter Affidavit (the "**Support Agreement**"), as applicable.

**SALES AND INVESTMENT SOLICITATION PROCESS**

3. **THIS COURT ORDERS** that the SISP is hereby approved and the Just Energy Entities are hereby authorized to implement the SISP pursuant to the terms thereof. The Just Energy Entities, the Monitor and the Financial Advisor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder and as directed by the Court in this Order and the related endorsement dated August 18, 2022.

4. **THIS COURT ORDERS** that the Monitor and the Financial Advisor, and their respective affiliates, partners, directors, employees, and agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of the Monitor or Financial Advisor, as applicable, in performing their obligations under the SISP, as determined by this Court.

**SUPPORT AGREEMENT**

5. **THIS COURT ORDERS** that the Support Agreement is hereby approved and the Just Energy Entities are authorized and empowered to enter into the Support Agreement, *nunc pro tunc*, subject to such minor amendments as may be consented to by the Monitor and as may be acceptable to each of the parties thereto, and are authorized, empowered and directed to take all steps and actions in respect of, and to comply with all of their obligations pursuant to, the Support Agreement.

6. **THIS COURT ORDERS** that, notwithstanding the stay of proceedings imposed by the Second ARIO, a counterparty to the Support Agreement may exercise any termination right that may become available to such counterparty pursuant to the Support Agreement, provided that such termination right must be exercised pursuant to and in accordance with the Support Agreement.

**STALKING HORSE TRANSACTION AGREEMENT**

7. **THIS COURT ORDERS** that Just Energy Group Inc. ("**Just Energy**") is hereby authorized and empowered to enter into the stalking horse transaction agreement (the "**Stalking Horse Transaction Agreement**") dated as of August 4, 2022, between Just Energy and LVS III

SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP, and CBHT Energy I LLC (collectively, the "**Sponsor**") and attached as Exhibit "A" to the Carter Affidavit, *nunc pro tunc,* and such minor amendments as may be acceptable to each of the parties thereto, with the approval of the Monitor and subject to the terms of the Support Agreement; provided that, nothing herein approves the sale and the vesting of any Property to the Sponsor (or any of its designees) pursuant to the Stalking Horse Transaction Agreement and that the approval of any sale and vesting of any such Property shall be considered by this Court on a subsequent motion made to this Court if the Stalking Horse Transaction is the Successful Bid pursuant to the SISP.

8. **THIS COURT ORDERS** that, as soon as reasonably practicable following Just Energy (a) entering into any amendment to the Stalking Horse Transaction Agreement permitted pursuant to the terms of this Order; or (b) agreeing upon the final Implementation Steps (as defined in the Stalking Horse Transaction Agreement), the Just Energy Entities shall, in each such case, (i) file a copy thereof with this Court, (ii) serve a copy thereof on the Service List, and (iii) provide a copy thereof to each SISP Participant (as hereinafter defined), excluding from the public record any confidential information that Just Energy and the Sponsor, with the consent of the Monitor, agree should be redacted.

**BID PROTECTIONS**

9. **THIS COURT ORDERS** that the Break-Up Fee is hereby approved and Just Energy is hereby authorized and directed to pay the Break-Up Fee to the Sponsor (or as it may direct) in the manner and circumstances described in the Stalking Horse Transaction Agreement.

10. **THIS COURT ORDERS** that the Sponsor shall be entitled to the benefit of and is hereby granted a charge (the "**Bid Protections Charge**") on the Property, which charge shall not exceed

US$14,660,000, as security for payment of the Break-Up Fee in the manner and circumstances described in the Stalking Horse Transaction Agreement.

11. **THIS COURT ORDERS** that Paragraphs 53, 54 and 56 of the Second ARIO shall be, and are hereby, amended in the manner detailed below:

(a) Paragraph 53 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that the priorities of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge, the Cash Management Charge and the Bid Protections Charge (as defined in the Order in these proceedings dated August 18, 2022), as among them, shall be as follows:
>
> > First – Administration Charge and FA Charge (to the maximum amount of C$3,000,000 and C$8,600,000, respectively), on a *pari passu* basis;
> >
> > Second – Directors' Charge (to the maximum amount of C$44,100,000);
> >
> > Third – KERP Charge (to the maximum amounts of C$2,012,100 and US$3,876,024);
> >
> > Fourth – DIP Lenders' Charge (to the maximum amount of the Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time) and the Priority Commodity/ISO Charge, on a *pari passu* basis; ~~and~~
> >
> > Fifth – Cash Management Charge; and~~.~~
> >
> > Sixth – Bid Protections Charge (in the amount of US$14,660,000).

(b) Paragraph 54 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge the Cash Management Charge, or the Bid Protections Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

(c) Paragraph 56 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court on notice to parties in interest, the Just Energy Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Just Energy Entities also obtain the prior written consent of the Monitor, the DIP Agent on behalf of the DIP Lenders and the beneficiaries of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the Priority Commodity/ISO Charge, the Cash Management Charge and the Bid Protections Charge or further Order of this Court.

**PIPEDA**

12. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Monitor, the Just Energy Entities and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants (each, a "**SISP Participant**") and their advisors personal information of identifiable individuals but only to the extent desirable or required to negotiate or attempt to complete a transaction pursuant to the SISP (a "**Transaction**"). Each SISP Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation for the purpose of effecting a Transaction, and if it does not complete a Transaction, shall return all such information to the Monitor or the Just Energy Entities, or in the alternative destroy all such information and provide confirmation of its destruction if requested by the Monitor or the Just Energy Entities. Any Successful Party shall maintain and protect the privacy of such information and, upon closing of the Transaction(s) contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Just Energy Entities, and shall return all other personal information to the Monitor or the Just Energy Entities, or ensure

that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor or the Just Energy Entities.

**THIRD KEY EMPLOYEE RETENTION PLAN**

13. **THIS COURT ORDERS** that the Third KERP, as described in the Carter Affidavit and attached as Confidential Exhibit "L" thereto, is hereby approved and the Just Energy Entities are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the Third KERP.

14. **THIS COURT ORDERS** that the Just Energy Entities, in consultation with the Monitor, are authorized and empowered to reallocate funds under the Third KERP originally allocated to Key Employees who have resigned, or will resign, from their employment with the Just Energy Entities, or who have declined, or will decline, to receive payments(s) under the Third KERP, to remaining Key Employees or other employees of the Just Energy Entities that the Just Energy Entities, in consultation with the Monitor, identify as critical to their ongoing business.

15. **THIS COURT ORDERS** that the KERP Charge established at paragraph 24 of the Second ARIO shall apply equally to, and secure, any remaining payments under the KERP and the Second KERP (as defined in the Order of this Court dated November 10, 2021) to the Key Employees and the payments contemplated to the Key Employees referred to in the Third KERP.

**STAY EXTENSION**

16. **THIS COURT ORDERS** that the Stay Period is hereby extended until and including October 31, 2022.

**APPROVAL OF MONITOR'S REPORTS**

17. **THIS COURT ORDERS** that the activities and conduct of the Monitor prior to the date hereof in relation to the Just Energy Entities and these CCAA proceedings are hereby ratified and approved.

18. **THIS COURT ORDERS** that each of the Tenth Report of the Monitor dated May 18, 2022, the Supplement to the Tenth Report of the Monitor dated June 1, 2022, and the Eleventh Report be and are hereby approved.

19. **THIS COURT ORDERS** that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way the approvals set forth in paragraphs 17 and 18 of this Order.

**CLAIMS PROCEDURE**

20. **THIS COURT ORDERS** that the ongoing claims review, claims determination and dispute resolution processes under (a) the Claims Procedure Order; (b) the Order of this Court dated March 3, 2022, among other things, appointing the Honourable Justice Dennis O'Connor as Claims Officer for the purposes set forth therein; and (c) the Endorsement of this Court dated June 10, 2022, shall be suspended pending further Order of this Court; provided that, for certainty, (x) where (i) a Claimant has not submitted a Proof of Claim or D&O Proof of Claim by the applicable Bar Date, (ii) a Negative Notice Claimant has not submitted a Notice of Dispute of Claim by the applicable Bar Date, or (iii) a Claim or D&O Claim has already been disallowed or revised in accordance with the Claims Procedure Order and the applicable period of time to dispute such revision or disallowance has expired without the Claimant submitting a Notice of Dispute of Revision or Disallowance, such Claimant will continue to be barred from pursuing such Claim or

D&O Claim pursuant to the relevant provisions of the Claims Procedure Order and (y) this Order does not impact the acceptance of any Claims or other final determination or agreement in respect of Claims made pursuant to the Claims Procedure Order prior to the date of this Order; provided further that, notwithstanding anything to the contrary herein, the Just Energy Entities shall be permitted, with the consent of the Monitor, to refer any Claim to a Claims Officer or this Court for adjudication for the purposes of determining entitlement to proceeds to be distributed in accordance with a transaction completed pursuant to the SISP.

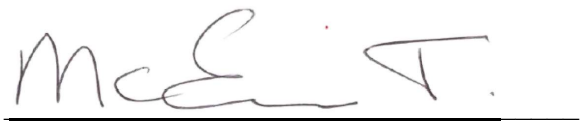
**GENERAL**

21. **THIS COURT ORDERS** that Confidential Exhibits "J" and "L" to the Carter Affidavit shall be and is hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

22. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal and regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, including the United States Bankruptcy Court for the Southern District of Texas overseeing the Just Energy Entities' proceedings under Chapter 15 of the Bankruptcy Code in Case No. 21-30823 (MI), or in any other foreign jurisdiction, to give effect to this Order and to assist the Just Energy Entities, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Just Energy Entities and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order

or to assist the Just Energy Entities and the Monitor and their respective agents in carrying out the terms of this Order.



**SCHEDULE "A"**
**PARTNERSHIPS**

- JUST ENERGY ONTARIO L.P.
- JUST ENERGY MANITOBA L.P.
- JUST ENERGY (B.C.) LIMITED PARTNERSHIP
- JUST ENERGY QUÉBEC L.P.
- JUST ENERGY TRADING L.P.
- JUST ENERGY ALBERTA L.P.
- JUST GREEN L.P.
- JUST ENERGY PRAIRIES L.P.
- JEBPO SERVICES LLP
- JUST ENERGY TEXAS LP

# SCHEDULE "B"
# SALE AND INVESTMENT SOLICITATION PROCESS

1. On August 18, 2022, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted an order (the "**SISP Order**") that, among other things, (a) authorized Just Energy (as defined below) to implement a sale and investment solicitation process ("**SISP**") in accordance with the terms hereof, (b) approved the Support Agreement, (c) authorized and directed Just Energy Group Inc. to enter into the Stalking Horse Transaction Agreement, (d) approved the Break-Up Fee, and (e) granted the Bid Protections Charge. Capitalized terms that are not defined herein have the meanings ascribed thereto in the Second Amended & Restated Initial Order granted by the Court in Just Energy's proceedings under the *Companies' Creditors Arrangement Act* on May 26, 2021, as amended, restated or supplemented from time to time or the SISP Order, as applicable.

2. This SISP sets out the manner in which (i) binding bids for executable transaction alternatives that are superior to the sale transaction to be provided for in the Stalking Horse Transaction Agreement involving the shares and/or the business and assets of Just Energy Group Inc. and its direct and indirect subsidiaries (collectively, "**Just Energy**") will be solicited from interested parties, (ii) any such bids received will be addressed, (iii) any Successful Bid (as defined below) will be selected, and (iv) Court (as defined below) approval of any Successful Bid will be sought. Such transaction alternatives may include, among other things, a sale of some or all of Just Energy's shares, assets and/or business and/or an investment in Just Energy, each of which shall be subject to all terms set forth in this SISP.

3. The SISP shall be conducted by Just Energy under the oversight of FTI Consulting Canada Inc., in its capacity as court-appointed monitor (the "**Monitor**"), with the assistance of BMO Capital Markets (the "**Financial Advisor**").

4. Parties who wish to have their bids considered shall be expected to participate in the SISP as conducted by Just Energy and the Financial Advisor.

5. The SISP will be conducted such that Just Energy and the Financial Advisor will (under the oversight of the Monitor):

    a) prepare marketing materials and a process letter;
    b) prepare and provide applicable parties with access to a data room containing diligence information;
    c) solicit interest from parties to enter into non-disclosure agreements (parties shall only obtain access to the data room and be permitted to participate in the SISP if they execute a non-disclosure agreement that is in form and substance satisfactory to Just Energy); and
    d) request that such parties (other than the Sponsor or its designee) submit (i) a notice of intent to bid that identifies the potential purchaser and a general description of the assets and/or business(es) of the Just Energy Entities that would be the subject of the bid and that reflects a reasonably likely prospect of culminating in a Qualified Bid (as defined below), as determined by the Just Energy Entities in consultation with the Monitor and the Credit Facility Agent (subject to the confidentiality requirements set forth in Section 15 below) (a "**NOI**") by the NOI Deadline (as defined below) and, if applicable, (ii) a binding offer meeting at least the requirements set forth in Section 7 below, as determined by the Just Energy Entities in consultation with the Monitor (a "**Qualified Bid**") by the Qualified Bid Deadline (as defined below).

6. The SISP shall be conducted subject to the terms hereof and the following key milestones:

    a) Just Energy to commence solicitation process on the date of service of the motion for approval of the SISP – August 4, 2022;[1]
    b) Court approval of SISP and authorizing Just Energy to enter into the Stalking Horse Transaction Agreement – August 18, 2022;
    c) Deadline to submit NOI – 11:59 p.m. Eastern Daylight Time on September 8, 2022 (the "**NOI Deadline**");
    d) Deadline to submit a Qualified Bid – 11:59 p.m. Eastern Daylight Time on October 13, 2022 (the "**Qualified Bid Deadline**");
    e) Deadline to determine whether a bid is a Qualified Bid and, if applicable, to notify those parties who submitted a Qualified Bid of the Auction (as defined below) – 5:00 p.m. Eastern Daylight Time on October 20, 2022;
    f) Just Energy to hold Auction (if applicable) – 10:00 a.m. Eastern Daylight Time on October 22, 2022; and
    g) Implementation Order (as defined below) hearing:
        - (if no NOI is submitted) – by no later than September 16, 2022, subject to Court availability.
        - (if there is no Auction) – by no later than October 29, 2022, subject to Court availability.
        - (if there is an Auction) – by no later than twelve (12) days after completion of the Auction, subject to Court availability.

7. In order to constitute a Qualified Bid, a bid must comply with the following:

    a. it provides for (i) the payment in full in cash on closing of the BP Commodity/ISO Services Claim (as defined in the Support Agreement), unless otherwise agreed to by the holder of such claim in its sole discretion; (ii) the payment in full in cash on closing of the Credit Facility Claims, unless otherwise agreed to by the Credit Facility Agent in its sole discretion; (iii) the payment in full in cash on closing of any claims ranking in priority to the claims set forth in subparagraphs (i) or (ii) including any claims secured by Court-ordered charges, unless otherwise agreed to by the applicable holders thereof in their sole discretion (iv) the return of all outstanding letters of credit and release of all Credit Facility LC Claims or arrangements satisfactory to the applicable Credit Facility Lenders in their discretion to secure with cash collateral or otherwise any Credit Facility LC Claims not released, and (v) the payment in full in cash on closing of any outstanding Cash Management Obligations or arrangements satisfactory to the applicable Credit Facility Lenders or their affiliates to secure with cash collateral or otherwise any outstanding Cash Management Obligations.
    b. it provides a detailed sources and uses schedule that identifies, with specificity, the amount of cash consideration (the "**Cash Consideration Value**") and any assumptions that could reduce the net consideration payable. At a minimum, the Cash Consideration Value plus Just Energy's cash on hand must be sufficient for payment in full of the items contemplated in Sections 7(a)(i) and 7(a)(ii) herein, 3.2 of the Stalking Horse Transaction Agreement and the Break-Up Fee, plus USD$1,000,000, on closing, which Cash Consideration Value is estimated to be USD$460,000,000 as of December 31, 2022.

[1] To the extent any dates would fall on a non-business day, to be the first business day thereafter.

c. it is reasonably capable of being consummated by 90 days after completion of the Auction if selected as the Successful Bid;
d. it contains:
    i. duly executed binding transaction document(s);
    ii. the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, and the name(s) of its controlling equityholder(s);
    iii. a redline to the form of transaction document(s) provided by Just Energy, if applicable;
    iv. evidence of authorization and approval from the bidder's board of directors (or comparable governing body) and, if necessary to complete the transaction, the bidder's equityholder(s);
    v. disclosure of any connections or agreements with Just Energy or any of its affiliates, any known, potential, prospective bidder, or any officer, manager, director, or known equity security holder of Just Energy or any of its affiliates; and
    vi. such other information reasonably requested by Just Energy or the Monitor;
e. it includes a letter stating that the bid is submitted in good faith, is binding and is irrevocable until the selection of the Successful Bid; provided, however, that if such bid is selected as the Successful Bid, it shall remain irrevocable until the closing of the Successful Bid;
f. it provides written evidence of a bidder's ability to fully fund and consummate the transaction and satisfy its obligations under the transaction documents, including binding equity/debt commitment letters and/or guarantees covering the full value of all cash consideration and the additional items (in scope and amount) covered by the guarantees provided by affiliates of the Purchaser in connection with the Transaction Agreement;
g. it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;
h. it is not conditional upon:
    i. approval from the bidder's board of directors (or comparable governing body) or equityholder(s);
    ii. the outcome of any due diligence by the bidder; or
    iii. the bidder obtaining financing;
i. it includes an acknowledgment and representation that the bidder has had an opportunity to conduct any and all required due diligence prior to making its bid;
j. it specifies any regulatory or other third-party approvals the party anticipates would be required to complete the transaction (including the anticipated timing necessary to obtain such approvals) and, in connection therewith, specifies whether the bidder or any of its affiliates is involved in any part of the energy sector, including an electric utility, retail service provider, a company with a tariff on file with the Federal Energy Regulatory Commission, or any intermediate holding company;
k. it includes full details of the bidder's intended treatment of Just Energy's employees under the proposed bid;
l. it is accompanied by a cash deposit (the "**Deposit**") by wire transfer of immediately available funds equal to 10% of the Cash Consideration Value, which Deposit shall be retained by the Monitor in a non-interest bearing trust account in accordance with this SISP;
m. a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and
n. it is received by the Qualified Bid Deadline.

8. The Qualified Bid Deadline may be extended by (i) Just Energy for up to no longer than seven days with the consent of the Monitor, the Credit Facility Agent and the Sponsor, acting reasonably, or (ii) further order of the Court. In such circumstances, the milestones contained in Subsections 6(f) and (g) shall be extended by the same amount of time.

9. Just Energy, in consultation with the Monitor, may waive compliance with any one or more of the requirements specified in Section 7 above and deem a non-compliant bid to be a Qualified Bid, provided that Just Energy shall not waive compliance with the requirements specified in Subsections 7(a), (b), (d), (e), (f), (g), (i) or (l) without the prior written consent of the Sponsor and Credit Facility Agent, each acting reasonably.

10. Notwithstanding the requirements specified in Section 7 above, the transactions contemplated by the Stalking Horse Transaction Agreement (the "**Stalking Horse Transaction**"), is deemed to be a Qualified Bid, provided that, for greater certainty, no Deposit shall be required to be submitted in connection with the Stalking Horse Transaction.

11. If one or more Qualified Bids (other than the Stalking Horse Transaction) has been received by Just Energy on or before the Qualified Bid Deadline, Just Energy shall proceed with an auction process to determine the successful bid(s) (the "**Auction**"), which Auction shall be administered in accordance with Schedule "A" hereto. The successful bid(s) selected within the Auction shall constitute the "**Successful Bid**". Forthwith upon determining to proceed with an Auction, Just Energy shall provide written notice to each party that submitted a Qualified Bid (including the Stalking Horse Transaction), along with copies of all Qualified Bids and a statement by Just Energy specifying which Qualified Bid is the leading bid.

12. If, by the NOI Deadline no NOI has been received, then the SISP shall be deemed to be terminated and the Stalking Horse Transaction shall be the Successful Bid and shall be consummated in accordance with and subject to the terms of the Support Agreement and the Stalking Horse Transaction Agreement. If no Qualified Bid (other than the Stalking Horse Transaction) has been received by Just Energy on or before the Qualified Bid Deadline, then the Stalking Horse Transaction shall be the Successful Bid and shall be consummated in accordance with and subject to the terms of the Support Agreement and the Stalking Horse Transaction Agreement.

13. Following selection of a Successful Bid, Just Energy, with the assistance of its advisors, shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bid in accordance with the key milestones set out in Section 6. Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by Just Energy, in consultation with the Monitor, Just Energy shall apply to the Court for an order or orders approving such Successful Bid and/or the mechanics to authorize Just Energy to complete the transactions contemplated thereby, as applicable, and authorizing Just Energy to (i) enter into any and all necessary agreements and related documentation with respect to the Successful Bid, (ii) undertake such other actions as may be necessary to give effect to such Successful Bid, and (iii) implement the transaction(s) contemplated in such Successful Bid (each, an "**Implementation Order**").

14. All Deposits shall be retained by the Monitor in a non-interest bearing trust account. If a Successful Bid is selected and an Implementation Order authorizing the consummation of the transaction contemplated thereunder is granted, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Qualified Bid that is not selected as a Successful Bid, will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten

(10) business days) after the date upon which the Successful Bid is approved pursuant to an Implementation Order or such earlier date as may be determined by Just Energy, in consultation with the Monitor.

15. Just Energy shall provide information in respect of the SISP to the DIP Lenders, the holder of the BP Commodity/ISO Services Claim and the Supporting Secured CF Lenders on a confidential basis, including (A) copies (or if not provided to the Just Energy Entities in writing, a detailed description) of any NOI and any bid received, including any Qualified Bid, no later than one (1) calendar day following receipt thereof by the Just Energy Entities or their advisors and (B) such other information as reasonably requested by the DIP Lenders', the holder of the BP Commodity/ISO Services Claim or the Supporting Secured CF Lenders' respective legal counsel or financial advisors or as necessary to keep the DIP Lenders, the holder of the BP Commodity/ISO Services Claim or the Supporting Secured CF Lenders informed no later than one (1) calendar day after any such request or any material change to the proposed terms of any bid received, including any Qualified Bid, as to the terms of any bid, including any Qualified Bid, (including any changes to the proposed terms thereof) and the status and substance of discussions related thereto. Just Energy shall be permitted, in its discretion, to provide general updates and information in respect of the SISP to counsel to any unsecured creditor of Just Energy (a "**General Unsecured Creditor**") on a confidential basis, upon: (i) the irrevocable confirmation in writing from such counsel that the applicable General Unsecured Creditor will not submit any NOI or bid in the SISP, and (ii) counsel to such General Unsecured Creditor executing confidentiality agreements with Just Energy, in form and substance satisfactory to Just Energy and the Monitor.

16. Any amendments to this SISP may only be made by Just Energy with the written consent of the Monitor and after consultation with the Credit Facility Agent, or by further order of the Court, provided that Just Energy shall not amend Subsections 7(a), (b), (d), (e), (f), (g), (i) or (l) or Section 14 without the prior written consent of the Sponsor and the Credit Facility Agent.

# SCHEDULE "A": AUCTION PROCEDURES

1. **Auction**. If Just Energy receives at least one Qualified Bid (other than the Stalking Horse Transaction), Just Energy will conduct and administer the Auction in accordance with the terms of the SISP. Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.

2. **Participation**. Only parties that provided a Qualified Bid by the Qualified Bid Deadline, including the Stalking Horse Transaction (collectively, the "**Qualified Parties**"), shall be eligible to participate in the Auction. No later than 5:00 p.m. Eastern Daylight Time on the day prior to the Auction, each Qualified Party (other than the Sponsor) must inform Just Energy whether it intends to participate in the Auction. Just Energy will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party provides such expression of intent, the Stalking Horse Transaction shall be the Successful Bid.

3. **Auction Procedures**. The Auction shall be governed by the following procedures:

   (a) **Attendance.** Only Just Energy, the other counterparties to the Support Agreement, the Qualified Parties, the Monitor and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any subsequent Overbids (as defined below) at the Auction;

   (b) **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (i) it has not engaged in any collusion with respect to the Auction and the bid process; and (ii) its bid is a good-faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bid (as defined below);

   (c) **Minimum Overbid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by Just Energy, in consultation with the Monitor (the "**Initial Bid**"), and any bid made at the Auction by a Qualified Party subsequent to Just Energy's announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional cash increments of USD$1,000,000;

   (d) **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video-conference, on an open basis, and all Qualified Parties will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each subsequent bid will be fully disclosed to all other Qualified Parties throughout the entire Auction; provided, however, that Just Energy, in its discretion, may establish separate video conference rooms to permit interim discussions between Just Energy and individual Qualified Parties with the understanding that all formal bids will be delivered in one group video conference, on an open basis;

   (e) **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit one or more additional bids with full knowledge and written confirmation of the then-existing highest bid(s); and

(f) **No Post-Auction Bids**. No bids will be considered for any purpose after the Auction has concluded.

**Selection of Successful Bid**

4. **Selection**. Before the conclusion of the Auction, Just Energy, in consultation with the Monitor, will: (a) review each Qualified Bid, considering the factors set out in Section 7 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in prong (i) above; (iii) the likelihood of the Qualified Party's ability to close a transaction by 90 days after completion of the Auction and the timing thereof (including factors such as the transaction structure and execution risk, including conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to Just Energy and (vi) any other factors Just Energy may, consistent with its fiduciary duties, reasonably deem relevant; and (b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").

5. **Acknowledgement**. The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by Just Energy in its sole discretion, subject to the milestones set forth in Section 6 of the SISP.

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

Court File No: CV-21-00658423-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., et al.

***Ontario***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

Proceeding commenced at Toronto

**SISP APPROVAL ORDER**

**OSLER, HOSKIN & HARCOURT LLP**
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

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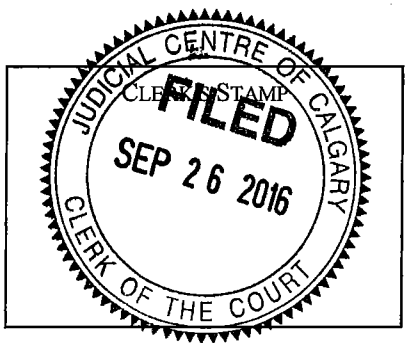
Fax: (416) 862-6666

Lawyers for the Just Energy Entities

# TAB 17

I hereby certify this to be a true copy of
the original Order
Dated this 26 day of Sept, 2016
for Clerk of the Court




| | |
|---|---|
| COURT FILE NUMBER | 1601 – 12571 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended<br><br>AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 1863360 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP |
| APPLICANTS | LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD AND 1863360 ALBERTA LTD |
| PARTIES IN INTEREST | LTS RESOURCES PARTNERSHIP AND BAKKEN RESOURCES PARTNERSHIP |
| DOCUMENT | **ORDER (EXTEND TIME FOR ANNUAL GENERAL MEETING)** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **BLAKE, CASSELS & GRAYDON LLP**<br>Barristers and Solicitors<br>3500 Bankers Hall East<br>855 – 2nd Street SW<br>Calgary, Alberta T2P 4J8<br>Attention: Kelly Bourassa / Milly Chow<br>Telephone No.: 403-260-9697/416-863-2594<br>Email: kelly.bourassa@blakes.com / milly.chow@blakes.com<br>Fax No.: 403-260-9700<br>File: 89691/8 |

**DATE ON WHICH ORDER WAS PRONOUNCED:** September 26, 2016

**NAME OF JUDGE WHO MADE THIS ORDER:** The Honourable Mr. Justice A.D. Macleod

**LOCATION OF HEARING:** Calgary, Alberta

**UPON THE APPLICATION** of Lightstream Resources Ltd. ("**LTS**"), 1863359 Alberta Ltd. and 1863360 Alberta Ltd. (collectively, the "**Applicants**") for an order providing relief to LTS from its obligation to hold an annual general meeting (the "**AGM**") by September 30, 2016 pursuant to section 132 of the *Business Corporations Act,* RSC 1985, c C-44, as amended (the "**ABCA**"); **AND UPON** reading the Application, the Affidavit of Peter D. Scott sworn September [**23**], 2016, and the Interim Order (the "**Interim Order**") of the Honourable Justice C.M. Jones in Court of Queen's Bench of Alberta Action Number 1601-08725, **AND UPON** hearing from counsel for LTS and any other interested parties present;

**IT IS HEREBY ORDERED AND DECLARED THAT:**

1. The time for service of the notice of Application for this Order is hereby abridged and deemed good and sufficient and this Application is properly returnable today.

2. LTS is relieved until March 31, 2017 from its obligation under section 132 of the ABCA and the Interim Order to hold an AGM by September 30, 2016.

3. Leave is hereby granted to any person, entity or party affected by this Order to apply to this Court for a further Order vacating, substituting, modifying or varying the terms of this Order, with such application to be brought on notice to the Applicants and any other affected party in accordance with the Alberta *Rules of Court.*

J.C. C.Q.B.A.

# TAB 18

SUPERIOR COURT OF JUSTICE

# COUNSEL/ENDORSEMENT SLIP

**COURT FILE NO.:** **CV-23-00696017-00CL** **DATE:** **20 March 2023**

**NO. ON LIST:** **2**

**TITLE OF PROCEEDING:** **LOYALTYONE, CO.**

**BEFORE MADAM JUSTICE:** **Conway**

## PARTICIPANT INFORMATION

**For Plaintiff, Applicant, Moving Party, Crown:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| Jane Dietrich | LoyaltyOne, Co. | jdietrich@cassels.com |
| Natalie Levine | LoyaltyOne, Co. | nlevine@cassels.com |
| | | |
| | | |

**For Defendant, Respondent, Responding Party, Defence:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

**For Other, Self-Represented:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| Heather Meredith | Reserve Trustee | hmeredith@mccarthy.ca |
| Mike Noel | Bank of Montreal | mnoel@torys.com |
| David Bish | Bank of Montreal | dbish@torys.com |
| Thomas Gray | Ad Hoc Group of Term B Lenders | grayt@bennettjones.com |
| Jesse Mighton | Ad Hoc Group of Term B Lenders | mightonj@bennettjones.com |
| Kevin Zych | Ad Hoc Group of Term B Lenders | zychk@bennettjones.com |
| Alex MacFarlane | Bank of America | amacfarlane@blg.com |
| Brendan O'Neill | Monitor (KSV) | boneill@goodmans.ca |

**ENDORSEMENT OF MADAM JUSTICE CONWAY**

**All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of LoyaltyOne, Co. dated March 17, 2023**.

[1] On March 10, 2023, the Applicant was granted protection under the CCAA pursuant to the Initial Order, which provides for a Stay of Proceedings up to March 20, 2023. This is the comeback motion. The Applicant seeks two orders today with a wide variety of relief.

[2] The first is the Amended and Restated Initial Order that, among other things, authorizes the DIP Financing Facility and the DIP Lender's Charge, authorizes the Applicant to enter into the Transaction Support Agreement *nunc pro tunc* and approves that agreement, extends the Stay of Proceedings to May 18, 2023, increases the Administration Charge and the Directors' Charge to the maximum of $3 million and $15.408 million, respectively, approves the Employee Retention Plans and grants the related charge to the maximum of $5.35 million, and approves the retention of the Financial Advisor and grants the Financial Advisor Charge to a maximum of US$6 million to secure the Transaction Fee.

[3] The second is the SISP Approval Order that authorizes the Applicant to enter into the Stalking Horse Purchase Agreement, approves the Bid Protections and related charge to the maximum of $US 4 million, and authorizes the Applicant to conduct the SISP along with the Financial Advisor and the Monitor.

[4] All of the relief sought is supported by BMO, the Consenting Stakeholders representing over 66-2/3% of the Credit Agreement Lenders by value, the Monitor, and is otherwise unopposed.

[5] With respect to the DIP Financing Facility of US$70 million, I have considered the interests of all of the Applicant's stakeholders and specifically the factors in s. 11.2(4) of the CCAA. The financing will provide sufficient financing to support the Applicant throughout the proposed SISP. The Applicant otherwise lacks the liquidity required to continue the business as a going concern during the sales process. It will permit the Applicant to pursue a going concern transaction for the business. No creditor will be materially prejudiced as a result of the charge given that it will rank behind the Reserve Account established for Collectors and, as noted, it has been consented to by the Consenting Stakeholders whose interests would be directly affected by the DIP Financing Facility. The Monitor considers the cash flow statement to be reasonable and is supportive of the financing.

[6] The DIP Financing Facility contemplates the making of the Intercompany DIP Loan from the Applicant to LVI of up to US$30 million. This will enable LVI to continue to provide the Intercompany Services to Applicant and provide LVI with liquidity to pursue the U.S. Proceedings, including the establishment of a liquidating trust and a claim against Bread and others, which is expected to yield further recovery for stakeholders. Subject to the granting of an order in the U.S. Proceedings, the Intercompany DIP Loan will be secured by a charge in the U.S. Proceedings over LVI's current and future assets.

[7] I am approving the DIP Financing Facility.

[8] The Transaction Support Agreement between the Applicant and the Consenting Stakeholders is designed to support the Applicant in its efforts to find a going-concern solution. The Monitor supports the agreement. It will provide stability and certainty to the Applicant's stakeholders as it pursues the going concern solution. I approve it under s. 11 of the CCAA.

[9] The Employee Retention Plans (both the retention plan for approximately 500 employees and the KERP for 20 key executives and employees) were developed with the assistance of the Monitor. They will ensure that the Applicant has the continued services of those required to continue the business while these CCAA proceedings unfold. I approve those plans and the related Employee Retention Plan Charge.

[10] The Stay of Proceedings to May 18, 2023 is designed to tie into the milestones in the SISP. I am satisfied that the Applicant is acting in good faith and with due diligence and that the extension should be granted under s. 11 and 11.02 of the CCAA. In addition, I am staying any setoff of pre-filing against post-filing obligations subject to further court order.

[11] The increased Administration Charge and Directors Charge have been developed in consultation with the Monitor and are reasonable. I approve same.

[12] The Financial Advisor engagement and related charge for the Transaction Fee are approved in light of the complexity of the restructuring.

[13] The Stalking Horse Agreement and the Bid Protections Charge are acceptable to me. The agreement is designed to provide a floor for an acquisition transaction while the Applicant runs the SISP. The quantum of the Bid Protections are, according to the Monitor, well within the reasonable range, 2.5% of the purchase price. I note that the Applicant is NOT seeking approval of any transaction at this time.

[14] The SISP is approved. The milestones and timelines are reasonable. The process seeks to maximize the recovery for the Applicant and its stakeholders. It satisfies the requirements of s. 36 of the CCAA.

[15] Orders to go as signed by me and attached to this Endorsement. These orders are effective from today's date and are enforceable without the need for entry and filing.

# TAB 19

Court File No. CV-23-00696017-00CL

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

| | | |
|---|---|---|
| THE HONOURABLE | ) | MONDAY, THE 20th |
| | ) | |
| JUSTICE CONWAY | ) | DAY OF MARCH, 2023 |

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 LOYALTYONE, CO.

(the "**Applicant**")

## SISP APPROVAL ORDER

**THIS MOTION**, made by the Applicant pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an order, *inter alia*, approving the Sale and Investment Solicitation Process in respect of the business and assets of the Applicant and its affiliate, LoyaltyOne Travel Services Co./Cie Des Voyages LoyaltyOne, in the form attached hereto as **Schedule "A"** (the "**SISP**") and certain related relief, was heard this day by judicial videoconference via Zoom in Toronto, Ontario.

**ON READING** the affidavit of Shawn Stewart sworn March 10, 2023 and the Exhibits thereto (the "**Stewart Affidavit**"), the pre-filing report of KSV Restructuring Inc. ("**KSV**") as the proposed Monitor dated March 10, 2023, the affidavit of Shawn Stewart sworn March 13, 2023 and the Exhibits thereto (the "**Second Stewart Affidavit**"), the first report of KSV as the Court-appointed monitor of the Applicant (in such capacity, the "**Monitor**") dated March 16, 2023 and the affidavit of Alec Hoy sworn March 18, 2023 and the Exhibits thereto, and on being advised that the secured creditors who are likely to be affected by the charge created herein were given notice, and on hearing the submissions of counsel for the Applicant, the Monitor, Bank of Montreal (the "**Stalking Horse Purchaser**"), and the other parties listed on the counsel slip, no one appearing for any other party although duly served as appears from the affidavits of service of Alec Hoy sworn March 10, March 13, March 17 and March 18, 2023,

**SERVICE AND DEFINITIONS**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP, the Amended and Restated Initial Order of this Court dated March 20, 2023 (the "**ARIO**"), the Stewart Affidavit or the Second Stewart Affidavit, as applicable.

**SALE AND INVESTMENT SOLICITATION PROCESS**

3. **THIS COURT ORDERS** that the SISP is hereby approved and the Applicant is hereby authorized and directed to implement the SISP pursuant to the terms thereof. The Applicant, the Monitor and the Financial Advisor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder, subject to prior approval of the Court being obtained before completion of any transaction(s) under the SISP.

4. **THIS COURT ORDERS** that the Applicant, the Monitor and the Financial Advisor and their respective affiliates, partners, directors, officers, employees, legal advisors, representatives, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of the Applicant, the Monitor or the Financial Advisor, as applicable, in performing their obligations under the SISP, as determined by this Court in a final order that is not subject to appeal or other review.

5. **THIS COURT ORDERS** that in overseeing the SISP, the Monitor shall have all of the benefits and protections granted to it under the CCAA, the ARIO and any other Order of this Court in the within proceeding.

**STALKING HORSE PURCHASE AGREEMENT**

6. **THIS COURT ORDERS** that the Applicant is hereby authorized and empowered to enter into the purchase agreement dated March 9, 2023 (the "**Stalking Horse Purchase Agreement**") between the Applicant and the Stalking Horse Purchaser attached as Exhibit "O" to the Stewart Affidavit, *nunc pro tunc,* and such minor amendments as may be acceptable to each of the parties thereto, in consultation with the Consenting Stakeholders (solely in the case of the Applicant) and with the approval of the Monitor; provided that, nothing herein approves the sale and the vesting of any Property to the Stalking Horse Purchaser (or any of its designees) pursuant to the Stalking Horse Purchase Agreement and that the approval of any sale and vesting of any such Property shall be considered by this Court on a subsequent motion made to this Court if the transaction set out in the Stalking Horse Purchase Agreement is the Successful Bid pursuant to the SISP.

7. **THIS COURT ORDERS** that, as soon as reasonably practicable following the Applicant and the Stalking Horse Purchaser agreeing to any amendment to the Stalking Horse Purchase Agreement permitted pursuant to the terms of this Order, the Applicant shall: (a) file a copy thereof with this Court; (b) serve a copy thereof on the Service List; and (c) provide a copy thereof to each SISP Participant (as hereinafter defined), excluding from the public record any confidential information that the Applicant and the Stalking Horse Purchaser, with the consent of the Monitor, agree should be redacted.

**BID PROTECTONS**

8. **THIS COURT ORDERS** that the Bid Protections are hereby approved and the Applicant is hereby authorized and directed to pay the Bid Protections to the Stalking Horse Purchaser (or

to such other person as it may direct) in the manner and circumstances described in the Stalking Horse Purchase Agreement.

9. **THIS COURT ORDERS** that the Stalking Horse Purchaser shall be entitled to the benefit of and is hereby granted a charge (the "**Bid Protections Charge**") on the Property, which charge shall not exceed US$4,000,000, as security for payment of the Bid Protections in the manner and circumstances described in the Stalking Horse Purchase Agreement.

10. **THIS COURT ORDERS** that the filing, registration or perfection of the Bid Protections Charge shall not be required, and that the Bid Protections Charge shall be valid and enforceable for all purposes, including against any right, title or interest filed, registered, recorded or perfected subsequent to the Bid Protections Charge, notwithstanding any such failure to file, register, record or perfect.

11. **THIS COURT ORDERS** that the Bid Protections Charge shall constitute a charge on the Property and the Bid Protections Charge shall rank in priority to all other Encumbrances in favour of any Person notwithstanding the order of perfection or attachment, other than (i) any Person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable legislation; (ii) the Reserve Trustee in respect of the Reserve Security; and (iii) the Charges.

12. **THIS COURT ORDERS** that except for the Charges or as may be approved by this Court on notice to parties in interest, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Bid Protections Charge, unless the Applicant also obtains the prior written consent of the Monitor and the Stalking Horse Purchaser, or further Order of this Court.

13. **THIS COURT ORDERS** that the Bid Protections Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Stalking Horse Purchaser shall not otherwise

be limited or impaired in any way by: (i) the pendency of these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) or receivership order(s) issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") or otherwise, or any bankruptcy order or receivership order made pursuant to such applications; (iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (iv) the provisions of any federal or provincial statutes; or (v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Bid Protections Charge nor the execution, delivery, perfection, registration or performance of the Stalking Horse Purchase Agreement shall create, cause or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;

(b) the Stalking Horse Purchaser shall not have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Bid Protections Charge or the execution, delivery or performance of the Stalking Horse Purchase Agreement; and

(c) the payments made by the Applicant pursuant to this Order, the Stalking Horse Purchase Agreement and the granting of the Bid Protections Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

14. **THIS COURT ORDERS** that the Bid Protections Charge created by this Order over leases of real property in Canada shall only be a charge in the Applicant's interest in such real property lease.

15. **THIS COURT ORDERS AND DECLARES** that the Stalking Horse Purchaser, with respect to the Bid Protections Charge only, shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the BIA.

**PIPEDA**

16. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 and any similar legislation in any other applicable jurisdictions the Monitor, the Applicant, the Financial Advisor and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants that are party to a non-disclosure agreement with the Applicant (each, a "**SISP Participant**") and their respective advisors personal information of identifiable individuals, but only to the extent required to negotiate or attempt to complete a transaction pursuant to the SISP (a "**Transaction**"). Each SISP Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation for the purpose of effecting a Transaction, and, if it does not complete a Transaction, shall return all such information to the Monitor, the Financial Advisor or the Applicant, or, in the alternative, destroy all such information and provide confirmation of its destruction if requested by the Monitor, the Financial Advisor or the Applicant. Any bidder with a Successful Bid shall maintain and protect the privacy of such information and, upon closing of the Transaction(s) contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Applicant, and shall return

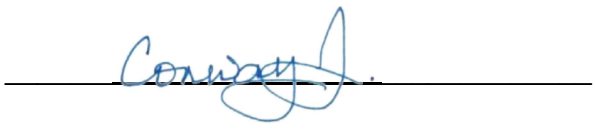
all other personal information to the Monitor, the Financial Advisor or the Applicant, or ensure that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor, the Financial Advisor or the Applicant.

**GENERAL**

17. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

18. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal and regulatory or administrative bodies, having jurisdiction in Canada or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicant, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

19. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Eastern Time) on the date of this Order without the need for entry or filing.



# SCHEDULE "A"
# SALE AND INVESTMENT SOLICITATION PROCESS

# Sale and Investment Solicitation Process

1. On March 10, 2023, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted an order (the "**Initial Order**"), among other things, granting LoyaltyOne, Co. (the "**Applicant**") relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

2. On March 20, 2023, the Court granted (i) an order amending and restating the Initial Order (the "**ARIO**"), and (ii) an order (the "**SISP Approval Order**") that, among other things: (a) authorized the Applicant to implement a sale and investment solicitation process ("**SISP**") in accordance with the terms hereof; (b) authorized and empowered the Applicant to enter into the Stalking Horse Purchase Agreement; (c) approved the Bid Protections; and (d) granted the Bid Protections Charge. Capitalized terms that are not otherwise defined herein have the meanings ascribed to them in the ARIO or the SISP Approval Order, as applicable. Copies of the ARIO and the SISP Approval Order can be found at https://www.ksvadvisory.com/experience/case/loyaltyone.

3. This SISP sets out the manner in which: (a) binding bids for executable transaction alternatives that are superior to the sale transaction contemplated by the Stalking Horse Purchase Agreement involving the business and assets of the Applicant and its subsidiary, LoyaltyOne Travel Services Co./Cie Des Voyages (together with the Applicant, the "**LoyaltyOne Entities**"), will be solicited from interested parties; (b) any such bids received will be addressed; (c) any Successful Bid (as defined below) will be selected; and (d) Court approval of any Successful Bid will be sought. Such transaction alternatives may include, among other things, a sale of some or all of the Applicant's assets and/or business and/or an investment in the Applicant, each of which shall be subject to all terms set forth herein.

4. The SISP shall be conducted by the Applicant with the assistance of PJT Partners LP (the "**Financial Advisor**") under the oversight of KSV Restructuring Inc., in its capacity as Court-appointed monitor (the "**Monitor**") of the Applicant and the Monitor shall be entitled to receive all information in relation to the SISP.

5. Parties who wish to have their bids considered must participate in the SISP as conducted by the Applicant with the assistance of the Financial Advisor.

6. The SISP will be conducted such that the Applicant and the Financial Advisor will (under the oversight of the Monitor):

    a) disseminate marketing materials and a process letter to potentially interested parties identified by the Applicant and the Financial Advisor;
    b) solicit interest from parties with a view to such interested parties entering into non-disclosure agreements (parties shall only obtain access to the data room and be permitted to participate in the SISP if they execute a non-disclosure agreement and agree to the additional measures that are required by the Applicant to protect competitively sensitive information, in form and substance satisfactory to the Applicant);
    c) provide applicable parties with access to a data room containing diligence information; and
    d) request that such parties (other than the Stalking Horse Purchaser or its designee) submit a binding offer meeting at least the requirements set forth in Section 8

below, as determined by the Applicant in consultation with the Monitor (a "**Qualified Bid**"), by the Qualified Bid Deadline (as defined below).

7. The SISP shall be conducted subject to the terms hereof and the following key milestones:

   a) the Court issues the SISP Approval Order approving the: (i) SISP and (ii) the Stalking Horse Purchase Agreement as the stalking horse in the SISP and the Applicant entering into same – by no later than March 20, 2023;[1]
   b) the Applicant to commence solicitation process by no later than March 23, 2023;
   c) deadline to submit a Qualified Bid – 5:00 p.m. Eastern Time on April 27, 2023 (the "**Qualified Bid Deadline**");
   d) deadline to determine whether a bid is a Qualified Bid and, if applicable, to notify those parties who submitted a Qualified Bid of the Auction (as defined below) – by no later than 5:00 p.m. Eastern Time on May 1, 2023;
   e) the Applicant to hold an Auction (if applicable) and select a Successful Bid – by no later than 10:00 a.m. Eastern Time on May 4, 2023;
   f) Approval and Vesting Order (as defined below) hearing:
      - (if there is no Auction) – by no later than May 15, 2023, subject to Court availability; or
      - (if there is an Auction) – by no later than May 18, 2023, subject to Court availability; and
   g) closing of the Successful Bid as soon thereafter as possible and, in any event, by not later than June 30, 2023, provided that such date shall be extended by up to 90 days where regulatory approvals are the only material remaining conditions to closing (the "**Outside Date**").

8. In order to constitute a Qualified Bid, a bid must comply with the following:

   a) it provides for aggregate consideration, payable in full on closing, in an amount equal to or greater than US$165 million (the "**Consideration Value**"), and provides a detailed sources schedule that identifies, with specificity, the composition of the Consideration Value and any assumptions that could reduce the net consideration payable including details of any material liabilities that are being assumed or being excluded;
   b) it includes an assumption of all obligations of the Applicant: (i) to consumers enrolled in the AIR MILES® Reward Program; and (ii) pursuant to the terms of that certain Amended and Restated Redemption Reserve Agreement dated December 31, 2001 and that certain Amended and Restated Security Agreement dated as of December 31, 2001, each such agreement between Loyalty Management Group Canada Inc. and Royal Trust Corporation of Canada;
   c) as part of the Consideration Value, it provides cash consideration sufficient to pay: (i) all outstanding obligations under the DIP Term Sheet; (ii) any obligations in priority to amounts owing under the DIP Term Sheet, including any applicable charges granted by the Court in the Applicant's CCAA proceeding; (iii) an amount of US$5 million to fund a wind-up of the Applicant's CCAA proceeding and any further proceedings or wind-up costs; and (iv) an amount of US$4 million to satisfy the Bid Protections;

[1] To the extent any dates would fall on a non-business day, they shall be deemed to be the first business day thereafter.

d) closing of the transaction by not later than the Outside Date;
e) it contains:
    i. duly executed binding transaction document(s);
    ii. the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, and the name(s) of its controlling equityholder(s);
    iii. a redline to the Stalking Horse Purchase Agreement;
    iv. evidence of authorization and approval from the bidder's board of directors (or comparable governing body) and, if necessary to complete the transaction, the bidder's equityholder(s);
    v. disclosure of any connections or agreements with the LoyaltyOne Entities or any of their affiliates, any known, potential, prospective bidder, or any officer, manager, director, member or known equity security holder of the LoyaltyOne Entities or any of their affiliates; and
    vi. such other information reasonably requested by the Applicant or the Monitor;
f) it includes a letter stating that the bid is submitted in good faith, is binding and is irrevocable until closing of the Successful Bid; provided, that if such bid is not selected as the Successful Bid or as the next-highest or otherwise best Qualified Bid as compared to the Successful Bid (such bid, the "**Back-Up Bid**") it shall only remain irrevocable until selection of the Successful Bid;
g) it provides that the bid will serve as a Back-Up Bid if it is not selected as the Successful Bid and if selected as the Back-Up Bid it will remain irrevocable until the earlier of (i) closing of the Successful Bid or (ii) closing of the Back-Up Bid;
h) it provides written evidence of a bidder's ability to fully fund and consummate the transaction (including financing required, if any, prior to the closing of the transaction to finance the proceedings) and satisfy its obligations under the transaction documents, including binding equity/debt commitment letters and/or guarantees covering the full value of all cash consideration and the additional items (in scope and amount) covered by the guarantees provided by affiliates of the bidder in connection with the Successful Bid;
i) it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;
j) it is not conditional upon:
    i. approval from the bidder's board of directors (or comparable governing body) or equityholder(s);
    ii. the outcome of any due diligence by the bidder; or
    iii. the bidder obtaining financing;
k) it includes an acknowledgment and representation that the bidder (i) has had an opportunity to conduct any and all required due diligence prior to making its bid, and has relied solely upon its own independent review, investigation and inspection in making its bid, (ii) is not relying upon any written or oral statements, representations, promises, warranties, conditions, or guaranties whatsoever, whether express or implied (by operation of law or otherwise), made by any person or party, including the Applicant, the Financial Advisor, the Monitor and their respective employees, officers, directors, agents, advisors and other representatives, regarding the proposed transactions, this SISP, or any information (or the completeness of any information) provided in connection therewith, except as expressly stated in the proposed transaction documents; (iii) is making its bid on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Applicant, the Financial

Advisor, the Monitor or any of their respective employees, officers, directors, agents, advisors and other representatives, except to the extent set forth in the proposed transactions documents (iv) is bound by this SISP and the SISP Approval Order, and (v) is subject to the exclusive jurisdiction of the Court with respect to any disputes or other controversies arising under or in connection with the SISP or its bid;

l) it specifies any regulatory or other third-party approvals the party anticipates would be required to complete the transaction (including the anticipated timing necessary to obtain such approvals);

m) it includes full details of the bidder's intended treatment of the LoyaltyOne Entities' employees under the proposed bid;

n) it is accompanied by a cash deposit (the "**Deposit**") by wire transfer of immediately available funds equal to 10% of the Consideration Value, which Deposit shall be retained by the Monitor in an interest bearing trust account in accordance with the terms hereof;

o) it includes a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and

p) it is received by the Applicant, with a copy to the Financial Advisor and the Monitor, by the Qualified Bid Deadline at the email addresses specified on Schedule "B" hereto.

9. The Qualified Bid Deadline may be extended by: (a) the Applicant for up to no longer than seven days with the consent of the Monitor; or (b) further order of the Court. In such circumstances, the milestones contained in Subsections 7 (d) to (f) shall be extended by the same amount of time.

10. The Applicant, in consultation with the Monitor, may waive compliance with any one or more of the requirements specified in Section 8 above and deem a non-compliant bid to be a Qualified Bid, provided that the Applicant shall not waive compliance with the requirements specified in Subsections 8 (a), (b), (c), (d), (e)(i), (e)(ii), (e)(iv), (f), (k) or (n) without the prior written consent of the Stalking Horse Purchaser, acting reasonably.

11. Notwithstanding the requirements specified in Section 8 above, the transaction contemplated by the Stalking Horse Purchase Agreement (the "**Stalking Horse Bid**"), is deemed to be a Qualified Bid, provided that, for greater certainty: (i) no Deposit shall be required to be submitted in connection with the Stalking Horse Bid; and (ii) the Stalking Horse Bid shall not serve as a Back-Up Bid.

12. If one or more Qualified Bids (other than the Stalking Horse Bid) has been received by the Applicant on or before the Qualified Bid Deadline, the Applicant shall proceed with an auction process to determine the successful bid(s) (the "**Auction**"), which Auction shall be administered in accordance with Schedule "A" hereto. The successful bid(s) selected pursuant to the Auction shall constitute the "**Successful Bid**". Forthwith upon determining to proceed with an Auction, the Applicant shall provide written notice to each party that submitted a Qualified Bid (including the Stalking Horse Bid) of which Qualified Bid is the highest or otherwise best bid (as determined by the Applicant, in consultation with the Monitor) along with a copy of such bid.

13. If by the Qualified Bid Deadline, no Qualified Bid (other than the Stalking Horse Bid) has been received by the Applicant, then the Stalking Horse Bid shall be deemed the Successful Bid and shall be consummated in accordance with and subject to the terms of the Stalking Horse Purchase Agreement.

14. Following selection of a Successful Bid, the Applicant, with the assistance of its advisors, shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bid in accordance with the milestones set out in Section 7. Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by the Applicant, in consultation with the Monitor, the Applicant shall apply to the Court for an order or orders approving such Successful Bid and/or the mechanics to authorize the Applicant to complete the transactions contemplated thereby, as applicable, and authorizing the Applicant to: (a) enter into any and all necessary agreements and related documentation with respect to the Successful Bid; (b) undertake such other actions as may be necessary to give effect to such Successful Bid; and (c) implement the transaction(s) contemplated in such Successful Bid (each, an "**Approval and Vesting Order**"). If the Successful Bid is not consummated in accordance with its terms, the Applicant shall be authorized, but not required, to elect that the Back-Up Bid (if any) is the Successful Bid.

15. If a Successful Bid is selected and an Approval and Vesting Order authorizing the consummation of the transaction contemplated thereunder is granted by the Court, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Qualified Bid that is not selected as a Successful Bid will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten (10) business days) after the date upon which the Successful Bid is approved pursuant to an Approval and Vesting Order or such earlier date as may be determined by the Applicant, in consultation with the Monitor; provided, the Deposit in respect of the Back-Up Bid shall not be returned to the applicable bidder until the closing of the Successful Bid.

16. The Applicant shall provide information in respect of the SISP to consenting stakeholders who are party to support agreements with the Applicant (the "**Consenting Stakeholders**") on a confidential basis and who have agreed to not submit a bid in connection with the SISP, including (A) access to the data room, (B) copies (or if not provided to the Applicant in writing, a description) of any Qualified Bid, no later than one (1) calendar day following receipt thereof by the Applicant or its advisors and (C) such other information as reasonably requested by the Consenting Stakeholders or their respective legal counsel or financial advisors (including Piper Sandler Corp. and FTI Consulting Canada Inc. (collectively, the "**Lender FAs**")) or as necessary to keep the Consenting Stakeholders informed no later than one (1) calendar day after any such request or any material change to the proposed terms of any bid received, including any Qualified Bid, as to the terms of any bid, including any Qualified Bid, (including any changes to the proposed terms thereof) and the status and substance of discussions related thereto. The Financial Advisor shall consult with the Lender FAs in respect of the Applicant's conduct of the SISP and prior to the Applicant making decisions in respect of the SISP (and during an Auction include the Lender FAs in discussions with Qualified Bidders, where practicable).

17. The Applicant shall be permitted, in its discretion, to provide general updates and information in respect of the SISP to counsel to any creditor (each a "**Creditor**") on a confidential basis, upon: (a) the irrevocable confirmation in writing from such counsel that the applicable Creditor will not submit any bid in the SISP; and (b) counsel to such Creditor executing confidentiality agreements with the Applicant, in form and substance satisfactory to the Applicant and the Monitor.

18. Any amendments to this SISP may only be made by the Applicant with the written consent of the Monitor, or by further order of the Court, provided that the Applicant shall not amend the requirements specified in Subsections 8(a), (b), (c), (d), (e)(i), (e)(ii), (e)(iv), (f), (k) or (n) without the prior written consent of the Stalking Horse Purchaser, acting reasonably.

## SCHEDULE "A": AUCTION PROCEDURES

**1. Auction.** If the Applicant receives at least one Qualified Bid (other than the Stalking Horse Bid), the Applicant will conduct and administer the Auction in accordance with the terms of the SISP. Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.

**2. Participation.** Only parties that provided a Qualified Bid by the Qualified Bid Deadline, including, for greater certainty, the Stalking Horse Bid (collectively, the "**Qualified Parties**" and each a "**Qualified Party**"), shall be eligible to participate in the Auction. No later than 5:00 p.m. Eastern Time on the day prior to the Auction, each Qualified Party must inform the Applicant and the Monitor in writing whether it intends to participate in the Auction. The Applicant will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party (including the Stalking Horse Purchaser) provides such expression of intent, the highest or otherwise best Qualified Bid as determined by the Applicant, in consultation with the Monitor, shall be designated as the Successful Bid (as defined below).

**3. Auction Procedures.** The Auction shall be governed by the following procedures:

a. **Attendance.** Only the Applicant, the Qualified Parties, the Monitor, and Consenting Stakeholders, and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any Overbids (as defined below) at the Auction;

b. **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (a) it has not engaged in any collusion with respect to the Auction and the bid process; and (b) its bid is a good-faith *bona fide* offer, it is irrevocable and it intends to consummate the proposed transaction if selected as the Successful Party (as defined below);

c. **Minimum Overbid and Back-Up Bid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by the Applicant, in consultation with the Monitor (the "**Initial Bid**"), and any bid made at the Auction by a Qualified Party subsequent to the Applicant's announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional cash increments of US$1,000,000, and all such Overbids shall be irrevocable until closing of the Successful Bid; provided, that if such Overbid is not selected as the Successful Bid or as the Back-Up Bid (if any) it shall only remain irrevocable until selection of the Successful Bid;

d. **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video-conference, on an open basis, and all Qualified Parties will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each

subsequent Qualified Bid will be fully disclosed to all other Qualified Parties throughout the entire Auction; provided, however, that the Applicant, in its discretion, may establish separate video conference rooms to permit interim discussions among the Applicant, the Monitor and individual Qualified Parties with the understanding that all formal bids will be delivered in one group video conference, on an open basis;

e. **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit an Overbid with full knowledge and confirmation of the then-existing highest or otherwise best bid and no Qualified Party submits an Overbid; and

f. **No Post-Auction Bids**. No bids will be considered for any purpose after the Successful Bid has been designated, and therefore the Auction has concluded.

## Selection of Successful Bid

**4. Selection.** During the Auction, the Applicant, in consultation with the Monitor, will: (a) review each subsequent Qualified Bid, considering the factors set out in Section 8 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in (i) above, (iii) the likelihood of the Qualified Party's ability to close a transaction by not later than the Outside Date (including factors such as: the transaction structure and execution risk; conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to the Applicant and its stakeholders and (vi) any other factors the directors or officers of Applicant may, consistent with their fiduciary duties, reasonably deem relevant; and (b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").

**5. Acknowledgement.** The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by the Applicant in its sole discretion, subject to the milestones set forth in Section 7 of the SISP.

## SCHEDULE "B": E-MAIL ADDRESSES FOR DELIVERY OF BIDS

To the counsel for the Applicant:

rjacobs@cassels.com; jdietrich@cassels.com; jroy@cassels.com; cground@cassels.com; jbornstein@cassels.com; pdublin@akingump.com; skuhn@akingump.com; emcgrady@akingump.com; mlahaie@akingump.com; alaves@akingump.com

with a copy to the Financial Advisor:

baird@pjtpartners.com; daniel.degosztonyi@pjtpartners.com

and with a copy to the Monitor and counsel to the Monitor:

dsieradzki@ksvadvisory.com; ngoldstein@ksvadvisory.com; boneill@goodmans.ca; carmstrong@goodmans.ca

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 LOYALTYONE, CO.

Court File No. CV-23-00696017-00CL

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

PROCEEDING COMMENCED AT
TORONTO

**SISP APPROVAL ORDER**

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Lawyers for the Applicant

# TAB 20

**CITATION:** Lydian International Limited (Re), 2019 ONSC 7473
**COURT FILE NO.:** CV-19-00633392-00CL
**DATE:** 2019-12-24

2019 ONSC 7473 (CanLII)

**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 ARRANGMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED**

**Applicants**

**BEFORE:** Chief Justice Geoffrey B. Morawetz

**COUNSEL:** *Elizabeth Pillon, Sanja Sopic,* and *Nicholas Avis*, for the Applicants

*Pamela Huff,* for Resource Capital Fund VI L.P.

*Alan Merskey*, for OSISKO Bermuda Limited

*D.J. Miller*, for Alvarez & Marsal Canada Inc. proposed Monitor

*David Bish*, for ORION Capital Management

*Bruce Darlington*, for ING Bank N.V./ABS Svensk Exportkrerdit (publ)

**HEARD and DETERMINED:** December 23, 2019

**REASONS RELEASED:** December 24, 2019

## ENDORSEMENT

### Introduction

[1] Lydian International Limited ("Lydian International"), Lydian Canada Ventures Corporation ("Lydian Canada") and Lydian UK Corporation Limited ("Lydian UK", and collectively, the "Applicants") apply for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

[2] The Applicants are part of a gold exploration and development business in south central Armenia (the "Amulsar Project"). The Amulsar Project is directly owned and operated by Lydian Armenia CJSC ("Lydian Armenia"), a wholly-owned subsidiary of the Applicants.

[3] As set out in the affidavit of Edward A. Sellers sworn December 22, 2019 (the "Sellers Affidavit"), the Applicants have been experiencing and continue to experience liquidity issues due to blockades of the Amulsar Project and other external factors. The Sellers Affidavit details such activities and Mr. Sellers deposes that these activities have prevented Lydian Armenia and its employees, contractors and suppliers from accessing, constructing and ultimately operating the Amulsar Project.

[4] Mr. Sellers states that the lack of progress at the Amulsar Project has prevented the Lydian Group (as that term is defined below) from generating any positive cash flow and has also triggered defaults on certain of the Lydian Group's obligations to its lenders which, if enforced, the Lydian Group would be unable to satisfy.

[5] The Lydian Group has operated under forbearance agreements in respect of these defaults since October 2018, but the most recent forbearance agreement expired on December 20, 2019.

[6] The Applicants contend that they now require immediate protection under the CCAA for the breathing room they require to pursue remedial steps on a time sensitive basis.

[7] The Applicants intend to continue discussions with their lenders and other stakeholders, including the Government of Armenia ("GOA"). The Applicants also intend to continue evaluating potential financing and/or sale options, all with a view to achieving a viable path forward.

**The Applicants**

[8] Lydian International is a corporation continued under the laws of the Bailiwick of Jersey, Channel Islands, from the Province of Alberta pursuant to the *Companies (Jersey) Law 1991*. Lydian International was originally incorporated under the *Business Corporations Act*, R.S.A. 2000, c. B-9 (Alberta) on February 14, 2006 as "Dawson Creek Capital Corp.", and subsequently became Lydian International on December 12, 2007.

[9] Lydian International's registered office is located in Jersey. On June 12, 2019, Lydian International shareholders approved its continuance under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, but this continuance has yet to be implemented.

[10] Lydian International has two types of securities listed on the Toronto Stock exchange: (1) ordinary shares and (2) warrants that expired in 2017.

[11] Lydian Canada is a direct, wholly owned subsidiary of Lydian International. Lydian Canada is incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57 (British Columbia) and has a registered head office in Toronto. Its registered and records office is located in British Columbia.

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[12] Lydian UK is a corporation incorporated in the United Kingdom and is a direct, wholly-owned subsidiary of Lydian Canada with a head office located in the United Kingdom. Lydian UK has no material assets in the UK.

[13] Lydian International and Lydian UK have assets in Canada in the form of deposits with the Bank of Nova Scotia in Toronto.

[14] The Applicants are part of a corporate group (the "Lydian Group") with a number of other subsidiaries ultimately owned by Lydian International. Other than the Applicants, certain of the Lydian Group's subsidiaries are Lydian U.S. Corporation ("Lydian US"), Lydian International Holdings Limited ("Lydian Holdings"), Lydian Resources Armenia Limited ("Lydian Resources") and Lydian Armenia, a corporation incorporated under the laws of the Republic of Armenia. Together, Lydian U.S., Lydian Holdings, Lydian Resources and Lydian Armenia are the "Non-Applicant" parties.

[15] The Applicants submit that due to the complete integration of the business and operations of the Lydian Group, an extension of the stay of proceedings over the Non-Applicant parties is appropriate.

[16] The Applicants contend that the Lydian Group is highly integrated and its business and affairs are directed primarily out of Canada. Substantially all of its strategic business affairs, including key decision-making, are conducted in Toronto and Vancouver.

[17] Further, all the Applicants and Non-Applicant Parties are borrowers or guarantors of the Lydian Group's secured indebtedness. The Lydian Group's loan agreements are governed primarily by the laws of Ontario.

[18] Finally, the Lydian Group's forbearance and restructuring efforts have been directed out of Toronto.

[19] The Lydian Group is focused on constructing the Amulsar Project, its wholly-owned development stage gold mine in Armenia. The Amulsar Project was funded by a combination of equity and debt capital and stream financing. The debt and stream financing arrangements are secured over substantially all the assets of Lydian Armenia and Lydian International in the shares of various groups of the Lydian Group.

[20] The Applicants contend that time is of the essence given the Applicants' minimal cash position and negative cash flow.

**Issues**

[21] The issues for consideration are whether:

(a) the Applicants meet the criteria for protection under the CCAA;

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(b) the CCAA stay should be extended to the Non-Applicant Parties;

(c) the proposed monitor, Alvarez & Marsal Canada Inc. ("A&M") should be appointed as monitor;

(d) Ontario is the appropriate venue for this proceeding;

(e) this court should issue a letter of request of the Royal Court of Jersey;

(f) this Court should exercise its discretion to grant the Administration Charge and the D & O Charge (as defined below); and

(g) it is appropriate to grant a stay extension immediately following the issuance of the Initial Order.

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**Law and Analysis**

[22] Pursuant to section 11.02(1) of the CCAA, a court may make an order staying all proceedings in respect of a debtor company for a period of not more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.

[23] Section 11.02(1) of the CCAA was recently amended and the maximum stay period permitted in an initial application was reduced from 30 days to 10 days. Section 11.001 which came into force at the same time as the amendment to s. 11.02(1), limits initial orders to "ordinary course" relief.

[24] Section 11.001 provides:

> 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[25] The News Release issued by Innovation, Science and Economic Development Canada specifically states that these amendments "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."

[26] In my view, the intent of s. 11.001 is clear. Absent exceptional circumstances, the relief to be granted in the initial hearing "shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that

period". The period being no more than 10 days, and whenever possible, the *status quo* should be maintained during that period.

[27] Following the granting of the initial order, a number of developments can occur, including:

(a) notification to all stakeholders of the CCAA application;

(b) stabilization of the operation of debtor companies;

(c) ongoing negotiations with key stakeholders who were consulted prior to the CCAA filing;

(d) commencement of negotiations with stakeholders who were not consulted prior to the CCAA filing;

(e) negotiations of DIP facilities and DIP Charges;

(f) negotiations of Administration Charges;

(g) negotiation of Key Employee Incentives Programs;

(h) negotiation of Key Employee Retention Programs;

(i) consultation with regulators;

(j) consultation with tax authorities;

(k) consideration as to whether representativecounsel is required; and

(l) consultation and negotiation with key suppliers.

[28] This list is not intended to be exhaustive. It is merely illustrative of the many issues that can arise in a CCAA proceeding.

[29] Prior to the recent amendments, it was not uncommon for an initial order to include provisions that would affect some or all of the aforementioned issues and parties. The previous s. 11.02 provided that the initial stay period could be for a period of up to 30 days. After the initial stay, a "comeback" hearing was scheduled and, in theory, parties could request that certain provisions addressed in the initial order could be reconsidered.

[30] The practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments. The intent of the amendments is to limit the relief granted on the first day. The ensuing 10-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.

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[31] In my view, this is consistent with the objectives of the amendments which include the requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players". It may also result in more meaningful comeback hearings.

[32] It is against this backdrop that the requested relief at the initial hearing should be scrutinized so as to ensure that it is restricted to what is reasonably necessary for the continued operations of the debtor company during the initial stay period.

[33] For the reasons that follow, I conclude that it is appropriate to grant a s. 11.02 order in respect of the Applicants.

[34] I am satisfied that Lydian Canada meets the CCAA definition of "company" and is eligible for CCAA protection.

[35] I have also considered whether the foreign incorporated companies are "companies" pursuant to the CCAA. Such entities must satisfy the disjunctive test of being an "incorporated company" either "having assets or doing business in Canada".

[36] In *Cinram International Inc., (Re)*, 2012 ONSC 3767, 91 C.B.R. (5th) 46, I stated that the threshold for having assets in Canada is low and that holding funds in a Canadian bank account brings a foreign corporation within the definition of "company" under the CCAA.

[37] In this case, both Lydian International and Lydian UK meet the definition of "company" because both corporations have assets in and do business in Canada.

[38] In my view the Applicants are each "debtor companies" under the CCAA. The Applicants are insolvent and have liabilities in excess of $5 million. I am satisfied that the Applicants are eligible for CCAA protection.

[39] The Applicants seek to extend the stay to Lydian Armenia, Lydian Holdings, Lydian Resources Armenia Limited and Lydian US. I am satisfied that, in the circumstances, it is appropriate to grant an order that extends the stay to the Non-Applicant Parties. The stay is intended to stabilize operations in the Lydian Group. This finding is consistent with CCAA jurisprudence: see e.g., *Sino-Forest Corporation (Re)*, 2012 ONSC 2063, at paras. 5, 18, and 31; *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.); and *Target Canada Co. (Re)*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 49-50.

[40] I am also satisfied that is appropriate to appoint A & M as monitor pursuant to the provisions of s. 11.7 of the CCAA.

[41] With respect to whether Ontario is the appropriate venue for this proceeding, Lydian Canada's registered head office is located in Toronto and its registered and records offices are located in Vancouver. In my view, Ontario has jurisdiction over Lydian Canada. The registered head offices for Lydian International and Lydian UK are in Jersey and the UK respectively, however, both entities have assets in Ontario, those being funds on deposit with the Bank of Nova Scotia in Toronto. Further, it seems to me that both Lydian International and Lydian UK

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have a strong nexus to Ontario and accordingly I am satisfied that Ontario is the appropriate jurisdiction to hear this application.

[42] I am also satisfied that, in these circumstances, it is appropriate for this court to issue to the Royal Court of Jersey a letter of request as referenced in the application record.

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**Administration Charge**

[43] The Applicants seek a charge on their assets in the maximum amount of US $350,000 to secure the fees and disbursements incurred in connection with services rendered by counsel to the Applicants, A & M and A & M's counsel, in respect of the CCAA proceedings (the "Administration Charge").

[44] Section 11.52 of the CCAA provides the ability for the court to grant the Administration Charge.

[45] The recently enacted s. 11.001 of the CCAA limits the requested relief on this motion, including the Administration Charge, to what is reasonably necessary for the continued operation of the Applicants during the Initial Stay Period. The Sellers Affidavit outlines the complex issues facing the Applicants.

[46] In *Canwest Publishing Inc.*, (Re), 2010 ONSC 222, 63 C.B.R.(5th) 115, Pepall J. (as she then was) identified six non-exhaustive factors that the court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge. These factors include:

(a) the size and complexity of business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[47] It seems to me that the proposed restructuring will require extensive input from the professional advisors and there is an immediate need for such advice. The requested relief is supported by A & M.

[48] I am satisfied that the Administration Charge in the limited amount of US $350,000 is appropriate in the circumstances and is reasonably necessary for the continued operation of the business at this time.

**D & O Charge**

[49] The Applicants also seek a charge over the property in favour of their former and current directors in the limited amount of $200,000 (the "D & O Charge").

[50] The Applicants maintain Directors' and Officers' liability insurance (the "D & O Insurance") which provides a total of $10 million in coverage.

[51] The D & O Insurance is set to expire on December 31, 2019.

[52] Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the D & O charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected.

[53] In *Jaguar Mining Inc., (Re),* 2014 ONSC 494, 12 C.B.R. (6th) 290, I set out a number of factors to be considered in determining whether to grant a directors' and officers' charge:

> (a) whether notice has been given to the secured creditors likely to be affected by the charge;
>
> (b) whether the amount is appropriate;
>
> (c) whether the Applicant could obtain adequate indemnification insurance for the director at a reasonable cost; and
>
> (d) whether the charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct.

[54] Having reviewed the Sellers Affidavit, it seems to me that the granting of the D & O charge is necessary in the circumstances. In arriving at this conclusion, I have also taken into account that the D & O Insurance will lapse shortly; having directors involved in the process is desirable; that the secured creditors likely to be affected do not object; and that A & M has advised that it is supportive of the D & O Charge. Further, the requested amount is one that I consider to be reasonably necessary for the continued operation of the Applicants.

**Extension of the Stay of Proceedings**

[55] The Applicants have requested that, if the initial order is granted, I should immediately entertain and grant an order extending the Stay Period until and including January 17, 2020 which will provide the Applicants and all stakeholders with enough time to adequately prepare for a comeback hearing.

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[56] The Applicants submit that I am authorized to grant a stay extension immediately after granting the initial order because section 11.02(2) of the CCAA does not provide a minimum waiting time before an applicant can seek a stay extension. The Applicants reference recent decisions where courts have scheduled hearings within two or three days after the granting of an initial order. Reference is made to *Clover Leaf Holdings Company (Re)*, 2019 ONSC 6966 and *Re Wayland group Corp. et al.* (2 December 2019), Toronto CV–19–00632079-00CL. In *Clover Leaf*, the stay extension for 36 days and additional relief including authorization for DIP financing was granted three days after the initial order and in *Wayland*, the stay extension was granted two days after the initial order.

[57] I acknowledge that, in this case, it may be challenging for the Applicants to return to court at or near the end of the 10-day initial stay period due to the year-end holidays. I also acknowledge that the offices of many of the parties involved in these proceedings may not be open during the holidays.

[58] However, the statutory maximum 10-day stay as referenced in s. 11.02(1) expires on January 2, 2020 and the courts are open on that day.

[59] As noted above, absent exceptional circumstances, I do not believe that it is desirable to entertain motions for supplementary relief in the period immediately following the granting of an initial order.

[60] It could very well be that circumstances existed in both *Clover Leaf* and *Wayland* that justified the stay extension and the ancillary relief being granted shortly after the initial order.

[61] However, in this case, I have not been persuaded on the evidence that it is necessary for the stay extension to be addressed prior to January 2, 2020 and I decline to do so.

**Disposition**

[62] The initial order is granted with a Stay Period in effect until January 2, 2020. In view of the holiday schedules of many parties, the following procedures are put in place. The Applicants can file a motion returnable on January 2, 2020, requesting that the stay be extended to January 23, 2020. Any party that wishes to oppose the extension of the stay to January 23, 2020 is required to notify the Applicant, A & M and the Commercial List Office of their intention to do so no later than 2:00 p.m. on December 30, 2019. In the event that the requested stay extension is unopposed, there will be no need for counsel to attend on the return of the motion. I will consider the motion based on the materials filed.

[63] If any objections are received by 2:00 p.m. on December 30, 2019, the hearing on January 2, 2020 will address the opposed extension request. Any further relief will be considered at the Comeback Motion on January 23, 2020.

2019 ONSC 7473 (CanLII)

Chief Justice Geoffrey B. Morawetz

**Date:** December 24, 2019

2019 ONSC 7473 (CanLII)

# TAB 21

**CITATION:** Nordstrom Canada Retail, Inc., 2023 ONSC 1422
**COURT FILE NO.:** CV-23-00695619-00CL
**DATE:** 2023-03-03

**SUPERIOR COURT OF JUSTICE – ONTARIO2023-03-01**

**RE:** 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 NORDSTROM CANADA RETAIL INC., NORDSTROM CANADA HOLDINGS INC., LLC AND NORDSTROM CANADA HOLDINGS II, LLC

**BEFORE:** Chief Justice G.B. Morawetz

**COUNSEL:** *Jeremy Dacks, Tracy Sandler, Martino Calvaruso and Marleigh Dick*, for the Applicants

*Susan Ursel, Karen Ensslen*, for the Proposed Employee Representative Counsel

*Brendan O'Neill and Brad Wiffen*, for the Proposed Monitor

*George Benchetrit*, for the Directors and Officers of the Nordstrom Canada Entities

*Aubrey Kauffman*, for Nordstrom, Inc. (U.S.)

**HEARD and DETERMINED:** March 2, 2023

**REASONS:** March 3, 2023

## ENDORSEMENT

### Background

[1] At the conclusion of the hearing on March 2, 2023, I granted the requested relief, with reasons to follows. These are the reasons.

[2] Nordstrom Canada Retail, Inc. ("Nordstrom Canada"), together with the other applicants listed above (collectively, the "Applicants"), seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Applicants seek a stay of proceedings (the "Stay") for the initial ten-day period (the "Initial Stay Period") under section 11.02(2) of the CCAA, together with related relief necessary to preserve the Applicants' business and stakeholder value during the Initial Stay Period. The Applicants also seek to extend the stay of proceedings to Nordstrom Canada Leasing LP ("Canada Leasing LP") and, for limited purposes, to Nordstrom,

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Inc. ("Nordstrom US"). The Applicants and Canada Leasing LP are referred to collectively below as the "Nordstrom Canada Entities."

[3] Nordstrom Canada is a retailer which acts as the Canadian operating subsidiary of Nordstrom US. Nordstrom Canada entered the Canadian marketplace in September 2014 and currently operates 13 retail stores in Ontario, Alberta and British Columbia. Nordstrom Canada has experienced losses each year. Nordstrom Canada has only been able to sustain operations due to the financial support of Nordstrom US, which has provided Nordstrom Canada with approximately USD$775 million in net funding through various means since inception. Nordstrom US also provides various other ongoing strategic support, and administrative services.

[4] Given Nordstrom Canada's financial performance and after considering available options, Nordstrom US has determined that it is in the best interest of its stakeholders to discontinue further financial and operational support for Nordstrom Canada in order to focus on its core business in the US. Nordstrom US has terminated its support and IP licensing arrangements with the Nordstrom Canadian Entities and replaced them with a Wind-Down Agreement (described further below).

[5] The Applicants contend that without support from Nordstrom US, the Nordstrom Canada Entities are insolvent and require the flexibility of the CCAA in order to effect an orderly, responsible and controlled wind-down of operations.

[6] The Applicants further contend that the requested relief is urgent, as the Nordstrom Canada Entities cannot operate without Nordstrom US's support, and continued support during the wind-down process is conditional on obtaining protection under the CCAA.

[7] The requested relief includes the approval of the Employee Trust, the appointment of Employee Representative Counsel, Court-ordered Administration and D&O charges in an amount required for the Initial Stay Period, as well as a Co-tenancy Stay of proceedings (the "Co-tenancy Stay") and a stay in favour of Nordstrom US.

[8] At the Comeback Hearing, the Applicants anticipate seeking certain additional relief, including the approval of an Employee Retention Plan. Additionally, the Applicants, in consultation with Alvarez & Marsal Canada Inc. (the "Proposed Monitor"), also plan to solicit bids from a number of professional third-party liquidators and to seek court approval in the near term to engage the successful liquidator bidder and to conduct an orderly realization process.

[9] The facts have been set out in an affidavit of Misti Heckel, President of Nordstrom Canada Retail, Inc., and President and Treasurer of Nordstrom Canada Holdings, LLC and Nordstrom Canada Holdings II LLC. In addition, the Proposed Monitor has filed a pre-filing report.

[10] The Proposed Monitor supports the position of the Applicants.

**The Nordstrom Canada Entities**

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[11] Nordstrom Canada is incorporated pursuant to the laws of British Columbia. It is a wholly-owned subsidiary of Nordstrom International Limited ("NIL"). NIL is a wholly-owned subsidiary of Nordstrom US, a publicly traded company on the New York Stock Exchange. Nordstrom Canada serves as the Canadian retail sales operating entity.

[12] As of January 28, 2023, Nordstrom Canada employed approximately 1925 full-time and 575 part-time employees. Of these, 2,047 are full-line store and 310 are Rack store employees.

[13] Nordstrom Canada Holdings, LLC ("NCH") is a US single member limited liability company wholly-owned by NIL. NCH, as general partner, owns 99.9% of Canada Leasing LP, the Canadian leasing entity. Nordstrom Canada Holdings II, LLC ("NCHII") is a US holding company that owns 0.1% of Canada Leasing LP, as its limited partner.

[14] Canada Leasing LP is an Alberta limited partnership responsible for the Canadian real estate activities, such as leasing retail space from the Landlords, and subleasing the retail space to Nordstrom Canada.

**Business of the Applicants**

[15] Nordstrom Canada currently operates six Nordstrom-branded full-line stores and seven off-price Nordstrom Rack stores in Ontario, Alberta and British Columbia. These retail operations are conducted in facilities which are leased to Canada Leasing LP, as lessee, by third-party landlords (the "Landlords") pursuant to leases (the "Leases") and sublet by Canada Leasing LP to Nordstrom Canada pursuant to subleases (the "Subleases").

[16] Ms. Heckel contends that Nordstrom Canada Entities' business is dependent on Nordstrom US for administrative and business support services, including legal, finance, accounting, bill processing, payroll, human resources, merchandising, strategy, and information technology project support (the "Shared Services"). Nordstrom US formerly provided these Shared Services under an inter-affiliate licence and services agreement, effective as of February 3, 2019, between Nordstrom US and Nordstrom Canada (the "Licence and Services Agreement").

[17] On March 1, 2023, Nordstrom US notified Nordstrom Canada that it would be terminating the Licence and Services Agreement in accordance with its terms, as well as the other agreements referenced above to which it is a party. Subsequently, the Nordstrom Canada Entities agreed to have the termination become effective immediately. Nordstrom US and the Nordstrom Canada Entities have entered into a new administrative services agreement effective March 1, 2023 (the "Wind-Down Agreement") for Nordstrom US to continue providing Shared Services, as well as a license to use the essential IP, for the sole purpose of an orderly wind down under the CCAA.

**Financial Position of the Nordstrom Canada Entities**

[18] As of January 28, 2023, the Nordstrom Canada Entities had combined total assets with a book value of approximately $500,784,000 and total liabilities of approximately $561,024,000.

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[19] Since 2014, Nordstrom Canada has experienced yearly losses across the majority of its 13 Canadian locations. For the year ended January 28, 2023, Nordstrom Canada generated revenue of $515,046,000. As a result of its high occupancy and other operating costs, its EBITDA for the year ending January 28, 2023, was negative $34,563,000, prior to taking into account intercompany payments.

[20] Most of the Nordstrom Canada Entities' losses have been absorbed by Nordstrom US through intercompany payments. However, Nordstrom US has resolved to discontinue this support, without which Nordstrom Canada cannot continue operating.

[21] The Nordstrom Canada Entities do not owe any secured indebtedness. Prior to the commencement of this proceeding, by virtue of amendments agreed upon by parties to a revolving Credit Agreement among Nordstrom US (as Borrower), Wells Fargo Bank, National Association, and certain other lenders, Nordstrom Canada was released from its guarantee obligations in relation to this indebtedness. The corresponding security interest granted by Nordstrom Canada was also released. Nordstrom Canada does not have any commitments under and has not granted any security in relation to the remaining debt agreements of Nordstrom US.

[22] Ms. Heckel states that since 2014, Nordstrom US has provided the Nordstrom Canada Entities with approximately USD $950 million. Taking into account the distributions of USD $175.6 million made by Nordstrom Canada to Nordstrom US, Nordstrom US has provided net funding to Nordstrom Canada of USD $775 million.

[23] Nordstrom US, with the support of its advisors, has decided in its business judgment that it is in the best interests of Nordstrom US to discontinue its support of the Canadian operations. The Applicants contend that due to its operational and financial dependence on Nordstrom US, Nordstrom Canada cannot continue operations without the full support of Nordstrom US, including a licence to use Nordstrom US's IP.

[24] The Nordstrom Canada Entities believe that these CCAA proceedings are the only practical means of ensuring a fair and orderly wind-down. Additionally, Nordstrom US has indicated that it is only willing to continue providing the Shared Services and to permit use of the IP if the wind-down is supervised by this Court under the CCAA.

**Requested Relief**

[25] Having reviewed the record and hearing submissions, I am satisfied that the Applicants are all affiliated debtor companies with total claims against them in excess of $5 million. I am also satisfied that Nordstrom Canada and the other Applicants are each a "company" for the purposes of s. 2 of the CCAA because they do business in or have assets in Canada.

[26] I accept that without the ongoing support of Nordstrom US, the realizable value of the Nordstrom Canada Entities' assets will be insufficient to satisfy all of their obligations to their creditors. I am satisfied that the Applicants in these proceedings are either currently insolvent under the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.

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B-3 ("BIA") or the expanded concept of insolvency adopted by this Court in *Stelco Inc., Re*, 2004 CanLII 24933 (Ont. Sup. Ct.).

[27] I am also satisfied that this Court has jurisdiction over the proceedings. The chief place of business of the Nordstrom Canada Entities is Ontario: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled $220 million, compared to $148 million in British Columbia and $77 million in Alberta .

[28] There are a number of examples of CCAA proceedings that have been commenced for the purpose of winding down a business. Recent examples include *Target Canada Co. (Re)*, 2015 ONSC 303, *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014, and *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1230.

[29] Section 11.02(1) of the CCAA permits the Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. Under section 11.001, other relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period." In my view, the relief requested in this first-day application meets these criteria.

[30] Where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. (See: *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 42 and 43; *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37; *Just Energy Corp. (Re)*, 2021 ONSC 1793 at para. 116; *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014, at para. 28).

[31] The Applicants submit that it is appropriate to extend the Stay to Canada Leasing LP. As the lessor of Nordstrom Canada's retail premises, its business and operations are fully intertwined with those of the Nordstrom Canadian Entities, and any proceedings commenced against Canada Leasing LP would necessarily involve key personnel of the Applicants, who collectively hold a 100% interest in Canada Leasing LP. As counterparty to the store Leases, Canada Leasing LP is also insolvent and needs the breathing space provided by the stay to prevent the exercise of Landlord remedies during the pendency of the proposed liquidation sale.

[32] I accept this submission. In my view, the proposed extension of the Stay is appropriate in the circumstances.

[33] Many retail leases provide that other tenants within the same shopping centre have certain rights against the Landlords upon an anchor tenant's (such as Nordstrom Canada's) insolvency or cessation of operations. In order to alleviate potential prejudice, the Applicants request that the Court extend the Stay to all rights of third-party tenants against the Landlords, owners, operators or managers of the commercial properties where the Nordstrom Canada's stores, offices or

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warehouses are located that arise as a result of the Applicants' insolvency, or as a result of any steps taken by the Applicants pursuant to the proposed Initial Order.

[34] The Court's authority to grant the Co-tenancy Stay flows from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that may impose." The Applicants submit that a Co-tenancy Stay is justified on the basis that, if tenants were permitted to exercise these "co-tenancy" rights during the Initial Stay Period (and beyond), the claims of the landlords against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company and that such claims would result in a multiplicity of proceedings which would be detrimental to an efficient and orderly wind-down.

[35] I have been persuaded that the Co-tenancy Stay should be granted in the circumstances.

[36] The Applicants also request that the Stay be extended (subject to certain exceptions related to the Cash Management System) to Nordstrom US in relation to claims that are derivative of the primary liability of or related to the Nordstrom Canada Entities (the "Parent Stay"). The Applicants submit that, among others, the Parent Stay would affect contractual counterparties with contracts or purchase orders involving Nordstrom Canada merchandise and concession operations entered into or issued by Nordstrom US on behalf of, or jointly with, Nordstrom Canada. The Parent Stay would also affect claims that arise out of or in connection with any indemnity, guarantee or surety relating the Leases. The proposed Initial Order further provides that any Landlord claim pursuant to an indemnity or guarantee in relation to either Canada Leasing LP or the Applicants shall not be released or affected in any way in any Plan filed by the Applicants under the CCAA, or any proposal under the BIA.

[37] The Parent Stay is being requested as a temporary measure designed to preserve the *status quo* and create breathing space during the Initial Stay Period, in particular to engage in good faith discussions with the Landlords. It is intended to prevent a multitude of proceedings being commenced in several different jurisdictions against Nordstrom US during this initial period with possibly inconsistent outcomes.

[38] The Court recently granted similar relief during the initial stay period in *Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014. I note that it is the Applicants' intention to request a continuation of the Parent Stay for a reasonable period beyond the Initial Stay Period at the Comeback Hearing.

[39] I note that the Applicants submit that section 11.04 of the CCAA does not prohibit this relief. Firstly, the Indemnities are not "guarantees." Secondly, even if the Indemnities could be characterized as "guarantees", the opening words of section. 11.04 do not oust the Court's jurisdiction under section 11 to grant a third party stay in favour of a guarantor in appropriate circumstances.

[40] The Applicant submits that the Court has jurisdiction under section 11 to grant a third party stay and references *Target Canada* at para. 50, *McEwan Enterprises Inc.,* 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury* 2021 ONSC 659 at paras. 30–33 and *Lydian*

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*International Limited*, 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the Court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen's Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

[41] This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

[42] There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicants and the various landlords, I am prepared to grant the Parent Stay for the initial 10-day period prior to the comeback hearing.

[43] Ms. Heckel states that it is expected that the vast majority of Nordstrom Canada's employees will be provided with working notice of termination on, or shortly after, the commencement of these CCAA proceedings.

[44] Nordstrom Canada is seeking this Court's approval of the Employee Trust, which is to be funded by Nordstrom US. The Employee Trust is intended to provide Nordstrom Canada employees with a measure of financial security during the wind-down process.

[45] The Applicants submit that the Court in *Target Canada* exercised its CCAA jurisdiction to sanction the establishment of an employee trust established by the debtor company's parent for similar purposes.

[46] The Applicants submit that the Employee Trust is intended to ensure that these employees receive the full amount of termination and severance pay owing to them pursuant to employment standards legislation in a timely manner. Nordstrom US has a right of subrogation against Nordstrom Canada in respect of amounts paid pursuant to the Employee Trust.

[47] I am satisfied that the creation of an Employee Trust is fair and appropriate in the circumstances. The Employee Trust is approved.

[48] The Applicants seek the appointment of Ursel Phillips Fellows Hopkinson LLP as Employee Representative Counsel, to represent Nordstrom Canada's store-level employees and all non-KERP eligible non-store employees. Among other things, Employee Representative Counsel will assist with questions regarding Eligible Employee Claims and other issues with respect to the Employee Trust.

[49] I am satisfied that the appointment of Employee Representative Counsel is appropriate in these circumstances. Employees who do not wish to be represented by Ursel Phillips will have the right to opt out.

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[50] The Applicants also seek authorization, with the consent of the Monitor, to make payments of pre-filing amounts owing to certain suppliers, including: (i) logistics or supply chain providers; (ii) providers of information, internet, telecommunications and other technology; and (iii) providers of payment, credit, debit and gift card processing related services. The Applicants believe that categories of suppliers are fundamental to continuing operations and the proposed liquidation sale and any disruptions of their services could jeopardize the orderly wind down, given the expedited timelines for the proposed Realization Process.

[51] For third-party suppliers or service providers other than those listed above, the Initial Order proposes permitting payments in respect of pre-filing amounts up to a maximum aggregate amount of $1,000,000 with the consent of the Monitor, if, in the opinion of the Nordstrom Canada Entities, the supplier is critical to the orderly wind down of Nordstrom Canada's business.

[52] The Applicants submit that the Court has exercised its jurisdiction on multiple occasions to grant similar relief (See: *Target Canada* at paras. 62-65; *Just Energy*, at para. 99; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753, at paras. 72-74; *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802, at paras. 20-22). The Court in *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 at para. 31 outlined the factors that courts have considered in determining whether to grant such authorization, including (a) whether the goods and services are integral to the business of the applicants; (b) the applicants' dependency on the uninterrupted supply of the goods or services; (c) the fact that no payments will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments.

[53] In my view, a consideration of these factors leads to the conclusion that this requested relief should be granted.

[54] Pursuant to section 11.52 of the CCAA, the Applicants are requesting an Administration Charge in favour of the Proposed Monitor, along with its counsel, counsel to the Nordstrom Canada Entities, counsel to the directors and officers of the Nordstrom Canada Entities, and Employee Representative Counsel, as security for their respective fees and disbursements up to a maximum of $750,000 (the "Administration Charge"), which amount covers the time period until the comeback hearing. The Applicants anticipate requesting an increase to $1.5 million at the Comeback Hearing. The Administration Charge was sized in consultation with the Proposed Monitor and is proposed to have first priority over all other charges and security interests.

[55] In my view, the requested Charge satisfies the well-accepted factors originally established by Pepall J. (as she then was) in *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 222, at para. 39. Among other factors, the requested amount is fair and reasonable, and appropriate to the size and complexity of the businesses being restructured. In addition, the initial amount requested is tailored only to the needs within the Initial Stay Period. This relief is granted.

[56] In accordance with section 11.51 of the CCAA, the Applicants also seek a directors and officers charge (the "Directors' Charge") in the amount of $10.75 million until the Comeback Hearing. The Applicants anticipate requesting an increase to $13.25 million at the Comeback

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Hearing. The Applicants submit that the quantum of the Director's Charge was arrived at in consultation with the Proposed Monitor and is proposed to be secured by the property of the Nordstrom Canada Entities and to rank behind the Administration Charge. The Directors' Charge would act as security for the Nordstrom Canada Entities' indemnification obligations for director and officer liabilities that may be incurred after the commencement of the CCAA proceeding. This charge would only be relied upon to the extent liabilities are not covered by existing insurance.

[57] In light of the potential liabilities, the continued service and involvement of the director and officers in this proceeding is conditional upon the granting of an Order which includes the Directors' Charge. I am satisfied that the Directors' Charge is necessary in the circumstances.

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**Disposition**

[58] In summary, the Applicants' request for the relief set out in the proposed Order is granted and Alvarez & Marsal Canada Inc. is appointed as Monitor. The Comeback Hearing is scheduled for March 10, 2023.

Chief Justice G.B. Morawetz

**Date:** March 3, 2023

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# TAB 22

**COURT FILE NO.: 09-CL-7950**
**DATE: 20090723**

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

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**RE:** **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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION**

**APPLICANTS**

**APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**BEFORE:** **MORAWETZ J.**

**COUNSEL:** **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

**Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited**

**J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor**

**M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF**

**S. Philpott, for the Former Employees**

**K. Zych, for Noteholders**

**Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.**

**David Ward, for UK Pension Protection Fund**

**Leanne Williams, for Flextronics Inc.**

**Alex MacFarlane, for the Official Committee of Unsecured Creditors**

**Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)**

**Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited**

**A. Kauffman, for Export Development Canada**

**D. Ullman, for Verizon Communications Inc.**

**G. Benchetrit, for IBM**

**HEARD &**
**DECIDED: JUNE 29, 2009**

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## E N D O R S E M E N T

### INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[4] The following are my reasons for granting these orders.

[5] The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

[6] The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

[7] The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

**BACKGROUND**

[8] The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

[9] At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

[10] The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

[11] In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

[12] On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

[13] In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

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(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

[14] Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

[16] In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

[17] The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

[18] The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

[19] The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

[20] The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

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[21] Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

[23] The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

**ISSUES AND DISCUSSION**

[24] The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

[25] The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

[26] Counsel to the Applicants submitted a detailed factum which covered both issues.

[27] Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

[28] The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*. (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

[30] The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

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(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras. 43-52.

[31] However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

[32] In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc*. (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

[33] Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

[34] Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc*. (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co*. (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

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*Financial Services Ltd. v. Hardrock Paving Co*. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

[36] In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> …we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

[37] Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

[38] Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

[39] In *Re Stelco Inc*., *supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not

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> feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

[40] I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc*. (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc*. (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale…be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*. (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

[43] In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

[44] I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

[46] At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

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Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"…Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged…

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary…

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

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[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(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?

(d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

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[52] The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

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**DISPOSITION**

[54] The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

[55] Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

[56] I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[57] Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

[58] In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

[59] Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

**MORAWETZ J.**

**Heard and Decided: June 29, 2009**

**Reasons Released: July 23, 2009**

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# TAB 23

Unofficial English Translation



2015 QCCS 4227 (CanLII)

# SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-049320-159

DATE: SEPTEMBER 14, 2015

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**THE HONOURABLE MARTIN CASTONGUAY, J.S.C., PRESIDING**

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**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. (1985), c. C-36, AS AMENDED, AND:**

**PASCAN AVIATION INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**LES STRUCTURES & COMPOSANTES AVTECH INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**3939421 CANADA INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**8039879 CANADA INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**PASCAN EXPRESS INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**8039895 CANADA INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**LES CARBURANTS AVTECH INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

Debtors

- and -

**BUSINESS DEVELOPMENT BANK OF CANADA**, a legal person having a place of business at 5 Place Ville-Marie, Montreal, Province of Quebec, H3B 5E7

- and -

**INVESTISSEMENT QUÉBEC**, a legal person having a place of business at 413 Saint-Jacques Street, Suite 500, Montreal, Province of Quebec, H2Y 1N9

Petitioners

- and -

**PRICE WATERHOUSE COOPERS INC.**, a legal person having a place of business at 1250 René-Lévesque Boulevard, Suite 3500, Montreal, Province of Quebec, H3B 2G4

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Impleaded party / Monitor

- and -

**ROYAL BANK OF CANADA**, a chartered bank
having a place of business at 1 Place Ville-Marie, Ground Floor,
Montreal, Province of Quebec, H3C 3B5

Impleaded party

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**JUDGMENT**

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[1] On August 31, 2015, the Business Development Bank of Canada and Investissement Québec (hereinafter the "Petitioners") asked the Court to make an initial order under the terms of sections 4, 5 and 11 of the *Companies' Creditors Arrangement Act* (hereinafter "the Act")[1] with regard to the following debtors:

- Pascan Aviation Inc.
- Pascan Express Inc.
- 8039879 Canada Inc.
- 3939421 Canada Inc.
- Les Structures & Composantes Avtech Inc.
- 8039895 Canada Inc.
- Les Carburants Avtech Inc.

(hereinafter the "Pascan Group")

[2] The motion for an initial order also sought to set up interim financing of $1,000,000.00, the funds coming from the Petitioners themselves, the whole accompanied by the related fees.

[3] The Petitioners also asked that Dominic Deveaux (hereinafter "Deveaux") be appointed Chief Restructuring Officer (hereinafter "CRO") of the Pascan Group. The Court sees fit to reproduce the allegations in the motion dealing with this point.

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[TRANSLATION]

Appointment of the CRO

129. The Petitioners propose that the Court appoint Dominic Deveaux to act as Chief Restructuring Officer of the Pascan Group;

130. The appointment of the CRO is necessary because the Petitioners have lost confidence in the current management and administration of the Pascan Group;

131. The appointment of the CRO is an essential condition for granting the interim financing offered by the Petitioners;

132. The CRO is already familiar with the operations of the Pascan Group given his involvement in recent months, and he, along with the key employees of the Pascan Group, will make it possible to continue its operations.

133. The Petitioners therefore request that the CRO be appointed by the Court to act as Chief Restructuring Officer of the Pascan Group under the terms of an offer of management services made to the Pascan Group and filed as Exhibit **R-24;**

134. The Petitioners further propose that the CRO have all the powers described in the draft initial order and that he enjoy the protections required to maintain the operations of the Pascan Group;

[4] As is usual for such a motion in view of an initial order, a draft order was attached, providing, *inter alia*, the following concerning the powers of the CRO:

[TRANSLATION]

30. - Declares that the CRO may exercise, without the intervention of the directors, all the powers described in the service proposal that are not incompatible with the following powers.

[5] The service proposal was the one prepared by Deveaux.[2] In addition to his emoluments, set at $40,000.00 a month, this document set out the powers and objectives of the CRO. The Court sees fit to reproduce them in their entirety.

[TRANSLATION]

**POWERS**

In the context of his role referred to hereinabove and in view of promoting the achievement of the objectives described hereinbelow, the Manager shall have all the powers necessary to:

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- Conduct, manage, operate and oversee the company, commercial operations and financial affairs of the CLIENT and perform any and all acts in this regard or in connection with the restructuring of the CLIENT.

- Take all measures to maintain control over the receipts and disbursements of the CLIENT including, without limiting the generality of the foregoing, all measures to control and use all the bank accounts of the CLIENT.

- Maintain or terminate, dismiss or lay off, temporarily or permanently, the employees of the CLIENT or of its agents or consultants and take any and all other measures for human resources management and any other administrative decision related thereto.

- Represent the CLIENT in all negotiations with any person whomsoever.

- Communicate with and provide information to the Monitor concerning the business of the CLIENT.

- Take any and all measures, sign any and all documents or agreements and incur any and all expenses and obligations necessary or incident to the powers of the Manager.

**OBJECTIVES**

The strategic objectives pursued by the Manager are as follows:

1. **Financial restructuring**

   a. File and obtain approval of a plan of arrangement under the *Companies' Creditors Arrangement Act* for the unsecured creditors of the CLIENT.

2. **Operating performance**

   a. Improve the financial performance and profitability of the CLIENT so that the CLIENT can meet its current obligations, provide for the engine reserve and investments in maintenance required for the operating fleet and pay the interest specified in the loan agreements.

   b. Set up a management team to reduce and eventually terminate the Manager's mandate on a monthly basis.

3. **Sale/recapitalization of operating entities**

a. Solicit offers for the operating assets and activities of the CLIENT and interest potential purchasers, partners or investors such that the loans on the operating assets are assumed or repaid to the satisfaction of the lenders.

4. **Sale/disposition of surplus assets**

Solicit offers in order to proceed with the sale of the surplus assets of the CLIENT such that these offers meet the minimum conditions established by the lenders according to the agreements in place with the CLIENT.

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[6] The Pascan Group, while theoretically in agreement with an initial order, filed a written opposition in the record with four specific points, although only two were debated before the Court. They were as follows:

- Identity and compensation of the CRO

- Powers of the CRO

[7] For a full understanding of the grounds for the opposition, some background is essential.

[8] The Pascan Group operates in passenger air transportation services, charter freight and certain airport services. Two directors look after its management, namely Serge Charron (hereinafter “Charron”) and Denis Charest (hereinafter “Charest”).

[9] Until very recently, the Pascan Group operated a fleet of twenty-one airplanes and one helicopter, serving some fifteen destinations (Rouyn-Noranda, Val-d'Or, Gatineau, Montreal, Quebec City, Bagotville, Mont-Joli, Bonaventure, Baie-Comeau, Sept-Îles, Havre-Saint-Pierre and the Magdalen Islands), Newfoundland and Labrador (Wabush and Goose Bay) and New Brunswick (Bathurst).[3]

[10] The Pascan Group had experienced a decline of some 50% in its sales in the past two years and as a result has sustained significant losses which it attributes to the following factors:

(a) The slowdown in the Plan Nord which began in May of 2011;

(b) The economic difficulties that have adversely affected companies working in Quebec’s mining industry;

(c) The volatility of oil and iron ore prices in the past two years;

(d) The austerity measures brought in by the Quebec government;

(e) The loss of a number of contracts because of increased competition; and

(f) The erosion of certain sectors of the Quebec economy, more specifically in the north of the province.[4]

[11] Until February of 2015, the Pascan Group had a $1,500,000.00 credit line from Royal Bank of Canada.

[12] Because of the Pascan Group's financial difficulties and following a breakdown in negotiations, Royal Bank of Canada withdrew its financial support from the Pascan Group, and as a result the Pascan Group no longer has the credit line.

[13] In fact, the only institutional creditors are the Petitioners, which have granted credit for the financing of assets and for part of the working capital in the amount of $21,069,903.00 as at August 17, 2015.

[14] The difficulties encountered by the Pascan Group led the Petitioners to designate specialized managers on their staff to take charge of problem accounts, namely Dany Couillard (hereinafter "Couillard").

[15] Couillard testified that during meetings with the Pascan Group in the winter of 2015, Pascan saw only one possible solution to its liquidity problem, and that was to obtain government assistance.

[16] In the spring of 2015, when it became clear that the Pascan Group could not meet its obligations vis-à-vis the Petitioners, the Petitioners required the Pascan Group to retain the services of restructuring consultants, namely PricewaterhouseCoopers (hereinafter "PwC") and Evology Management Inc. (Deveaux).[5]

[17] The uncontradicted evidence reveals that from the very start the Pascan Group was against the level of compensation for Deveaux, which it considered too costly in light of its financial situation.

[18] In any case, as often occurs in such situations, the Pascan Group nonetheless gave Deveaux a mandate.

[19] On arriving at the Pascan Group, Deveaux ordered an evaluation of the airplanes operated by the Pascan Group. The evaluation showed that they had declined considerably in value because of two factors.

- Absence or major deficit in the engine reserve[6]

- Cannibalization of certain aircraft[7]

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[20] Naturally, the Petitioners were very dismayed when the situation was revealed to them.

[21] At the same time, beyond the difficulties the Pascan Group was having in meeting its obligations to the Petitioners, it was also late in paying its landing fees at some of the airports it served.

[22] What is more, lawsuits had arisen concerning the aircraft leased and operated by the Pascan Group.

[23] In particular, two lawsuits existed between the Pascan Group and two lessors of the airplanes currently operated or in the possession of the Pascan Group. These involved:

Coast to Coast Helicopter Inc.

and

Danish Air Transport Leasing

This is an important detail in the decision the Court must make.

[24] In short, the situation was catastrophic.

[25] Deveaux, together with Charron and Charest, the directors of the Pascan Group, came up with a program to rationalize the air routes, such that the Pascan Group needed only eight airplanes to operate, with the fourteen others to be sold.

[26] At the same time, Deveaux and the Pascan Group directors were negotiating with some of the Pascan Group's suppliers to spread out the payment of its debts.

[27] After Deveaux's arrival and until the end of May, the parties held discussions and tried to establish debt tolerance conditions that would be acceptable to the Petitioners.

[28] The parties could not come to an agreement, and the fact that Charest, the main spokesman for the Pascan Group, left for two weeks to look after other matters was the straw that broke the camel's back.

[29] In June 2015, tired of fighting, the Petitioners sent a notice to the Pascan Group under section 244 of the BIA[8] indicating that they intended to realize on their security.

[30] On June 12, 2015, the expiry date of the notice under section 244 BIA, the Pascan Group terminated Deveaux's mandate.

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[31] On July 19, 2015, Deveaux, without the knowledge of the Pascan Group, gave the Petitioners, PwC and Lavery, counsel for the Petitioners, a document entitled "Memorandum". This document laid out several strategies including having the entities holding the airplanes declare bankruptcy as well as [TRANSLATION] "having the lenders take control of the three (3) entities (the Pascan Group "2.0").

[32] It was not until later that the directors found out about the existence of this "Memorandum".

[33] In spite of the notice under section 244 BIA, the parties continued to talk to each other and at the beginning of July 2015, the Pascan Group submitted a business plan showing a possible return to profitability. Even so, a cash injection of $1,000,000.00 was necessary for this purpose.

[34] Discussions therefore began on this basis between the Petitioners and the directors, including Charest.

[35] It should be mentioned that of the two Pascan Group directors, Charest was the only one who had the financial capacity to inject funds.

[36] Right away, Charest indicated that he had no intention of injecting any new funds and so the solution would be a loan from the Petitioners, and the discussion started moving in that direction.

[37] Thus the Petitioners, persuaded that there was a chance that the Pascan Group could be turned around, were ready to advance $1,000,000.00 on an interim basis, subject to certain conditions, including the involvement of Deveaux and the disengagement of the current directors, who for all intents and purposes would be stripped of their powers. Couillard, an account and restructuring manager at the BDC, invoked the following elements to justify this approach.

- Loss of confidence.

- Management team unable to manage the crisis, notably the Pascan Group's inability to sell five (5) airplanes since January 2014.

- Threats of lawsuits.

[38] While Charron was willing to sign the agreement suggested by the Petitioners, Charest refused.

[39] At that point, the situation began to deteriorate.

[40] The motion for an initial order was served and filed on August 26, 2015.

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[41] Part of the motion was addressed on August 31, 2015, such that an initial order was issued without dealing with the issue of appointing a CRO. Here is why.

[42] As we have seen, the Petitioners suggested Deveaux, while the Pascan Group suggested another candidate in its written opposition, namely Hélène Zakaib (hereinafter "Zakaib"), a lawyer by training, former Member of the National Assembly and Deputy Finance Minister responsible for industrial policy and the Banque de développement économique du Québec.

[43] Because of the oppositions from both sides, the Court conducted a brief review of the credentials of Deveaux and Zakaib to find that neither had worked in a highly regulated environment such as civil aviation whether for purposes of restructuring or any other purpose.

[44] Furthermore, in his much talked-about *Memorandum* dated July 19, 2015, Deveaux made a remark, which, although it appears innocuous at first glance , has serious consequences.

> [TRANSLATION]
>
> Transport Canada authorities have already been questioning the Pascan Group officers' compliance with regulations and are closely monitoring the situation.

[45] In addition, the emoluments requested by both, namely $40,000.00 a month for Deveaux and $30,000.00 a month for Zakaib, seem excessive under the circumstances.

[46] In view of the candidates proposed by both sides, who have never worked in such a highly regulated industry and are asking for significant fees, the Court can and must intervene.

[47] The Court therefore suggested to the parties that they try to agree on a candidate with the necessary credentials to carry out a restructuring in the civil aviation industry, as that such a candidate would certainly reassure Transport Canada. The Court also asked the parties to consider a more realistic form of compensation given the circumstances.

[48] This having been done, all that remained for the Court was to determine the scope of the powers to be given to the CRO.

[49] Unfortunately, once again, the parties were unable to agree on the choice of candidate. This disagreement revolved more around the independence that a CRO should have in the performance of his duties.

[50] The Court must make a short digression here. Despite the law, we are all human.

[51] Clearly there is no trust between Charest, who represents the Pascan Group, and Couillard, who acts on behalf of the Petitioners.

[52] Charest has testified twice before the Court. He is an intelligent and accomplished businessman but, above all, he has a strong character.

[53] As a result, chances are that his choice of candidates for the CRO position are people over whom, rightly or wrongly, he thinks he could wield some influence.

[54] On the other hand, the Petitioners are attempting to avoid this problem by asking that the Court confer on the CRO powers that are exceptional for such a position.

[55] Indeed, a spade is a spade even if you call it a pitchfork. The scope of the powers sought by the Petitioners for the CRO is more like the powers of a receiver than those normally vested in a CRO.

[56] Before tackling the profile of the best candidate for the CRO position, it is important to review the Court's basic guiding principles.

[57] The author Janis Sarra perfectly summarizes the circumstances that lead to the appointment of a CRO:

> In the past two decades, there has been the growing use of chief restructuring officers (CRO) in CCAA workouts, frequently appointed in the initial stay order. This development is a governance response to creditor concerns that directors and officers that may have skills appropriate to oversight of financially healthy corporations may not have the skills or expertise to deal with a turnaround situation.

[58] This is the most important criterion that should guide the Court. The existing directors, who are quite knowledgeable about their industry, are normally the best qualified to carry out the restructuring. That being said, however, even the best directors can be overwhelmed by a crisis situation.

[59] In the present case, although Charron and Charest knew how to run their business during the profitable years, the evidence shows that they lost control in a crisis situation. The following points demonstrate this:

- Five unsold airplanes even though they had been declared surplus since January 2014

- Cannibalization of certain aircraft.

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- Lack of engine reserve.

[60] Nevertheless, the directors of the Pascan Group showed that with adequate guidance, they were able to make good decisions.

[61] In this particular case, the appointment of a CRO, uncontested the Pascan Group, is advisable.

[62] A court-appointed CRO for a restructuring under the Act is nothing new in law.

[63] It is necessary, however, to recall, if not define the objectives sought when a court-appointed CRO is required.

[64] It goes without saying that the situation or powers of a CRO when a company is being wound up are quite different from those of a CRO who will be involved in working out a plan of arrangement.[9]

[65] In the present case, representations were made to the Court that a plan of arrangement would in fact ultimately be filed, with the result that negotiations have already been initiated with certain creditors.

[66] In such a case, to fulfil his or her mandate, the CRO must identify the action to be taken for the financial turnaround of the company; namely the disposal of assets or the creation of a new business plan, or both. The CRO must then, together with the Monitor and the Board of Directors, prepare a viable plan of arrangement that will be acceptable to all the parties involved, whether they are shareholders or secured or unsecured creditors, and ultimately see to its implementation and completion. Moreover, since the CRO is court-appointed, he or she must report to the Court.

[67] Even though the appointment of a CRO can be reassuring to all stakeholders, the aim of such an appointment is not to look out for the interests of a single category of stakeholders.

[68] Certain qualities are therefore required, including independence vis-à-vis these same parties, in addition to a solid reputation and expertise in the civil aviation industry as well as in restructuring.

[69] Selecting the best possible CRO is vital to a company's restructuring process. When a CRO is court-appointed because of differences between the parties, the guiding criteria are the following:

- A good knowledge of the industry in which the company operates so that the CRO's presence is reassuring to all the industry stakeholders, namely, the creditors, clients and competent authorities.

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- Independence.[10]

- Experience in restructuring.

- Reasonable cost.

[70] These criteria are not cumulative, but their analysis can lead to the identification of the ideal candidate from among those proposed.

[71] Now that the selection criteria have been established, what should be determined with respect to the powers requested by the Petitioners?

[72] To justify the powers requested, the Petitioners refer to the breach of trust without taking into consideration that a Monitor has already been appointed.

[73] The Petitioners also cite the order issued by Schrager J. of the Quebec Superior Court, as he then was, in *Aveos Fleet Performance*,[11] by which all the powers of administration were conferred on the CRO, to the exclusion of the existing directors.

[74] There are no reasons provided for this order, as is generally the case for emergency orders issued under the Act.

[75] Counsel for the Pascan Group, judicial officers well informed about the Aveos case, told the Court that the scope of powers conferred on the CRO was prompted by the resignation or absence of Aveos directors.

[76] This same order specifies the degree of collaboration to be shown by shareholders and directors. The Court deems it useful to reproduce it here.

> **ORDER** that the Petitioners and their shareholders, direct and indirect subsidiaries, former and current officers, directors, employees, servants, agents and representatives (the "**Company Persons**") shall cooperate fully with the CRO in the exercise of his powers and the discharge of his obligations. Without limiting the generality of the foregoing, the Company Persons shall provide the CRO with such access to the Petitioners' and their direct and indirect subsidiaries' books, records, assets and premise as the CRO requires to exercise his powers and perform his obligations under this Order.

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[77] The Court is of the opinion that, at this stage, collaboration is required, not coercion, especially since the Court will ensure the independence of the candidate selected.

[78] The Court does not challenge the Petitioners' decision to use the mechanisms provided by the Act, especially since the Petitioners firmly believe in the Pascan Group's capacity for financial rehabilitation.

[79] This being the case, the Petitioners must live with the consequences of their choices; stripping the directors of their powers in favour of a CRO, however, is not the standard applied by the courts.

[80] This decision is not set in stone and may be reviewed by the Court if it becomes obvious that the directors are not cooperating with the CRO. In such a scenario, the Court would not hesitate to consent to increased powers for the CRO, as in the form used by Schrager J. in *Aveos*.

[81] Let us now look at the candidates. Each one has filed a résumé, and Messrs. Deveaux, Nice and Simard have testified about their past experiences.

[82] The Court would like to point out that this exercise does not make a value judgment with regard to the candidates not selected but rather consists of the application of the criteria presented earlier.

[83] Deveaux has a great deal of experience in restructuring, but none in the civil aviation industry.

[84] Moreover, his "Memorandum" dated July 19, 2015, which was transmitted to the Petitioners, PwC and counsel for the Petitioners while his fees were being paid by the Pascan Group, raises questions for the Court about his independence. In addition, as a result of the animosity which ensued, the relationship between Deveaux and the directors of the Pascan Group would be dysfunctional.

[85] Therefore, Deveaux cannot be considered for the appointment.

[86] Zakaib also cannot be considered for the position.

[87] Despite impressive academic credentials and a remarkable professional career, Zakaib has no knowledge of the aviation industry and her knowledge of restructuring is quite limited.

[88] Simard's application will also be rejected.

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[89] Although his knowledge of the civil aviation industry is impressive, he has never participated in any restructuring under the Act.

[90] What is more, scarcely even a few months ago, he started up a company headed by the same person who is the driving force behind Coast to Coast Helicopters Inc., which is currently involved in a dispute with the Pascan Group. Under the circumstances, the criterion of independence or the appearance of independence is not met.

[91] Derek Nice is selected to perform the duties of CRO for the following reasons:

- Solid experience in civil aviation.

- Participation in restructurings under the Act in the civil aviation industry.

- More than reasonable cost under the circumstances.

[92] Regarding the last point, the Court can only suggest that managers involved in restructurings should show more creativity in their choice of consultants.

[93] The costs related to such external consultants are similar to legal costs much decried by litigants.

[94] In this case, a CRO at almost half the cost[12] of that proposed in the initial motion would have been selected simply through competition.

[95] The Petitioners and the Monitor have ask the Court that it be the Monitor that controls, and not just oversees, the Pascan Group's receipts and disbursements.

[96] Once again, the Court does not see the need for such a measure since no evidence of misappropriation, negligence or incompetence in regard thereto has been presented to the Court.

[97] In closing, the evidence shows that Charron has lost interest in his role as director, giving complete leeway to Charest. Charest, however, may need to be absent because of his other obligations. Therefore, if Charest's absences end up amounting to a lack of collaboration on his part, a motion may be filed with the Court to review the powers of the CRO.

**FOR THESE REASONS, THE COURT:**

**ALLOWS** the component regarding the appointment of the Chief Restructuring Officer in the motion for the issue of an initial order dated August 26, 2015.

**APPOINTS** Derek Nice as Chief Restructuring Officer for all the entities of the Pascan Group on the terms and conditions in his offer dated September 10, 2015, to PricewaterhouseCoopers, reflecting the undertakings to which Nice subscribed during his testimony.

**ORDERS** the Debtors and their shareholders, directors, employees and/or representatives to collaborate fully with the Chief Restructuring Officer in the performance of his duties and in the exercise of his powers, notably by providing him access to all the books of account and/or financial information as well as to all premises and equipment currently operated and used by the Debtors.

**DECLARES** that the CRO may exercise all the powers described in the service proposal, the whole subject to the agreement of the director of the Debtors and of the Monitor for any decision or act that may have a major impact on the Debtors, namely:

(a) Represent the Debtors in all negotiations with the parties concerned (whether creditors, suppliers, investors, etc.);

(b) Ensure the transition of the role of accountable executive between Serge Charron and Julian Roberts;

(c) Ensure the proper maintenance of aircraft and passenger security;

(d) Find new clients, maintain relationships with existing clients and promote the services of the Debtors;

(e) Make decisions regarding employee retention, including the continued employment of key employees;

(f) Streamline the operations of one or more operating units of the Debtors, including the sale of the surplus fleet;

(g) Terminate or repudiate any contract, agreement or arrangement pursuant to CCAA terms and conditions;

(h) Communicate with and provide information concerning the Debtors to the Monitor at the request of the latter in the performance of its duties; and

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(i) Any other power, responsibility or duty that the CRO may agree to exercise, discharge or perform at the request of the Debtors following an order from this Court.

**DECLARES** that all the powers exercised by the CRO pursuant to this order and the service proposal shall be deemed to have been exercised by the CRO for and on behalf of the Debtors, and not by the CRO in his own personal capacity.

**ORDERS** that the CRO shall, in the exercise of his powers, consult and report to the Debtors and their director.

**DECLARES** that the CRO shall benefit from the indemnification obligation provided for in paragraph 25 of the initial order and from the directors' charge as security for this indemnification obligation with regard to the obligations and liabilities that the CRO may incur when acting in such capacity as of the date of this order.

**ORDERS** the Debtors to pay the reasonable fees and disbursements of the CRO directly related to these proceedings, the plan and the restructuring that he incurred after the date of this order.

**DECLARES** that, as security for the professional fees and disbursements of the CRO incurred after the date of this order with regard to these proceedings, the plan and the restructuring, the same shall benefit from the administrative charge determined in paragraph 39 of the initial order in order of the priority determined in paragraphs 40 and 41 of the initial order.

**ORDERS** that no person shall institute or continue proceedings nor cause proceedings to be instituted against the CRO, in relation to the business or property of the Debtors, without first obtaining the prior permission of the Court by way of a prior written notice of five (5) days to counsel for the Debtors and to all those mentioned in this paragraph who are proposed to be named in these proceedings.

**ORDERS** that this order and all the provisions thereof take effect at or after 00:01 a.m., Montreal time, Province of Quebec, on the date of this order.

[98] **THE WHOLE,** without costs.

_____
Martin Castonguay, J.S.C.

Mtre Jean Legault
Mtre Mathieu Thibault
**LAVERY, DE BILLY**
Counsel for Business Development Bank of Canada and Investissement Québec

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Mtre Guy P. Martel
Mtre Joseph Reynaud
**STIKEMAN ELLIOTT**
Counsel for the Pascan Group

Mtre Alain Tardif
**McCARTHY TÉTRAULT**
Counsel for Fiducie Denis Charest

Mtre Martin Desrosiers
**OSLER, HOSKIN & HARCOURT**
Counsel for the Monitor, PricewaterhouseCoopers

Date of hearing: September 9, 2015

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[1] *An Act to facilitate compromises and arrangements between companies and their creditors*, R.S.C., 1985, c. C-36.
[2] Exhibit R-24.
[3] Paragraph 22 of the motion.
[4] Paragraph 26 of the written opposition.
[5] Even if the mandate is signed by the Pascan Group and Evology Management Inc./Gestion Evologie inc., because it is a mandate *intuitu personae,* the Court will refer only to Mr. Deveaux.
[6] An engine reserve is required from the lenders and consists of a certain sum of money set aside for every hour of flight time to constitute a reserve that will be used to recondition the engine or engines when their regulatory life has expired.
[7] Cannibalization consists of removing operating parts from one aircraft without replacing them and installing them in another aircraft.
[8] *Bankruptcy and Insolvency Act*, R.S.C. (1985) c. B-3.
[9] Janis Sarra: Rescue: *The Companies' Creditors Arrangement Act* (Thomson Carswell) at 160-161.
[10] Janis Sarra: Rescue: *The Companies' Creditors Arrangement Act,* "If the CRO is court-appointed, arguably it has obligations to the court and must act neutrally with respect to stakeholders," at 161.
[11] *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à*) (20 March 2012) 500-11-042345-120.
[12] Fees of Mr. Nice set at $23,000.00 a month, excluding the addition of certain resource persons and expenses, whereas Mr. Deveaux required $40,000.00 a month, as presented in the initial motion. It should be noted that in the evidence adduced with regard to the choice of CRO, Mr. Deveaux agreed to reduce his emoluments to $32,000.00 a month.

# TAB 24

**CITATION:** Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re) 2019 ONSC 1215
**COURT FILE NO.:** CV-19-00614629-00CL
**DATE:** 20190220

**RE: SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)**

**RE:** **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 PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.**

**Applicants**

**BEFORE:** Regional Senior Justice G. B. Morawetz

**COUNSEL:** *J. Dietrich and S. Kukulowicz and R. Jacobs,* for the Applicants

*S. Zweig and A. Nelms,* for FTI Consulting Canada Inc., Proposed Monitor

*S. Brotman and D. Chochla,* for the Ad Hoc Group of Term Lenders

*S. Kour,* for Term Loan Agent, Cortland Products Corp.

*T. Reyes* for Wells Fargo, ABL Agent

**HEARD AND ENDORSED:** February 19, 2019

**REASONS:** February 20, 2019

## ENDORSEMENT

## OVERVIEW

[1] At the conclusion of argument, the record was endorsed as follows:

> CCAA application has been brought by Applicants. Initial Order granted. Order signed. Applicants will serve parties today and return to court for further directions on Thursday, February 21, 2019 at 9:30 a.m. Reasons will follow.

[2] These are the Reasons.

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[3] This application is brought by Payless ShoeSource Canada Inc. ("Payless Canada Inc.") and Payless ShoeSource Canada GP Inc. ("Payless Canada GP") for relief under the Companies' Creditors Arrangement Act ("CCAA"), including an initial stay of proceedings. The Applicants also seek to have the stay of proceedings and the other benefits of the Initial Order extended to Payless ShoeSource Canada LP ("Payless Canada LP", together with the Applicants, the "Payless Canada Entities"), a limited partnership which carries on substantially all of the operations of the Payless Canada Entities. The requested relief is not opposed.

[4] The evidence provided in the affidavit of Stephen Marotta, Managing Director at Ankura Consulting Group LLC, the Chief Restructuring Organization ("CRO") establishes that each of the Payless Canada Entities is insolvent and unable to meet its liabilities as they become due. The Applicants seek relief provided by the proposed Initial Order under the CCAA in order to provide a stable environment for the Payless Canada Entities to undertake the Canadian Liquidation.

[5] On February 18, 2019, a number of Payless Entities in the United States (the "U.S. Debtors") (including the Payless Canada Entities) commenced cases under chapter 11 of title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri (the "U.S. Bankruptcy Court") (the "U.S. Proceedings"). The U.S. Debtors' "First Day Motions" are scheduled to be heard by the U.S. Bankruptcy Court on February 19, 2019.

[6] Counsel to the Applicants advises that the orders to be sought by the U.S. Debtors from the U.S. Bankruptcy Court at the First Day Motions contain language providing that if there are inconsistencies between any order made in the U.S. Proceedings and in this court, the orders of this court will govern with respect to the Payless Canada Entities and their business.

**FACTS**

[7] The Applicants are indirect wholly owned subsidiaries of a U.S. Debtor, Payless Holdings LLC. Both Payless Canada Inc. and Payless Canada GP are governed by the *Canada Business Corporations Act* (the "CBCA").

[8] Payless Canada LP is a limited partnership organized under the laws of Ontario. The general partner and limited partner of Payless Canada LP are Payless Canada GP and Payless Canada Inc., respectively. Payless Canada LP is the primary vehicle conducting the business operations of the Payless Canada Entities.

[9] The Payless Canada Entities operate 248 retail stores in 10 provinces throughout Canada. The retail locations are leased from commercial landlords.

[10] The Payless Canada Entities also have a corporate office at leased premises located in Toronto, Ontario.

[11] There are approximately 2,400 employees in Canada of which 12 are corporate office employees. The remainder work at the retail locations.

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[12] The Payless Canada Entities rely on the infrastructure of the U.S. Debtors for substantially all head office functions. These services are provided by certain U.S. Debtors pursuant to intercompany agreements.

[13] The assets of the Payless Canada Entities primarily consist of inventory and an intercompany promissory note receivable which was reported on the balance sheet in the amount of approximately USD $110 million. Given that the issuer of the note is a U.S. Debtor, the Applicants advise that it is doubtful that the full value can be realized.

[14] The liabilities of the consolidated Payless Canada Entities include, among other things, outstanding gift cards, leased payments, trade and other accounts payable, taxes, accrued salary benefits, long term liabilities, and intercompany service payables.

[15] The Payless Canada Entities are also guarantors under two credit facilities, the ABL Credit Facility and the Term Loan Credit Facility. There is approximately USD $156.7 million outstanding under the ABL Credit Facility and USD $277.2 million outstanding under the Term Loan Credit Facility.

[16] The total amount of liabilities of the Payless Canada Entities inclusive of obligations under the guarantees of the ABL Credit Facility and the Term Loan Credit Facility is in excess of USD $500 million.

[17] In December 2018, Payless engaged an investment bank, PJ Solomon L.P., to review strategic alternatives. In consultation with its advisers, the Payless Canada Entities decided to take steps to monetize or preserve its Latin America business and liquidate its North American operations.

[18] The Payless Canada Entities have determined that there is no practical way for the company to operate on a standalone basis. The Payless Canada Entities have decided that it was in their best interest and in the best interest of their stakeholders to complete the Canadian Liquidation.

**ISSUES**

[19] Counsel to the Payless Canada Entities state that the issues to be determined on this application are as follows:

(a) Whether the CCAA applies in respect of the Applicants;

(b) Whether a stay of proceedings is appropriate;

(c) Whether the Monitor should be appointed;

(d) Whether the CRO should be appointed;

(e) Whether the Administration Charge should be approved;

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(f) Whether the Directors' Charge should be approved;

(g) Whether the Cross-Border Protocol should be approved.

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**LAW**

[20] The CCAA applies to a company where the aggregate claims against it or its affiliated debtor companies are more than five million dollars. I am satisfied that both of the Applicants meet the definition of a "company" under section 2(1) of the CCAA.

[21] The evidence is such that I am able to conclude that the Payless Canada Entities have failed to pay their February rent for a number of Canadian stores. In addition, defaults have occurred under the ABL Credit Facility and the Term Loan Credit Facility, and the ABL Agent has issued a Cash Dominion Direction.

[22] It has been demonstrated that the Payless Canada Entities have insufficient assets to discharge their liabilities and insufficient cash flow to meet their obligations as they come due.

[23] Accordingly, I find that the Applicants are insolvent debtor companies under the CCAA.

[24] Counsel for the Applicants submits that the Payless Canada Entities require a stay of proceedings in order to prevent enforcement actions by various creditors including landlords and other contractual counterparties. I accept this submission and in my view, it is appropriate to grant the requested stay of proceedings.

[25] I am also of the view that it is appropriate that the stay of proceedings apply not only in respect of the Applicants' themselves, but that it extend to the partnership Payless Canada LP.

[26] Although the definition of "debtor company" in the CCAA does not include partnerships, this court has previously held that where a limited partnership is significantly interrelated to the business of the applicants and forms an integral part of its operations, the CCAA Court may extend the stay of proceedings accordingly. (See: *Re Lehndorff General Partner Ltd.*, (1993) 9 BLR (2d) 975 (Ont. S.C); *Re Priszm Income Fund*, 2011 ONSC 2061; *Re Urbancorp Toronto Management Inc.*, 2016 ONSC 3288; and *Re Target Canada Co.*, 2015 ONSC 303).

[27] In these circumstances, and in order to ensure that the objectives of the CCAA are achieved, I am satisfied that it is appropriate to grant the requested stay of proceedings to Payless Canada LP.

[28] In addition, the Payless Canada Entities also seek a stay of proceedings against the Directors and Officers. I am satisfied that the stay against to the Directors and Officers is

appropriate as it will allow such parties to focus their time and energies on maximizing recoveries for the benefit of stakeholders.

[29] The Applicants propose FTI Consulting Canada Inc. as Monitor. I am satisfied that FTI is qualified to act as Monitor in these proceedings.

[30] The proposed Initial Order also provides for the appointment of Ankura as CRO. Counsel to the Applicants submits that the proposed CRO is necessary to assist with the Canadian liquidation and is particularly critical given the number of departures by senior management.

[31] The Proposed CRO Engagement Letter has been heavily negotiated and no parties, including the ABL agent and the term lenders, voice objection to the Engagement Letter.

[32] I am satisfied that the CRO should be appointed and the CRO Engagement Letter should be approved.

[33] I am also satisfied that it is appropriate to grant a charge on the Property in priority to all other charges to protect the CRO, Proposed Monitor, counsel to the Proposed Monitor, and Canadian counsel to the Payless Canada Entities, up to a maximum amount of USD $2 million (the "Administration Charge"). In arriving at this conclusion, I have taken into account the provisions of section 11.52 of the CCAA and the appropriate considerations which include:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[34] I am also of the view that the requested Directors' Charge is appropriate in the circumstances and it is approved in the maximum amount of USD $4 million that will reduce to USD $2 million after March 21, 2019. It is noted that the Directors' Charge only applies with respect to amounts not otherwise covered under the Payless Canada Entities directors' and officers' liability insurance policies.

[35] In order to facilitate the orderly administration of the Payless Canada Entities and in recognition of their reliance upon the U.S. Debtors, the Applicants propose that these proceedings be coordinated with the U.S. Proceedings and accordingly the proposed Initial Order includes the approval of a cross-border protocol.

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[36] I am satisfied that the proposed cross-border protocol establishes appropriate principles for dealing with international jurisdictional issues and procedures to file materials and conduct joint hearings. It is my understanding that the U.S. Debtors will also be seeking the approval of the proposed protocol by the U.S. Bankruptcy Court as part of their First Day Motions.

[37] Counsel advises that the form of the Cross-Border Protocol is consistent with this court's decision in *Re Aralez* (25 October 2018), Toronto CV-18-603054-00CL (Ont. S.C) which is based on the Judicial Insolvency Network ("JIN Guidelines"). As stated on the JIN website:

> The JIN held its inaugural conference in Singapore on 10 and 11 October 2016 which concluded with the issuance of a set of guidelines titled "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" also known as the JIN Guidelines…The JIN Guidelines address key aspects and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs.

[38] The JIN Guidelines have been endorsed by the Commercial List Users' Committee of this court.

[39] I also note that the JIN Guidelines have been recognized in a number of jurisdictions globally, including the United Kingdom, United States (New York, Delaware and Florida), Singapore, Bermuda, Australia (New South Wales), Korea (Seoul Bankruptcy Court), and the Cayman Islands.

[40] The JIN Guidelines have received international recognition and acceptance. As noted, the aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs, an objective that all parties should strive to achieve in every insolvency proceeding.

[41] Counsel to the Applicants advised that this application will be served on a number of interested parties, including the landlords of the leased premises.

[42] It is both necessary and appropriate to schedule a Comeback Hearing in order to provide affected parties with the opportunity to respond to this application. Counsel to the Applicants propose that the Comeback Hearing be held on Thursday, February 21, 2019.

[43] It is expected that the following will be considered at the Comeback Hearing:

(a) Whether the Liquidation Consulting Agreement and Sale Guidelines should be approved; and

(b) Whether an extension of the stay of proceedings is appropriate.

[44] I am not certain as to whether this schedule will provide interested parties with adequate time to respond to the issues raised in this application. The Comeback Hearing will proceed on

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February 21, 2019 on the understanding that certain matters may not be addressed at that time, if it is determined that parties have not had adequate time to respond to the issues raised in the application.

[45] The Initial Order has been signed by me.

Morawetz R.S.J.

**Date:** February 20, 2019

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# TAB 25

**CITATION:** Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
**COURT FILE NO.:** CV-13-10228-00CL
**DATE:** 20130828

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

2013 ONSC 5461 (CanLII)

| | |
|---|---|
| **BETWEEN:** | |
| IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED<br><br>AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP. | S. Richard Orzy, Derek J. Bell and Sean H. Zweig, for the Applicants<br><br>Robert J. Chadwick and Logan Willis, for Duff & Phelps Canada Restructuring Inc., the proposed Monitor<br><br>Joseph Bellissimo, for Renvest Mercantile Bankcorp Inc.<br><br>**HEARD:** August 23, 2013 |

**NEWBOULD J.**

[1] The applicants applied on August 23, 2013 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

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**Tamerlane business**

[2] At the time of the application, Tamerlane Ventures Inc. (“Tamerlane”) was a publicly traded company whose shares were listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "Tamerlane Group"), including Pine Point Holding Corp. (“Tamerlane Pine Point”), Tamerlane Ventures USA Inc. ("Tamerlane USA") and Tamerlane Ventures Peru SAC ("Tamerlane Peru") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.

[3] The applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. It at one time was an operating mine. The applicants firmly believe that there is substantial value in the Pine Point Property and have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The project has been determined to be feasible and licences have been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, power lines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The applicants only need to raise the financing necessary to be able to exploit the value of the project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

[4] The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

[5] The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices, it is now viewed as being even more valuable.

[6] The exploration and development activities have been generally carried out by employees of Tamerlane USA. The applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the applicants.

[7] As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of $24,814,433. The assets included consolidated current assets of $2,007,406, and consolidated non-current assets with a net book value of $22,807,027. Non-current assets included primarily the investment in the Pine Point property of $20,729,551 and the Los Pinos property of $1,314,936.

[8] Tamerlane has obtained valuations of Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of $12 to $15 million using a 0.3% copper cut-off grade, or $17 to $21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of $30 to $56 million based on market comparables, with a value as high as $229 million considering precedent transactions.

**Secured and unsecured debt**

[9] Pursuant to a credit agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. (“Global Resource Fund” or "secured lender") made as of December 16, 2010, as amended by a first amending agreement dated June 30, 2011 and a second amending agreement dated July 29, 2011, Tamerlane became indebted to the Secured Lender for USD $10,000,000 . The secured indebtedness under the credit agreement is

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guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the secured lender in respect of the secured debt.

[10] The only other secured creditors are the applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each.

[11] The applicants' unsecured creditors are principally trade creditors. Collectively, the applicants' accounts payable were approximately CAD $850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the secured debt and this proceeding.

**Events leading to filing**

[12] Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

[13] It was contemplated when the credit agreement with Global Resource Fund was entered into that the take-out financing would be in the form of construction financing for Pine Point. However Tamerlane was unsuccessful in arranging that. Tamerlane was successful in late 2012 in arranging a small flow-through financing from a director and in early 2013 a share issuance for $1.7 million dollars. Negotiations with various parties for to raise more funds by debt or asset sales have so far been unsuccessful.

[14] As a result of liquidity constraints facing Tamerlane in the fall of 2012, it failed to make regularly scheduled monthly interest payments in respect of the secured debt beginning on September 25, 2012 and failed to repay the principal balance on the maturity date of October 16, 2012, each of which was an event of default under the credit agreement with the secured lender Global Resource Fund.

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[15] Tamerlane and Global Resource Fund then entered into a forbearance agreement made as of December 31, 2012 in which Tamerlane agreed to make certain payments to Global Resource Fund, including a $1,500,000 principal repayment on March 31, 2013. As a result of liquidity constraints, Tamerlane was unable to make the March 31 payment, an event of default under the credit and forbearance agreements. On May 24, 2013, Tamerlane failed to make the May interest payment, and on May 29, 2013, the applicants received a letter from Global Resource Fund's counsel enclosing a NITES notice under the BIA and a notice of intention to dispose of collateral pursuant to section 63 of the PPSA. The total secured debt was $11,631,948.90.

[16] On June 10, 2013, Global Resource Fund and Tamerlane entered into an amendment to the forbearance agreement pursuant to which Global Resource Fund withdrew its statutory notices and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Global Resource Fund that were capitalized and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment. Tamerlane was unable to make the July 25 payment, which resulted in an event of default under the credit and forbearance amendment agreements.

[17] On July 26, 2013, Global Resource Fund served a new NITES notice and a notice of intention to dispose of collateral pursuant to section 63 the PPSA, at which time the total of the secured debt was $12,100,254.26.

[18] Thereafter the parties negotiated a consensual CCAA filing, under which Global Resource Fund has agreed to provide DIP financing and to forbear from exercising its rights until January 7, 2014. The terms of the stay of proceedings and DIP financing are unusual, to be discussed.

**Discussion**

[19] There is no doubt that the applicants are insolvent and qualify for filing under the CCAA and obtaining a stay of proceedings. I am satisfied from the record, including the report from the

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proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made.

[20] The applicants request that the stay apply to Tamerlane USA and Tamerlane Peru, non-parties to this application. The business operations of the applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the request to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru is to maintain stability and value during the CCAA process.

[21] Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Re Lehndorff* (1993), 9 B.L.R. (2d) 275 and Pepall J. (as she then was) in *Re Canwest Publishing Inc*. (2010), 63 C.B.R. (5th) 115. Recently Morawetz J. has made such orders in *Cinram International Inc. (Re.),* 2012 ONSC 3767, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 and *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500. I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.

[22] Under the Initial Order, PricewaterhouseCoopers Corporate Finance Inc. is to be appointed a financial advisor. PWC is under the oversight of the Monitor to implement a Sale and Solicitation Process, under which PWC will seek to identify one or more financiers or purchasers of, and/or investors in, the key entities that comprise the Tamerlane Group. The SISP will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing to repay the secured debt, an investment in the applicants' business and/or a purchase of some or all of the applicants' assets. The proposed Monitor supports the SIST and is of the view that it is in the interests of the applicants' stakeholders. The SISP and its terms are appropriate and it is approved.

[23] The Initial Order contains provisions for an administration charge for the Monitor, its counsel and for counsel to the applicants in the amount of $300,000, a financial advisor charge of

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$300,000, a directors' charge of $45,000 to the extent the directors are not covered under their D&O policy and a subordinated administration charge subordinated to the secured loans and the proposed DIP charge for expenses not covered by the administration and financial advisor charges. These charges appear reasonable and the proposed Monitor is of the same view. They are approved.

**DIP facility and charge**

[24] The applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the applicants, office related expenses, and professional fees and disbursements in connection with these *CCAA* proceedings. The applicants will require additional borrowing to do this. It is apparent that given the lack of alternate financing, any restructuring will not be possible without DIP financing.

[25] The DIP lender is Global Resource Fund, the secured lender to the applicants. The DIP loan is for a net $1,017,500 with simple 12% interest. It is to mature on January 7, 2014, by which time it is anticipated that the SISP process will have resulted in a successful raising of funds to repay the secured loan and the DIP facility.

[26] Section 11.2(4) of the CCAA lists factors, among other things, that the court is to consider when a request for a DIP financing charge is made. A review of those factors in this case supports the DIP facility and charge. The facility is required to continue during the CCAA process, the assets are sufficient to support the charge, the secured lender supports the applicants' management remaining in possession of the business, albeit with PWC being engaged to run the SISP, the loan is a fraction of the applicants' total assets and the proposed Monitor is of the view that the DIP facility and charge are fair and reasonable. The one factor that gives me pause is the first listed in section 11.2(4), being the period during which the applicants are expected to be subject to the CCAA proceedings. That involves the sunset clause, to which I now turn.

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**Sunset clause**

[27] During the negotiations leading to this consensual CCAA application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any CCAA initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the CCAA proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and (ii) a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.

[28] The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the CCAA proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.

[29] Ms. Kent, the executive chair and CFO of Tamerlane, has sworn in her affidavit that Global Resource Fund insisted on these terms and that given the financial circumstances of the applicants, there were significant cost-savings and other benefits to them and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the applicants exercised their business judgment to agree to the terms. The proposed Monitor states its understanding as well is that the consent of Global Resource Fund to these CCAA proceedings is conditional on these terms.

[30] Section 11 of the CCAA authorizes a court to make any order “that it considers appropriate in the circumstances.” In considering what may be appropriate, Deschamps J. stated in *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379:

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> 70. …Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] There is no doubt that CCAA proceedings can be terminated when the prospects of a restructuring are at an end. In *Century Services*, Deschamps J. recognized this in stating:

> 71. It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.

[32] The fact that the board of directors of the applicants exercised their business judgment in agreeing to the terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account, with the caution that in the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). The court may consider, but not defer to or be fettered by, the recommendation of the board. See *Re Crystallex International Corp.* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para 85.

[33] It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to

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any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.

[34] What is unusual in the proposed Initial Order is that the discretion of the court on January 7, 2014 to do what it considers appropriate is removed. Counsel have been unable to provide any case in which such an order has been made. I did not think it appropriate for such an order to be made. At my direction, the parties agreed to add a clause that the order was subject in all respects to the discretion of the Court. With that change, I approved the Initial Order.

Newbould J.

**Released:** August 28, 2013

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**CITATION:** Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
**COURT FILE NO.:** CV-13-10228-00CL
**DATE:** 20130828

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

**BETWEEN:**

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 TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.

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**REASONS FOR JUDGMENT**

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Newbould J.

**Released:** August 28, 2013

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# TAB 26

**CITATION:** Target Canada Co. (Re), 2015 ONSC 303
**COURT FILE NO.:** CV-15-10832-00CL
**DATE:** 2015-01-16

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** 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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

**BEFORE:** Regional Senior Justice Morawetz

**COUNSEL:** *Tracy Sandler* and *Jeremy Dacks*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

*Jay Swartz*, for the Target Corporation

*Alan Mark*, *Melaney Wagner*, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

*Terry O'Sullivan*, for The Honourable J. Ground, Trustee of the Proposed Employee Trust

*Susan Philpott*, for the Proposed Employee Representative Counsel for employees of the Applicants

**HEARD and ENDORSED:** January 15, 2015

**REASONS:** January 16, 2015

## ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

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proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

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employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

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[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

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[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

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[25] On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

   a) Should the stay be extended to the Partnerships?

   b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

   c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

   d) Should the Court approve protections for employees?

   e) Is it appropriate to allow payment of certain pre-filing amounts?

   f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

   g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

   h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

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[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 ("*Canwest Global*").

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[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

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[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

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could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

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[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

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potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

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[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R ($4^{th}$) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

**Date:** January 16, 2015

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# TAB 27

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

SEP 23 2020

ENTERED

**No. S-208894**
**Vancouver Registry**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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 AND ARRANGEMENT OF URTHECAST CORP., URTHECAST INTERNATIONAL CORP., URTHECAST USA INC., 1185729 B.C. LTD. AND THOSE OTHER PETITIONERS SET OUT ON THE ATTACHED SCHEDULE "A"

**ORDER MADE AFTER APPLICATION**

**(Revised Amended and Restated Initial Order)**

| | | |
|---|---|---|
| BEFORE THE HONOURABLE<br>MADAM JUSTICE SHARMA | )<br>)<br>) | September 23, 2020 |

THE APPLICATION of the Petitioners coming on for hearing by telephone at Vancouver, British Columbia, on the 23rd day of September, 2020; AND ON HEARING David E. Gruber, counsel for the Petitioners and those other counsel listed on **Schedule "B"** hereto; AND UPON READING the material filed, including the Affidavits of Sai Chu filed in these proceedings and the Second Report of Ernst & Young, Inc. ("**EY**") in its capacity as Monitor; AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended (the "**CCAA**"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court; and further to the Initial Order pronounced by this Court on the 4th day of September, 2020 (the "**Order Date**");

THIS COURT ORDERS AND DECLARES THAT:

1. This Revised Amended and Restated Initial Order amends and restates the Order (the "**Amended and Restated Initial Order**") of this Court made in these proceedings on September 14, 2020.

**SERVICE**

2. The time for service of the Notice of Application dated September 22, 2020 herein be and is hereby abridged such that the Notice of Application is properly returnable today and service thereof on any interested party is hereby dispensed with.

**JURISDICTION**

3. The Petitioners are companies to which the CCAA applies. For greater certainty, the companies set out in Schedule "A" to this Order shall enjoy the benefits of the protections provided herein, and shall be subject to the same restrictions hereunder.

**PLAN OF ARRANGEMENT**

4. Subject to the Hale Commitment Letter (as defined below), the Petitioners shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

**POSSESSION OF PROPERTY AND OPERATIONS**

5. Subject to the Hale Commitment Letter, this Order and any further Order of this Court, the Petitioners shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"), and continue to carry on their business (the "**Business**") in the ordinary course and in a manner consistent with the preservation of the Business and the Property. The Petitioners shall be authorized and empowered to continue to retain and employ

the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deems reasonably necessary or desirable in the ordinary course of business or for carrying out the terms of this Order.

6. THIS COURT ORDERS that the Petitioners shall be entitled to continue to utilize the cash management system currently in place as described in the Affidavit of Sai Chu sworn September 3, 2020 or replace it with another substantially similar cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Petitioners of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Petitioners, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. Subject to the Hale Commitment Letter, the Petitioners shall be entitled, but not required, to pay the following expenses which may have been incurred prior to the Order Date:

(a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred (collectively "**Wages**"); and

(b) the fees and disbursements of any Assistants retained or employed by the Petitioners which are related to the Petitioners' restructuring, at their standard

rates and charges, including payment of the fees and disbursements of legal counsel retained by the Petitioners, whenever and wherever incurred, in respect of:

(i) these proceedings or any other similar proceedings in other jurisdictions in which the Petitioners or any subsidiaries or affiliated companies of the Petitioners are domiciled;

(ii) any litigation in which the Petitioners are named as a party or is otherwise involved, whether commenced before or after the Order Date; and

(iii) any related corporate matters.

8. Except as otherwise provided herein and subject to the Hale Commitment Letter, the Petitioners shall be entitled to pay all expenses reasonably incurred by the Petitioners in carrying on the Business in the ordinary course following the Order Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably incurred and which are necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services, provided that any capital expenditure exceeding $75,000 shall be approved by the Monitor;

(b) all obligations incurred by the Petitioners after the Order Date, including without limitation, with respect to goods and services actually supplied to the Petitioners following the Order Date (including those under purchase orders outstanding at the Order Date but excluding any interest on the Petitioners' obligations incurred prior to the Order Date); and

(c) fees and disbursements of the kind referred to in paragraph 7(b) which may be incurred after the Order Date.

9. The Petitioners are authorized to remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from Wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes or any such claims which are to be paid pursuant to Section 6(3) of the CCAA;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Petitioners in connection with the sale of goods and services by the Petitioners, but only where such Sales Taxes accrue or are collected after the Order Date, or where such Sales Taxes accrued or were collected prior to the Order Date but not required to be remitted until on or after the Order Date; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal property taxes, municipal business taxes or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors.

10. Until such time as a real property lease is disclaimed in accordance with the CCAA, the Petitioners shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated between the Petitioners and the landlord from time to time ("**Rent**"), for the period commencing from and including the Order Date, twice-monthly in equal payments on the first and fifteenth day of the month in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including Order Date shall also be paid.

11. Except as specifically permitted herein and subject to the Hale Commitment Letter, the Petitioners are hereby directed, until further Order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Petitioners to any of their creditors as of the Order Date except as authorized by this Order;

(b) to make no payments in respect of any financing leases which create security interests;

(c) to grant no security interests, trust, mortgages, liens, charges or encumbrances upon or in respect of any of their Property, nor become a guarantor or surety, nor otherwise become liable in any manner with respect to any other person or entity except as authorized by this Order;

(d) to not grant credit except in the ordinary course of the Business only to their customers for goods and services actually supplied to those customers, provided such customers agree that there is no right of set-off in respect of amounts owing for such goods and services against any debt owing by the Petitioners to such customers as of the Order Date; and

(e) to not incur liabilities except in the ordinary course of Business.

12. Notwithstanding paragraph 11, the Petitioners are permitted, with the consent of the Monitor and the Hale Interim Lender (as defined below), to make regular payments under all mortgages granted by the Petitioners due and after the Order date.

**RESTRUCTURING**

13. Subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents and Hale Definitive Documents (as hereinafter defined), the Petitioners shall have the right to:

(a) permanently or temporarily cease, downsize or shut down all or any part of their Business or operations and commence marketing efforts in respect of any of their redundant or non-material assets and to dispose of redundant or non-material assets not exceeding $10,000.00 in any one transaction or $100,000.00 in the aggregate. If

the disposition of assets exceeds these quantums, the Petitioners shall seek the approval of the Monitor, and if the Monitor deems appropriate, the approval of the Court for such dispositions;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate; and

(c) pursue all avenues of refinancing for their Business or Property, in whole or part;

all of the foregoing to permit the Petitioners to proceed with an orderly restructuring of the Business (the "**Restructuring**").

14. The Petitioners shall provide each of the relevant landlords with notice of the Petitioners' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Petitioners' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors who claim a security interest in the fixtures, such landlord and the Petitioners, or by further Order of this Court upon application by the Petitioners, the landlord or the applicable secured creditors on at least two (2) clear days' notice to the other parties. If a Petitioner disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any dispute concerning such fixtures (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Petitioners' claim to the fixtures in dispute.

15. If a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then: (a) during the period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours on giving the Petitioners and the Monitor 24 hours' prior written notice; and (b) at the effective time of the disclaimer, the landlord shall be entitled to take possession of any such leased premises without waiver of or

prejudice to any claims the landlord may have against the Petitioners, or any other rights the landlord might have, in respect of such lease or leased premises and the landlord shall be entitled to notify the Petitioners of the basis on which it is taking possession and gain possession of and re-lease such leased premises to any third party or parties on such terms as the landlord considers advisable, provided that nothing herein shall relieve the landlord of its obligation to mitigate any damages claimed in connection therewith.

16. Pursuant to Section 7(3)(c) of the *Personal Information Protection and Electronics Documents Act*, S.C. 2000, c. 5 and Section 18(1)(o) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63, and any regulations promulgated under authority of either Act, as applicable (the "**Relevant Enactment**"), the Petitioners, in the course of these proceedings, are permitted to, and hereby shall, disclose personal information of identifiable individuals in their possession or control to stakeholders, their advisors, prospective investors, financiers, buyers or strategic partners (collectively, "**Third Parties**"), but only to the extent desirable or required to negotiate and complete the Restructuring or to prepare and implement the Plan or transactions for that purpose; provided that the Third Parties to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners binding them in the same manner and to the same extent with respect to the collection, use and disclosure of that information as if they were an organization as defined under the Relevant Enactment, and limiting the use of such information to the extent desirable or required to negotiate or complete the Restructuring or to prepare and implement the Plan or transactions for that purpose, and attorning to the jurisdiction of this Court for the purposes of that agreement. Upon the completion of the use of personal information for the limited purposes set out herein, the Third Parties shall return the personal information to the Petitioners or destroy it. If the Third Parties acquire personal information as part of the Restructuring or the preparation and implementation of the Plan or transactions in furtherance thereof, such Third Parties may, subject to this paragraph and any Relevant Enactment, continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioner.

## STAY OF PROCEEDINGS, RIGHTS AND REMEDIES

17. Until and including October 2, 2020, or such later date as this Court may order (the "**Stay Period**"), no action, suit or proceeding in any court or tribunal (each, a "**Proceeding**") against or in respect of the Petitioners, or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of the Petitioners and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Petitioners or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

18. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Petitioners or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Petitioners and the Monitor or leave of this Court.

19. Nothing in this Order, including paragraphs 17 and 18, shall: (i) empower the Petitioners to carry on any business which the Petitioners are not lawfully entitled to carry on; (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (iii) prevent the filing of any registration to preserve or perfect a mortgage, charge or security interest (subject to the provisions of Section 39 of the CCAA relating to the priority of statutory Crown securities); or (iv) prevent the registration or filing of a lien or claim for lien or the commencement of a Proceeding to protect lien or other rights that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such lien, claim for lien or Proceeding except for service of the initiating documentation on the Petitioner.

## NO INTERFERENCE WITH RIGHTS

20. During the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or

permit in favour of or held by the Petitioners, except with the written consent of the Petitioners and the Monitor or leave of this Court.

**CONTINUATION OF SERVICES**

21. During the Stay Period, all Persons having oral or written agreements with the Petitioners or mandates under an enactment for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Petitioner, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by the Petitioners, and that the Petitioners shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the Order Date are paid by the Petitioners in accordance with normal payment practices of the Petitioners or such other practices as may be agreed upon by the supplier or service provider and the Petitioners and the Monitor, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

22. Notwithstanding any provision in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the Order Date, nor shall any Person be under any obligation to advance or re-advance any monies or otherwise extend any credit to the Petitioners on or after the Order Date. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

23. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against the directors or officers of the Petitioners with respect to any claim against the directors or officers that arose before the date hereof and

that relates to any obligations of the Petitioners whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Petitioners, if one is filed, is sanctioned by this Court or is refused by the creditors of the Petitioners or this Court. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of the Petitioners that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for service of the initiating documentation on the applicable director or officer.

**DIRECTORS AND OFFICERS INDEMNIFICATION AND CHARGE**

24. The Petitioners shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Petitioners after the commencement of the within proceedings, except to the extent that, with respect to any director or officer, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

25. The directors and officers of the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $350,000, as security for the indemnity provided in paragraph 24 of this Order. The Directors' Charge shall have the priority set out in paragraphs 48 and 50 herein.

26. Notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Petitioners' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 24 of this Order.

**APPOINTMENT OF MONITOR**

27. EY is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Petitioners with the powers and obligations set out in the CCAA or set forth herein, and that the Petitioners and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Petitioners pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

28. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) assist the Petitioners in sourcing debtor-in-possession financing, and advising the Petitioners in relation thereto;

(b) monitor the Petitioners' receipts and disbursements;

(c) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(d) advise the Petitioners in their preparation of the Petitioners' cash flow statements and reporting required by the Hale Interim Lender or Interim Lender, which information shall be reviewed with the Monitor and delivered to the applicable Hale Interim Lender or Interim Lender and their respective counsel in accordance with the Commitment Letter and Hale Commitment Letter;

(e) assist the Petitioners, to the extent required by the Petitioners and the Interim Lender and Hale Interim Lender, in its dissemination to the Interim Lender and Hale Interim Lender and their respective counsel, financial information and

reporting as contemplated in the Commitment Letter and Hale Commitment Letter;

(f) advise the Petitioners in their development of the Plan and any amendments to the Plan;

(g) assist the Petitioner, to the extent required by the Petitioner, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(h) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Petitioner, to the extent that is necessary to adequately assess the Petitioners' business and financial affairs or to perform its duties arising under this Order;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(j) hold funds in trust or in escrow, to the extent required, to facilitate settlements or other arrangements in connection with the Restructuring between the Applicants and any other Person;

(k) implement a sales and investment solicitation process for the sale of the ISS Cameras (as defined in Affidavit #1 of Sai Chu, sworn September 3, 2020); and

(l) perform such other duties or take any steps reasonably incidental to the exercise of any powers and obligations conferred upon the Monitor by this Order or any further order of the Court.

29. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or

performance of duties under this Order, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof, and nothing in this Order shall be construed as resulting in the Monitor being an employer or a successor employer, within the meaning of any statute, regulation or rule of law or equity, for any purpose whatsoever.

30. Nothing herein contained shall require or allow the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Fisheries Act*, the British Columbia *Environmental Management Act*, the British Columbia *Fish Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. For greater certainty, the Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

31. The Monitor shall provide any creditor of the Petitioners with information provided by the Petitioners in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Petitioners are confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Petitioners may agree.

32. In addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross

negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the rights and protections afforded the Monitor by the CCAA or any applicable legislation.

**ADMINISTRATION CHARGE**

33. The Monitor, counsel to the Monitor, if any, and counsel to the Petitioners shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Petitioners as part of the cost of these proceedings. The Petitioners are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor and counsel to the Petitioners on a periodic basis and, in addition, the Petitioners are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Petitioners, retainers in the amounts of $50,000 each to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

34. The Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the British Columbia Supreme Court who may determine the manner in which such accounts are to be passed, including by hearing the matter on a summary basis or referring the matter to a Registrar of this Court.

35. The Monitor, counsel to the Monitor, if any, and counsel to the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order which are related to the Petitioners' restructuring. The Administration Charge shall have the priority set out in paragraphs 48 and 50 hereof.

**INTERIM FINANCING**

36. The Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility from 1262743 B.C. Ltd. (the "**Interim Lender**") in order to finance the continuation of

the Business and preservation of the Property, provided that borrowings under such credit facility shall not exceed USD $1,000,000.00 unless permitted by further Order of this Court.

37. Such credit facility shall be on the terms and subject to the conditions set forth in a commitment letter between the Petitioners and the Interim Lender on terms to be approved by the Monitor (the "**Commitment Letter**").

38. The Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

39. The Interim Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property. The Interim Lender's Charge shall not secure an obligation that exists before this Order is made. The Interim Lender's Charge shall have the priority set out in paragraphs 48 and **50** hereof.

40. Notwithstanding any other provision of this Order:

(a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under any of the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon 7 days notice to the Petitioners and the Monitor, may exercise any and all of its rights and remedies against the Petitioners or the Property under or pursuant to the Commitment Letter, Definitive Documents and the Interim Lender's Charge, including without

limitation, to cease making advances to the Petitioners and set off and/or consolidate any amounts owing by the Interim Lender to the Petitioners against the obligations of the Petitioners to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Petitioners and for the appointment of a trustee in bankruptcy of the Petitioners; and

(c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioner or the Property.

41. The Interim Lender, in such capacity, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the CCAA, or any proposal filed by the Petitioners under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

**SENIOR INTERIM FINANCING**

42. The Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility (the "**Hale Facility**") from HCP-FVL, LLC, an affiliate of Hale Capital Partners L.P. (the "**Hale Interim Lender**"), in order to finance the continuation of the Business and preservation of the Property, provided that borrowings under such credit facility shall not exceed the principal amount of USD $5,000,000.00 unless permitted by further Order of this Court.

43. The Hale Facility shall be on the terms and subject to the conditions set forth in a commitment letter between the Petitioners and the Hale Interim Lender on terms to be approved by the Monitor (the "**Hale Commitment Letter**").

44. The Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Hale Definitive Documents**"), as are contemplated by

the Hale Commitment Letter or as may be reasonably required by the Hale Interim Lender pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the Hale Interim Lender under and pursuant to the Hale Commitment Letter and the Hale Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

45. The Hale Interim Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Hale Interim Lender's Charge**") on the Property. The Hale Interim Lender's Chargeshall not secure an obligation that exists before this Order is made. The Hale Interim Lender's Chargeshall rank behind the Administration Charge and in priority to the Interim Lender's Charge with the priority set out in paragraphs 48 and **50** provided however that the Hale Interim Lender must either obtain the Interim Lender's consent or the Interim Lender must be paid any amounts owing pursuant to the Commitment Letter prior to any advance above USD $2,000,000 being secured by the Hale Interim Lender's Charge.

46. Notwithstanding any other provision of this Order:

(a) the Hale Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Hale Interim Lender's Chargeor any of the Hale Definitive Documents;

(b) upon the occurrence of an event of default under any of the Hale Definitive Documents or the Hale Interim Lender's Charge, the Hale Interim Lender, upon 7 days notice to the Petitioners and the Monitor, may exercise any and all of its rights and remedies against the Petitioners or the Property under or pursuant to the Hale Commitment Letter, Hale Definitive Documents and the Hale Interim Lender's Charge, including without limitation, to cease making advances to the Petitioners and set off and/or consolidate any amounts owing by the Hale Interim Lender to the Petitioners against the obligations of the Petitioners to the Hale Interim Lender under the Hale Commitment Letter, the Hale Definitive Documents or the Hale Interim Lender's Charge, to make demand, accelerate

payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Petitioners and for the appointment of a trustee in bankruptcy of the Petitioners; and

(c) the foregoing rights and remedies of the Hale Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioner or the Property.

47. The Hale Interim Lender, in such capacity, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the CCAA, or any proposal filed by the Petitioners under the *BIA*, with respect to any advances made under the Hale Commitment Letter or the Hale Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

48. The priorities of the Administration Charge, the Interim Lender's Charge, the Hale Interim Lender's Charge, the Directors' Charge, and the Intercompany Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – Hale Interim Lender's Charge;

Third – Interim Lender's Charge;

Fourth – Directors' Charge (to the maximum amount of $350,000); and

Fifth – Intercompany Charge

Any security documentation evidencing, or the filing, registration or perfection of, the Administration Charge, the Hale Interim Lender's Charge, the Interim Lender's Charge, Directors' Charge, and the Intercompany Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be effective as against the Property and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or

perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register or perfect any such Charges.

49. Each of the Charges shall constitute a mortgage, security interest, assignment by way of security and charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**"), in favour of any Person, save and except those claims contemplated by section 11.8(8) of the CCAA.

50. Except as otherwise expressly provided herein, or as may be approved by this Court, the Petitioners shall not grant or suffer to exist any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Petitioners obtains the prior written consent of the Monitor and the beneficiaries of the Administration Charge, Hale Interim Lender's Charge, Interim Lender's Charge, Intercompany Charge and the Director's Charge.

51. The Administration Charge, the Director's Charge, the Interim Lender's Charge, the Hale Interim Lender's Charge, the Commitment Letter, the Hale Commitment Letter, the Definitive Documents, the Hale Definitive Documents, the Intercompany Charge and the Intercompany Advances Security Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Petitioners; and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Intercompany Advances, Security Documents,

the Commitment Letter, the Hale Commitment Letter, the Definitive Documents or Hale Definitive Documents shall create or be deemed to constitute a breach by the Petitioners of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges or from the Intercompany Lender entering into the Intercompany Advances Security Documents and the Commitment Letter, the Hale Commitment Letter, or the execution, delivery or performance of the Definitive Documents, the Hale Definitive Documents and the Intercompany Advances Security Documents; and

(c) the payments made by the Petitioners pursuant to this Order, the Intercompany Advances Security Documents, the Commitment Letter, the Hale Commitment Letter, the Definitive Documents, the Hale Definitive Documents and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

52. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Petitioners' interest in such real property leases.

**RELIEF FROM REPORTING OBLIGATIONS**

53. THIS COURT ORDERS that the decision by the Petitioners to incur no further expenses in relation to any filings, 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, including without limitation, the *Securities Act (British Columbia)* and comparable statutes enacted by other provinces of Canada, the *Securities Act of 1933* (United States) and the *Securities Exchange Act of 1934* (United States) and comparable statutes enacted by individual states of the

United States, the TSX Company Manual and other rules, regulations and policies of the Toronto Stock Exchange (collectively, the "**Securities Provisions**"), is hereby authorized, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of the Petitioners failing to make any Securities Filings required by the Securities Provisions.

54. THIS COURT ORDERS that none of the directors, officers, employees and other representatives of the Petitioners, the Monitor (and its directors, officers, employees and representatives, shall have any personal liability for any failure by the Petitioners to make any Securities Filings required by the Securities Provisions.

**INTERCOMPANY FINANCING**

55. THIS COURT ORDERS that subject to the Hale Commitment Letter, UrtheCast Corp. (the "**Intercompany Lender**") is authorized to loan to each of Geosys Holdings, ULC, Geosys-Int'l, Inc, Geosys SAS, Geosys Australia PTY, Geosys do Brasil Sistemas de Informacao Agricolas Ltda. and Geosys Europe SARL (collectively, the "**Geosys Petitioners**"), and each of the Geosys Petitioners is authorized to borrow, repay and re-borrow, such amounts from time to time as the Geosys Petitioners, with the approval of the Monitor, considers necessary or desirable on a revolving basis to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order (the "**Intercompany Advances**"), on terms consistent with existing arrangements or past practice or otherwise as approved by the Monitor, including as to the provision of any security to be provided by the Geosys Petitioners to the Intercompany Lender to secure the Intercompany Advances.

56. Subject to the Hale Commitment Letter, each of the Geosys Petitioners is authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Intercompany Advances Security Documents**") as may be reasonably necessary and as approved by the Monitor to perfect any security for the Intercompany Advances in any jurisdiction in which Property of the Geosys Petitioners may be located.

57. THIS COURT ORDERS that the Intercompany Lender shall be entitled to the benefit and is hereby granted a charge (the "**Intercompany Charge**") on all of the Property of each of the Geosys Petitioners, as security for the Intercompany Advances made to such Geosys Petitioner, which Intercompany Charge shall not secure an obligation that exists before the Order Date. The Intercompany Charge shall have the priority set out in paragraphs 48 and 50 of this Order.

58. THIS COURT ORDERS AND DECLARES that the Intercompany Lender shall be treated as unaffected and may not be compromised in any Plan or any proposal filed under the BIA in respect of the Petitioners, with respect to any Intercompany Advances made on or after the Order Date.

## SALES AND INVESTMENT SOLICITATION PROCESS ("SISP")

59. THIS COURT ORDERS that the Petitioners, upon obtaining the prior consent of the Monitor, are hereby authorized to commence a SISP with respect to the sale of the ISS Cameras (as defined in Affidavit #1 of Sai Chu, sworn September 3, 2020), in a form approved by the Monitor, which SISP may include a "stalking-horse" bid (the "**Stalking Horse Bid**") by the Interim Lender for the purchase price of $10,000.00 per ISS Camera and other commercial terms as reasonable necessary to implement the Stalking Horse Bid and as approved by the Monitor.

60. The Petitioners shall seek approval of the Court for a sale of all or any part of the Property following the conclusion of the SISP.

61. The Petitioners and the Monitor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations under the SISP.

## SERVICE AND NOTICE

62. The Monitor shall (i) without delay, publish in the *Globe and Mail* a notice containing the information prescribed under the CCAA, (ii) within five days after Order Date, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed

manner, a notice to every known creditor who has a claim against the Petitioners of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

63. The Petitioners and the Monitor are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Petitioners' creditors or other interested parties at their respective addresses as last shown on the records of the Petitioners and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

64. Any Person that wishes to be served with any application and other materials in these proceedings must deliver to the Monitor by way of ordinary mail, courier, personal delivery or electronic transmission a request to be added to a service list (the "**Service List**") to be maintained by the Monitor. The Monitor shall post and maintain an up to date form of the Service List on its website at: www.ey.com/ca/urthecast.

65. Any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on its website at: www.ey.com/ca/urthecast.

66. Notwithstanding paragraphs 63 and 65 of this Order, service of the Petition, the Notice of Hearing of Petition, any affidavits filed in support of the Petition and this Order shall be made on the Federal and British Columbia Crowns in accordance with the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and regulations thereto, in respect of the Federal Crown, and the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, in respect of the British Columbia Crown.

**GENERAL**

67. The Petitioners or the Monitor may from time to time apply to this Court for directions in the discharge of its powers and duties hereunder.

68. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Petitioners, the Business or the Property.

69. THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any federal or State Court or administrative body in the United States of America, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.

70. Each of the Petitioners and the Monitor shall be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada, including acting as a foreign representative of the Petitioners to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1330, as amended.

71. The Petitioners may (subject to the provisions of the CCAA and the BIA) at any time file a voluntary assignment in bankruptcy or a proposal pursuant to the commercial reorganization provisions of the BIA if and when the Petitioners determines that such a filing is appropriate.

72. The Petitioners are hereby at liberty to apply for such further interim or interlocutory relief as it deems advisable within the time limited for Persons to file and serve Responses to the Petition.

73. Leave is hereby granted to hear any application in these proceedings on two (2) clear days' notice after delivery to all parties on the Service List of such Notice of Application and all affidavits in support, subject to the Court in its discretion further abridging or extending the time for service.

74. Any interested party (including the Petitioners and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to all parties on the Service List and to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

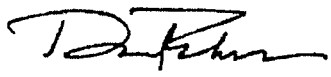
75. Any secured creditor may give notice to the Petitioners, the Monitor and the Hale Interim Lender that it intends to apply to this Court to vary or amend the terms of this Order pertaining to the Hale Commitment Letter within 48 hours of electronic delivery of this Order, the Notice of Application and the materials filed in support. If such notice is given and such application is brought, it shall proceed on a *de novo* basis. If no such notice is given, the respective secured creditor will be deemed to have consented or taken no position on the granting of the provisions in this Order pertaining to the Hale Commitment Letter.

76. Endorsement of this Order by counsel appearing on this application other than counsel for the Petitioners is hereby dispensed with.

77. This Order and all of its provisions are effective as of 12:01 a.m. local Vancouver time on the Order Date.

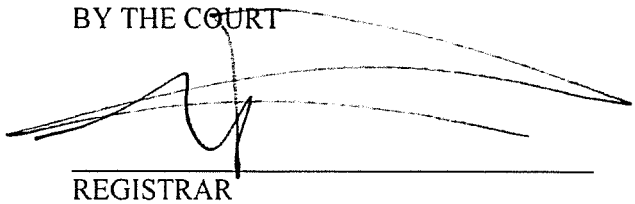
THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of David Gruber,



Lawyer for the Petitioners

BY THE COURT



REGISTRAR

**Schedule "A"**
**List of Petitioners**

1. 1185781 B.C. Ltd.
2. Deimos Imaging S.L.U.
3. DOT Imaging S.L.U.
4. Geosys Australia PTY
5. Geosys do Brasil Sistemas de Informacao Agricolas Ltda.
6. Geosys Europe Sarl
7. Geosys Holding, ULC (was Geosys Technology Holding LLC)
8. Geosys-Int'l, Inc.
9. Geosys S.A.S.
10. UrtheCast Holdings (Malta) Limited
11. UrtheCast Imaging S.L.U.
12. UrtheCast Investments (Malta) Limited
13. UrtheDaily Corp.

**Schedule "B"**

**List of Counsel**

| Name of Counsel | Party Represented |
|---|---|
| Colin Brousson | The Monitor |
| | |
| | |
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| | |
| | |

# TAB 28

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
19-Oct-20
Vancouver
REGISTRY

**No. S-208894**
**Vancouver Registry**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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 AND ARRANGEMENT OF URTHECAST CORP., URTHECAST INTERNATIONAL CORP., URTHECAST USA INC., 1185729 B.C. LTD. AND THOSE OTHER PETITIONERS SET OUT ON THE ATTACHED SCHEDULE "A"

**ORDER MADE AFTER APPLICATION**

**(Sales Process Order)**

| | | |
|---|---|---|
| BEFORE THE HONOURABLE<br>MADAM JUSTICE SHARMA | )<br>)<br>) | October 16, 2020 |

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 16th day of October, 2020, by telephone; AND ON HEARING Alexandra Andrisoi and David E. Gruber, counsel for the Petitioners and those other counsel listed on **Schedule "B"** hereto; AND UPON READING the material filed, including the Fourth Report of Ernst & Young, Inc. in its capacity as Monitor (the "**Monitor**"); AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended (the "**CCAA**"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS AND DECLARES THAT:

**SERVICE**

1. The time for service of the Notice of Application dated October 14, 2020 herein be and is hereby abridged such that the Notice of Application is properly returnable today and service thereof on any interested party is hereby dispensed with.

**APPROVAL OF SISP**

2. Capitalized terms used in this Order that are not otherwise defined have the same meaning as in the Amended and Restated Initial Order granted in these proceeding on September 23, 2020.

3. The sale and investment solicitation process (the "**General SISP**") substantially in the form set out in the attached **Schedule "C"** to this Order be and is hereby approved and the Petitioners be and are hereby authorized and directed, with the assistance and supervision of the Monitor, to carry out the General SISP in the manner set out Schedule "C" herein.

4. The Petitioners are authorized and directed, *nunc pro tunc,* to execute and deliver the stalking horse letter agreement and bid substantially in the form attached as **Schedule "D"** herein between the Petitioners and 1269336 B.C. Ltd (the "**Stalking Horse Bidder**") and/or one or more special purpose entities affiliated with Antarctica Infrastructure Partners, LLC (the "**Stalking Horse Bid**").

5. The Stalking Horse Bid payment of the break-up fee and expense reimbursement to the Stalking Horse Bidder provided for in the Stalking Horse Bid is approved.

**GENERAL**

6. Endorsement of this Order by counsel appearing on this application other than the counsel for the Petitioners is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Alexandra Andrisoi,
Lawyer for the Petitioners

BY THE COURT

REGISTRAR

**Schedule "A"**

**List of Petitioners**

1. 1185781 B.C. Ltd.
2. Deimos Imaging S.L.U.
3. DOT Imaging S.L.U.
4. Geosys Australia PTY
5. Geosys do Brasil Sistemas de Informacao Agricolas Ltda.
6. Geosys Europe Sarl
7. Geosys Holding, ULC (was Geosys Technology Holding LLC)
8. Geosys-Int'l, Inc.
9. Geosys S.A.S.
10. UrtheCast Holdings (Malta) Limited
11. UrtheCast Imaging S.L.U.
12. UrtheCast Investments (Malta) Limited
13. UrtheDaily Corp.

**Schedule "B"**

**List of Counsel**

| **Name of Counsel** | **Party Represented** |
|---|---|
| Jeffrey Bradshaw | The Monitor |
| Michael Nowina | Land O'Lakes, Inc. and Winfield Solutions LLC |
| Ian Aversa and Sam Babe | 1262743 B.C. Ltd. |
| Asim Iqbal | Hale Capital Partners L.P. |
| Sean Collins and Robert Richardson | Antarctica Infrastructure Partners LLC |
| Daniel Shouldice | Bolzano Investments Limited, Lunar Ventures Inc., Vine Rose Limited SMF Investments Limited |
| Ryan Laity | 1249836 B.C. Ltd. |

## Schedule "C" – Sale and Investment Solicitation Process

## Sale and Investment Solicitation Process Outline

### Introduction

On September 4, 2020, UrtheCast Corp., UrtheCast International Corp., UrtheCast USA Inc., 1185729 B.C. Ltd. and the other petitioner parties set out on Schedule A (collectively, the "**Petitioners**" or "**UrtheCast Group**") to the initial order (the "**Initial Order**") granted by the Supreme Court of British Columbia (the "**Court**"), obtained relief under the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") from the Court that, among other things, commenced the CCAA proceedings (the "**CCAA Proceedings**"), granted an initial stay of proceedings in respect of the Petitioners (the "**Stay**") and appointed Ernst & Young Inc., as monitor (the "**Monitor**").

On September 14, 2020, the Petitioners obtained an amended and restated version of the Initial Order from the Court (the "**Amended and Restated Initial Order**") that, among other things, extended the Stay to October 2, 2020, authorized a limited sales and investment solicitation process for certain camera equipment owned by the Petitioners and authorized an interim debtor-in-possession financing facility from 1262743 B.C. Ltd. (the "**Existing DIP Lender**") providing for borrowings of up to US$1,000,000 (the "**Existing DIP**") and the grant of a priority charge (the "**Existing DIP Lender's Charge")** to the Existing DIP Lender as security for borrowings under the Existing DIP.

On September 21, 2020, the Petitioners obtained a further amended and restated version of the Initial Order from the Court (the "**Second Amended and Restated Initial Order**") that, among other things, authorized an additional interim debtor-in-possession financing from HCP-FVL, LLC, an affiliate of Hale Capital Partners L.P. (the "**Second DIP Lender**") providing for borrowings of up to US $5,000,000 (the "**Second DIP**") pursuant to the DIP Facilities Loan Agreement dated as of September 21, 2020 (the "**Second DIP Agreement**").

On October 2, 2020, the Petitioners obtained an order of the Court (the "**Stay Extension Order**") that, among other things extended the Stay to December 18, 2020.

On October 16, 2020, the Petitioners obtained an order from the Court that amongst other things:

(a) authorized the Petitioners to pursue all avenues of refinancing or sale of its business or property, in whole or part, subject to prior approval of the Court before any material refinancing or sale is concluded;

(b) approved the Sale and Investment Solicitation Process set forth herein (the "**SISP**");

(c) approved an additional interim debtor-in-possession financing facility from an affiliate of Antarctica Infrastructure Partners, LLC (the "**AC DIP Lender**"), providing for borrowings of up to CAD $3,548,000 (the "**Stalking Horse DIP**") and the grant of a priority charge (the "**AC DIP Lender's Charge")** to the AC DIP Lender as security for borrowings under the Stalking Horse DIP, ranking in priority to the Existing DIP Lender's Charge;

(d) approved and accepted for the purpose of conducting a "stalking horse" solicitation in accordance with the SISP procedures set out in this this document (the "**SISP Process**

**Outline**") that certain letter agreement dated October 13, 2020 between the Petitioners and the Stalking Horse Bidder, providing for a potential sale (the "**Stalking Horse Bid**") of the Applicants' UrtheDaily Constellation project and UrthePipeline business (together, the "**Designated Assets**") to 1269336 B.C. Ltd. the Stalking Horse Bidder or a designated affiliate, including the payment of an expense reimbursement (the "**Expense Reimbursement**") by the Petitioners to the Stalking Horse Bidder as contemplated by the Stalking Horse Bid; and

(e) approved the procedures set forth in this SISP Process Outline.

To facilitate an efficient and thorough SISP in the face of UrtheCast's acute liquidity challenges, the Petitioners have:

(a) created a form of non-disclosure agreement ("**NDA**") and established a confidential online data site to facilitate due diligence investigations by Qualified Bidders (defined below) who enter into a NDA with UrtheCast Corp.; and

(b) finalized a list of potential bidders, including (i) parties that have approached the Petitioners or the Monitor indicating an interest in the Opportunity (defined below), (ii) domestic and international strategic and financial parties who UrtheCast Group in consultation with the Monitor, believe could be interested in purchasing all or part of the assets or investing in UrtheCast Group pursuant to the SISP (including, without limitation, any parties with whom were in contact prior to the Initial Order as part of UrtheCast Group's strategic review process) and (iii) any other parties reasonably suggested by a stakeholder as a potential bidder who may be interested in the Opportunity (collectively, "**Known Potential Bidders**").

**Opportunity**

1. The SISP is intended to solicit interest in and opportunities for a sale of or investment in all or part of the assets, property, business operations and undertaking (the "**Opportunity**") of the Petitioners and their subsidiaries (collectively, the "**UrtheCast Group**"). The Opportunity may include one or more of a recapitalization, arrangement or other form of investment in or reorganization of the business and affairs of the UrtheCast Group as a going concern or a sale of all, substantially all or one or more components of UrtheCast Group's assets, including without limitation, the sale of the shares of one or more of the corporations comprising the UrtheCast Group and its business operations (the "**Assets**") as a going concern or otherwise.

2. Except to the extent otherwise set forth in a definitive sale or investment agreement with a successful bidder, any sale of the Assets or investment in UrtheCast Group will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by any member of the UrtheCast Group, the Monitor or any of their respective agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of UrtheCast Group in and to the Assets to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders.

**Timeline**

3. The following table sets out the key milestones under the SISP:

| Milestone | Deadline |
|---|---|
| Teaser Letter sent to potential Known Potential Bidders | As soon as practicable and, in any case, not later than October 16, 2020 |
| Phase 1 Bid Deadline | November 6, 2020 |
| Phase 2 Bid Deadline | To be specified in Phase 2 Bid Process Letter, but in any case not later than November 18, 2020 |
| Auction (if required) | November 23, 2020 |

4. In recognition that certain of the UrtheCast Group Assets, including but not limited to the synthetic aperture radar ("**SAR**") and Deimos assets, have already been subject to extensive marketing, UrtheCast Group may, with the consent of the Monitor and in consultation with affected stakeholders, shorten any of the deadlines specified above.

**Solicitation of Interest: Notice of the SISP**

5. The SISP will include a notification process and up to two phases of activity for qualified interested bidders ("**Phase 1**" and "**Phase 2**", respectively). As soon as reasonably practicable, but in any event by no later than October 16, 2020:

   (a) UrtheCast Group will cause a notice of the SISP (and such other relevant information which UrtheCast Group, in consultation with the Monitor, considers appropriate) (the "**Notice**") to be published in such publications as UrtheCast Group in consultation with the Monitor, consider appropriate, if any; and

   (b) UrtheCast Group will issue a press release setting out the information contained in the Notice and such other relevant information which UrtheCast Group considers appropriate for dissemination in Canada and major financial centres in the United States.

**Stalking Horse Protections**

6. Unless and until the Stalking Horse Bid has been completed or terminated by one of the parties in accordance with its terms, or amended to provide expressly to the contrary, the Stalking Horse Bidder will be afforded complete and timely access to (a) all confidential information regarding the Opportunity that is shared with any Potential Bidder (defined below), (b) the Bid Process Letter (defined below), and (c)a bi-weekly status update from the Monitor regarding the status of the SISP generally, including an update on whether there are any Qualified Bidders (defined below), Qualified Bids (defined below) received from Phase 2 Qualified Bidders (defined below), Competing Bids (defined below) and/or Compliant Competing Bid (as defined below), however this update will not provide the Stalking Horse Bidder any confidential information about these bidders or the terms of their bids if they include, in whole or in part, the Designated Assets (defined below) unless

and until a Successful Bidder (defined below) is determined for the Designated Assets and the SISP is proceeding to the Auction (defined below). For certainty, nothing is this SISP Process Outline is intended to derogate from any contractual rights of the Stalking Horse Bidder in the Stalking Horse Bid (including in any definitive agreement that may be entered into in respect of the Stalking Horse Bid), including the Stalking Horse Bidder's right to participate in the Auction SISP process, to be paid a break fee and to have certain of its expenses reimbursed.

**PHASE 1: NON-BINDING LOIs**

**Phase 1 Qualified Bidders**

7. Any Known Potential Bidder or other third party who contacts any of the Petitioners or Monitor to express interest in participating in the SISP (each, a "**Potential Bidder**") must provide an executed NDA to the Monitor and provide a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder.

8. A Potential Bidder (who has delivered the executed NDA and letter as set out above) will be deemed a "**Phase 1 Qualified Bidder**" only if UrtheCast Group in its reasonable business judgment and in consultation with the Monitor, determines that such Potential Bidder is likely, based on the availability of financing, experience and other considerations, to be able to timely consummate a sale or investment pursuant to the SISP.

9. For certainty, the Stalking Horse Bidder will be deemed a Phase 1 Qualified Bidder for the purposes of the SISP and, unless terminated by the Stalking Horse Bidder or UrtheCast Corp. in accordance with its terms, the Stalking Horse Bid will be deemed a Qualified LOI and the Stalking Horse Bidder will not be required to submit any other bid during Phase 1 of the SISP.

10. At any time during Phase 1 of the SISP, UrtheCast Group may, in their reasonable business judgment and after consultation with and the consent of the Monitor, eliminate a Phase 1 Qualified Bidder (other than the Stalking Horse Bidder) from the SISP, in which case such bidder will be eliminated from the SISP and will no longer be a "Phase 1 Qualified Bidder" for the purposes of the SISP.

11. UrtheCast Group, in consultation with the Monitor, reserves the right to limit any Phase 1 Qualified Bidder's (other than the Stalking Horse Bidder's) access to any confidential information (including any information in the data room) and to customers and suppliers of UrtheCast Group, where, in UrtheCast Group's opinion after consultation with the Monitor, such access could negatively impact the SISP, the ability to maintain the confidentiality of the confidential information, the UrtheCast Group or the Assets.

12. Potential Bidders must rely solely on their own independent review, investigation and/or inspection of all information of the UrtheCast Group and the Assets in connection with their participation in the SISP and any transaction they enter into with UrtheCast Group.

**Non-Binding Letters of Intent from Qualified Bidders**

13. A Phase 1 Qualified Bidder (other than the Stalking Horse Bidder) that wishes to pursue the Opportunity further must deliver a non-binding letter of intent (an "**LOI**") to the Monitor

and UrtheCast Group at the addresses specified in Schedule "1" attached hereto (including by email or fax transmission), so as to be received by them not later than 5:00 PM (Pacific Time) on or before November 6, 2020, or such other date as the Monitor may advise in accordance with paragraph 4(the "**Phase 1 Bid Deadline**").

14. Subject to paragraph 13, an LOI so submitted will be considered a qualified LOI (a "**Qualified LOI**") only if:

(a) it is submitted on or before the Phase 1 Bid Deadline by a Phase 1 Qualified Bidder;

(b) it contains an indication of whether the Phase 1 Qualified Bidder is proposing:

(i) to acquire all, substantially all or a portion of the Assets (a "**Sale Proposal**"), or

(ii) a recapitalization, arrangement or other form of investment in or reorganization of the UrtheCast Group (an "**Investment Proposal**");

(c) in the case of a Sale Proposal (other than the Stalking Horse Bid), it identifies or contains the following:

(i) the purchase price or price range in Canadian dollars, including details of any liabilities to be assumed by the Phase 1 Qualified Bidder and key assumptions supporting the valuation;

(ii) a description of the Assets that is expected to be subject to the transaction and any of the Assets expected to be excluded;

(iii) a description of the Phase 1 Qualified Bidder's proposed treatment of material agreements and employees (for example, anticipated employment offers):

(iv) a specific indication of the financial capability of the Phase 1 Qualified Bidder and the expected structure and financing of the transaction (including, but not limited to, the sources of financing to fund the acquisition, preliminary evidence of the availability of such financing or such other form of financial disclosure and credit-quality support or enhancement that will allow UrtheCast Group and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Phase 1 Qualified Bidder's financial or other capabilities to consummate the transaction and to perform all obligations to be assumed in such transaction; and the steps necessary and associated timing to obtain financing and any related contingencies, as applicable);

(v) a description of the conditions and approvals required for the Phase 1 Qualified Bidder to be in a position to submit a final and binding offer, including any anticipated corporate, securityholder or other internal approvals and any anticipated impediments for obtaining such approvals;

(vi) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;

(vii) a description of all conditions to closing that the Phase 1 Qualified Bidder expects to include in its final and binding offer, including without limitation any regulatory approvals and any form of agreement required from a government body, stakeholder or other third party ("**Third Party Agreement**") and an outline of the principal terms thereof; and

(viii) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;

(d) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment;

(ii) the aggregate amount of the equity and/or debt investment to be made in the UrtheCast Group in Canadian dollars;

(iii) key assumptions supporting the Phase 1 Qualified Bidders' valuation;

(iv) a description of the Phase 1 Qualified Bidder's proposed treatment of any liabilities, material contracts and employees;

(v) the underlying assumptions regarding the pro forma capital structure (including the form and amount of anticipated equity and/or debt levels, debt service fees, interest or dividend rates, amortization, voting rights or other protective provisions (as applicable), redemption, prepayment or repayment attributes and any other material attributes of the investment);

(vi) a specific indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the transaction (including, but not limited to, the sources of capital to fund the investment, preliminary evidence of the availability of such capital or such other form of financial disclosure and credit-quality support or enhancement that will allow UrtheCast Group and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Phase 1 Qualified Bidder's financial or other capabilities to consummate the transaction, steps necessary and associated timing to obtain such capital and any related contingencies, as applicable, and a sources and uses analysis);

(vii) a description of the conditions and approvals required for the Phase 1 Qualified Bidder to be in a position to submit a final and binding offer, including any anticipated corporate, securityholder or other internal approvals and any anticipated impediments for obtaining such approvals;

(viii) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;

(ix) a description of all conditions to closing that the Phase 1 Qualified Bidder expects to include in its final and binding offer, including without limitation any regulatory approvals and any Third Party Agreement required and an outline of the principal terms thereof; and

(x) any other terms or conditions of the Investment Proposal which the Phase 1 Qualified Bidder believes are material to the transaction;

(e) in the case of

(i) a Sale Proposal for Assets that include any of the Designated Assets, or

(ii) an Investment Proposal that contemplates taking any security interest in any of the Designated Assets or that could reasonably be expected to take longer to complete than the sale of the Designated Assets to the Stalking Horse Bidder pursuant to the Stalking Horse Bid (any Sale Proposal or Investment Proposal referred to in this subsection (e) being referred to as a "**Conflicting Bid**"),

such Conflicting Bid provides for payment of the expense reimbursement and break fee (it being understood and agreed that only the Stalking Horse Bidder will be entitled to any bid protections including expense reimbursement and a break fee) and provides that, at a minimum and on closing of the Conflicting Bid, cash proceeds will be paid in an amount which is at least equal to the sum of: (A) the amount of cash payable under the Stalking Horse Bid, (B) the amount of obligations being credit bid and debt assumed (exclusive of cure costs) in the Stalking Horse Bid, (C) the amount of the Expense Reimbursement, (D) the amount of any break fee payable under the Stalking Horse Bidder, (E) the principal and any accrued and unpaid interest owing under the Stalking Horse Bid DIP and the Existing DIP, plus (F) a minimum overbid amount of CAD $250,000 (the sum of such amounts in clauses (A) through (F) of this paragraph 14(e) being referred to as the "**Minimum Purchase Price**") and provides that, upon closing of the Conflicting Bid, the Stalking Horse DIP will be repaid in full and all amounts owing to the Stalking Horse Bidder (including the Stalking Horse's reimbursable expenses and break fee) will be paid at closing (a Conflicting Bid that satisfies the Minimum Purchase Price and other requirements of this clause being referred to as a "**Compliant Conflicting Bid**"); and

(f) in the case of either a Sale Proposal or an Investment Proposal, it contains such other information as reasonably requested by UrtheCast Group in consultation with the Monitor.

15. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

**Preliminary Assessment of Phase 1 Bids and Subsequent Process**

16. Following the Phase 1 Bid Deadline, UrtheCast Group, in consultation with the Monitor, will assess the Qualified LOIs. If it is determined by UrtheCast Group in consultation with the Monitor, that a Phase 1 Qualified Bidder that has submitted a Qualified LOI: (i) has a

bona fide interest in completing a Sale Proposal or Investment Proposal (as the case may be); and (ii) has the financial capability (based on availability of financing, experience and other considerations) to consummate such a transaction based on the financial information provided, then such Phase 1 Qualified Bidder will be deemed a "**Phase 2 Qualified Bidder**", provided that UrtheCast Group may, in their reasonable business judgment and after consultation with and with the approval of the Monitor, limit the number of Phase 2 Qualified Bidders (and thereby eliminate some bidders from the process) taking into account the factors identified in paragraph 18 below and any material adverse impact on the operations and performance of UrtheCast Group. Only Phase 2 Qualified Bidders shall be permitted to proceed to Phase 2 of the SISP.

17. For certainty, the Stalking Horse Bidder will be deemed a Phase 2 Qualified Bidder for the purposes of the SISP and, unless terminated by the Stalking Horse Bidder or UrtheCast Corp. in accordance with its terms, the Stalking Horse Bid will be deemed a Qualified Bid and the Stalking Horse Bidder will not be required to submit any other bid during Phase 2 of the SISP.

18. As part of the assessment of Qualified LOIs and the determination of the process subsequent thereto, UrtheCast Group, in consultation with the Monitor and with the approval of the Monitor, shall determine the process and timing to be followed in pursuing Qualified LOIs based on such factors and circumstances as they consider appropriate in the circumstances including, but not limited to: (i) the number of Qualified LOIs received, (ii) the extent to which the Qualified LOIs relate to the same Assets or involve Investment Proposals predicated on certain Assets, (iii) the scope of the Assets to which any Qualified LOIs may relate, and (iv) whether to proceed by way of sealed bid or auction (with or without a stalking horse bidder) with respect to some or all of the Assets (other than the Designated Assets). With respect to the Designated Assets, an auction shall be held in accordance with the auction process set out below (the "Auction") where UrtheCast Group in consultation with the Monitor, determines that one or more, or a combination thereof, of the Qualified Bids constitutes a Superior Bid (as defined below).

19. Upon the determination by UrtheCast Group, in consultation with the Monitor and with the approval of the Monitor, of the manner in which to proceed to Phase 2 of the SISP, UrtheCast Group, in consultation with and with the approval of the Monitor, will prepare a bid process letter for Phase 2 (the "**Bid Process Letter**"), and the Bid Process Letter will be (i) sent by the Monitor to all Phase 2 Qualified Bidders, and (ii) posted by the Monitor on the website the Monitor maintains in respect of this CCAA proceeding.

20. Notwithstanding the process and deadlines outlined above with respect to Phase 1 of the SISP and the process to supplement Phase 2 by way of the Bid Process Letter:

    (a) UrtheCast Group may, at any time bring a motion to seek approval of a stalking horse agreement in respect of some or all of the assets (excluding the Designated Assets) or the UrtheCast Group and related bid procedures in respect of such Assets or to establish further or other procedures for Phase 2; and

    (b) If no Compliant Conflicting Bid is received by UrtheCast Group on or before the Phase 1 Bid Deadline, the Petitioners will promptly bring an application seeking the granting of an order by the Court authorizing the Petitioners to proceed with the sale of the Designated Assets to the Stalking Horse Bidder in accordance with the terms and subject conditions of the Stalking Horse Bid.

## PHASE 2: FORMAL OFFERS AND SELECTION OF SUCCESSFUL BIDDER

21. Paragraphs 22 to 32 below and the conduct of Phase 2 are subject to paragraphs 18, 19, and 20 and any adjustments made to Phase 2 in accordance with the Bid Process Letter and any further Court order regarding the SISP.

### Due Diligence

22. UrtheCast Group in consultation with the Monitor, shall in their reasonable business judgment and subject to competitive and other business considerations, afford each Phase 2 Qualified Bidder (which shall be deemed to include the Stalking Horse Bidder, if the Stalking Horse Bid has not been completed in accordance with paragraph 20(b) or terminated by one of the parties in accordance with its terms) such access to due diligence materials and information relating to the Assets and UrtheCast Group as they deem appropriate. Due diligence access may include management presentations, on-site inspections, and other matters which a Phase 2 Qualified Bidder may reasonably request and as to which UrtheCast Group in their reasonable business judgment and after consulting with the Monitor, may agree. The UrtheCast Group will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Phase 2 Qualified Bidders and the manner in which such requests must be communicated. Neither the UrtheCast Group nor the Monitor will be obligated to furnish any information relating to the Assets or UrtheCast Group to any person other than to Phase 2 Qualified Bidders. Further and for the avoidance of doubt, selected due diligence materials may be withheld from certain Phase 2 Qualified Bidders if UrtheCast Group in consultation with the Monitor, determine such information to represent proprietary or sensitive competitive information.

### Formal Binding Offers

23. Phase 2 Qualified Bidders (other than the Stalking Horse Bidder, which will be deemed to have satisfied this paragraph 23 by delivering a definitive agreement of purchase and sale to effectuate the transactions contemplated by the Stalking Horse Bid, as the same may be amended by the parties thereto) that wish to make a formal offer to purchase or make an investment in UrtheCast Group or its Assets shall submit a binding offer that complies with all of the following requirements prior to the date set out the Bid Process Letter (the "**Phase 2 Bid Deadline**"):

    (a) the bid shall comply with all of the requirements set forth in respect of Phase 1 Qualified LOIs, including without limitation paragraph 14(e);

    (b) the bid (either individually or in combination with other bids that make up one bid) is an offer to purchase or make an investment in some or all of the Assets or UrtheCast Group and is consistent with any necessary terms and conditions communicated to Phase 2 Qualified Bidders;

    (c) the bid includes a letter stating that the Phase 2 Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder (as defined below), provided that if such Phase 2 Qualified Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the transaction with the Successful Bidder;

(d) the bid includes duly authorized and executed transaction agreements, including the purchase price, investment amount and any other key economic terms expressed in Canadian dollars (the "**Purchase Price**"), together with all exhibits and schedules thereto, all applicable ancillary agreements with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such agreements), and proposed order to approve the sale by the Court;

(e) the bid includes written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed transaction, that will allow UrtheCast Group and the Monitor to make a determination as to the Phase 2 Qualified Bidder's financial and other capabilities to consummate the proposed transaction;

(f) the bid is not conditioned on (i) the outcome of unperformed due diligence by the Phase 2 Qualified Bidder, apart from, to the extent applicable, to the disclosure of due diligence materials that represent proprietary or sensitive competitive information which was withheld in Phase 2 from the Phase 2 Qualified Bidder and/or (ii) obtaining financing;

(g) the bid fully discloses the identity of each entity that will be entering into the transaction or the financing (including through the issuance of debt in connection with such bid), or that is participating or benefiting from such bid, and such disclosure shall include, without limitation: (i) in the case of a Phase 2 Qualified Bidder formed for the purposes of entering into the proposed transaction, the identity of each of the actual or proposed direct or indirect equity holders of such Phase 2 Qualified Bidder and the terms and participation percentage of such equity holder's interest in such bid; and (ii) the identity of each entity that has or will receive a benefit from such bid from or through the Phase 2 Qualified Bidder or any of its equity holders and the terms of such benefit;

(h) the bid includes a commitment by the Phase 2 Qualified Bidder to provide a non-refundable deposit in the amount of not less than 10% of the purchase price offered upon the Phase 2 Qualified Bidder being selected as the Successful Bidder and in any event, prior to service of the materials for the Sale Approval Motion (as defined below);

(i) the bid includes acknowledgements and representations of the Phase 2 Qualified Bidder that: (i) the transaction is on an "as is, where is" basis; (ii) it has had an opportunity to conduct any and all due diligence regarding the Assets and UrtheCast Group prior to making its offer (apart from, to the extent applicable, the disclosure of due diligence materials that represent proprietary or sensitive competitive information which were withheld in Phase 2 from the Phase 2 Qualified Bidder); (iii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; and (iv) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Assets, or UrtheCast Group or the completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by UrtheCast Group;

(j) the bid includes evidence, in form and substance reasonably satisfactory to UrtheCast Group, in consultation with the Monitor, of authorization and approval from the Phase 2 Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction agreement(s) submitted by the Phase 2 Qualified Bidder;

(k) the bid contains other information required by UrtheCast Group or the Monitor including, without limitation, such additional information as may be required in the event Phase 2 is supplemented in accordance with paragraph 19 to contemplate that an auction of certain Assets be conducted; and

(l) the bid is received by the Phase 2 Bid Deadline.

24. Following the Phase 2 Bid Deadline, UrtheCast Group in consultation with the Monitor, will assess the Phase 2 bids received. UrtheCast Group, in consultation with the Monitor, will designate the most competitive bids that comply with the foregoing requirements to be "**Qualified Bids**". No Phase 2 bids received shall be deemed not to be Qualified Bids unless the Monitor so approves. Only Phase 2 Qualified Bidders whose bids have been designated as Qualified Bids are eligible to become the Successful Bidder(s).

25. The Monitor shall notify each Phase 2 Qualified Bidder in writing as to whether its bid constituted a Qualified Bid within three (3) business days of the Phase 2 Bid Deadline, or at such later time as UrtheCast Group in consultation with the Monitor, deem appropriate.

26. UrtheCast Group may, in consultation with the Monitor, aggregate separate bids from unaffiliated Phase 2 Qualified Bidders (if, and only if, such aggregation is reasonably practicable to effect a transaction without overlap) to create one "Qualified Bid".

**Evaluation of Competing Bids**

27. A Qualified Bid will be evaluated based upon several factors, including, without limitation, items such as the Purchase Price and the net value provided by such bid, the claims likely to be created by such bid in relation to other bids, the identity, circumstances and ability of the Phase 2 Qualified Bidder to successfully complete such transactions, the proposed transaction documents, the effects of the bid on the stakeholders of UrtheCast Group, factors affecting the speed, certainty and value of the transaction (including any regulatory approvals or third party contractual arrangements required to close the transactions), the Assets included or excluded from the bid, any related restructuring costs, and the likelihood and timing of consummating such transactions, each as determined by UrtheCast Group and the Monitor.

28. A Qualified Bid will be deemed a Superior Bid where a credible, unconditional and financially viable third party offer, or combination of offers for (A) the acquisition of all, substantially all or certain of the Designated Assets; or (B) an investment, restructuring, recapitalization, refinancing or other reorganization of the UrtheCast Group, the terms of which offer are no less favourable and no more burdensome or conditional than the terms contained in the Stalking Horse Asset Purchase Agreement, and which at a minimum, alone, or in a combination with other offers, includes:

(a) a payment in cash in excess of CAD $250,000 of the aggregate of the total consideration payable pursuant to the Stalking Horse APA, being CAD $69.3 million;

(b) a payment in cash in the amount necessary to fully pay the Stalking Horse bidder's break fee and expense reimbursement together with any CCAA priority amounts owing, including any interim financing obligations as at the closing of such transaction; and

(c) a payment in cash of all priority charges and an assumption of liabilities to satisfy and payment of all cure costs required to the closing of such transaction.

**Selection of Successful Bid**

29. UrtheCast Group, in consultation with the Monitor, (a) will review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated between UrtheCast Group, in consultation with the Monitor, and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations, and (b) identify the highest or otherwise best bid (the "**Successful Bid**"), and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") for any particular Assets or UrtheCast Group, in whole or part. UrtheCast's determination of any Successful Bid, with the assistance of the Monitor, shall be subject to approval by the Court and in the case of the Designated Assets, where the Successful Bid constitutes a Superior Bid, the UrtheCast Group will proceed to an auction (the "Auction").

30. For certainty, notwithstanding the process and deadlines outlined above with respect to Phase 2 of the SISP, if no binding offer for a Compliant Conflicting Bid is received by UrtheCast Group during Phase 2 on or before the Phase 2 Bid Deadline, then the Petitioners will promptly bring an application seeking the granting of an order by the Court authorizing the Petitioners to proceed with the sale of the Designated Assets to the Stalking Horse Bidder in accordance with the terms and subject conditions of the Stalking Horse Bid. UrtheCast Group shall have no obligation to enter into a Successful Bid (excluding the Stalking Horse Bid, if applicable), and it reserves the right, after consultation with the Monitor to reject any or all Phase 2 Qualified Bids.

**Auction**

31. The Auction shall run in accordance with the following procedures, which may be modified by the UrtheCast Group in its discretion, after consultation with the Monitor:

(a) prior to the Auction Monitor shall have identified the Superior Offer and all bidding at the Auction shall be irrevocably made on the terms of the Superior Offer, except for price/investment amount and certain other identified business terms;

(b) the Monitor will provide to all Qualified Bidders the material terms and conditions of the Superior Offer (the "**Starting Bid**") and each Qualified Bidder must inform the UrtheCast Group whether it intends to participate in the Auction (the parties who so inform the UrtheCast Group, that they intend to participate are the "**Auction Bidders**");

(c) Only representatives of the Auction Bidders, the UrtheCast Group, the Monitor, the DIP Lenders and such other persons permitted by the UrtheCast Group and the Monitor (and the advisors to each of the foregoing) are entitled to attend the Auction;

(d) At the commencement of the Auction, each Auction Bidder shall be required to confirm that it has not engaged in any collusion with any other Auction Bidder to detrimentally affect the price for any sale;

(e) Only the Auction Bidders will be entitled to make any Subsequent Bids (as defined herein);

(f) All Subsequent Bids presented during the auction shall be made and received in one room on an open basis. All Auction Bidders will be entitled to be present for all Subsequent Bids at the Auction with the understanding that the true identity of each Auction Bidder at the Auction will be fully disclosed to all other Auction Bidders at the Auction and that all material terms of each Subsequent Bid will be fully disclosed to all other Auction Bidders throughout the entire Auction;

(g) All Auction Bidders must have at least one individual representative with authority to bind such Auction Bidder present in person at the Auction;

(h) The UrtheCast Group, after consultation with the Monitor, may employ and announce at the auction additional procedural rules that are reasonable under the circumstances, (e.g. the amount of time allotted to make Subsequent Bids, requirement to bid in each round, and the ability of multiple Auction Bidders to combine to present a single bid) for conducting the auction, provided that such rules are (i) not inconsistent with any applicable law, and (ii) disclosed to each Auction Bidder at the auction;

(i) Bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by an Auction Bidder (a "**Subsequent Bid**") that the UrtheCast Group determines, after consultation with the Monitor, is (A) for the first round, a higher or otherwise better offer than the Starting Bid, and (B) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (as defined herein); in each case by at least the Minimum Incremental Overbid. Each bid at the auction shall provide net value to the UrtheCast Group of at least CAD $100,000 (the "**Minimum Incremental Overbid**") over the Starting Bid or the Leading Bid (as defined herein), as the case may be; provided however that the UrtheCast Group, after consultation with the Monitor, shall retain the right to modify the incremental requirements at the Auction and provided further that the UrtheCast Group, in determining the net value of an incremental bid, shall not be limited to evaluating the incremental dollar value of such bid and may consider other factors. After each Subsequent Bid, the UrtheCast Group shall, after consultation with the Monitor, announce whether such bid (including the value and material terms thereof) is higher or otherwise better than the prior bid (the "**Leading Bid**"). A round of bidding will conclude after each Auction Bidder has the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid;

(j) If, in any round of bidding, no new Subsequent Bid is made that becomes a Leading Bid, the Auction shall be closed;

(k) The Auction shall be closed by midnight on the day of the Auction unless extended for a further 24 hour period by the UrtheCast Group with the approval of the Monitor;

(l) No bids (from Auction Bidders or otherwise) shall be considered after the conclusion of the Auction; and

(m) At the close of the Auction, the Monitor shall identify the winning bid (the "**Auction Successful Bid**"). At the conclusion of the Auction, the Monitor will notify the other bidders of the identities of the bidders of the Auction Successful Bid. (n) following conclusion of the Stalking Horse Scenario Auction, the UrtheCast Group, with the assistance of the Monitor, may finalize a definitive agreement or agreements in respect of the Stalking Horse Auction Successful Bid and the Stalking Horse Auction Backup Bid, respectively, if any, conditional upon approval of the Court.

32. All other bids received at the Auction shall be deemed rejected on the earlier of: (i) the date of closing of the Auction Successful Bid, and (ii) confirmation from the Monitor that the bid has been rejected.

**Sale Approval Motion Hearing**

33. At the hearing of the motion to approve any transaction with a Successful Bidder (which would include the Stalking Horse Bidder in the circumstances contemplated by paragraphs 20(b) or 29 (the "**Sale Approval Motion**"), UrtheCast Group shall seek, among other things, approval from the Court to consummate any Successful Bid. All the Phase 2 Qualified Bids other than the Successful Bid, if any, shall be deemed rejected by UrtheCast Group on and as of the date of approval of the Successful Bid by the Court.

**Confidentiality, Stakeholder/Bidder Communication and Access to Information**

34. All discussions regarding an LOI, Sale Proposal or Investment Proposal must be directed through the Monitor. Under no circumstances should the management of the UrtheCast Group or any stakeholder of UrtheCast Group be contacted directly without the prior consent of the Monitor. Any such unauthorized contact or communication could result in exclusion of the interested party from the SISP process.

35. Participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Phase 1 Qualified Bidders, LOIs, Phase 2 Qualified Bidders, Phase 2 Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between UrtheCast Group, the Monitor and such other bidders or Potential Bidders in connection with the SISP, except to the extent UrtheCast Group with the approval of the Monitor and consent of the applicable participants, are seeking to combine separate bids from Phase 1 Qualified Bidders or Phase 2 Qualified Bidders.

**Supervision of the SISP**

36. The participation of UrtheCast Group in the SISP will be directed by UrtheCast Corp.'s board of directors.

37. The Monitor will participate in the conduct of the SISP in the manner set out in this SISP Process Outline and the Initial Order and is entitled to receive all information in relation to the SISP.

38. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between UrtheCast Group and any Phase 1 Qualified Bidder, any Phase 2 Qualified Bidder (other than the Stalking Horse Bidder) or any other party, other than as specifically set forth in a definitive agreement that may be signed with UrtheCast Group.

39. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any LOI, Phase 2 bid, due diligence activities, and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

40. UrtheCast Group shall have the right to modify the SISP (including, without limitation, pursuant to the Bid Process Letter) provided always that the outside date for closing a transaction of purchase and sale of the Designated Assets will only be amended with the written consent of the Stalking Horse Bidder) with the prior written approval of the Monitor if, in their reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP; provided that the Service List in this CCAA proceeding shall be advised of any substantive modification to the procedures set forth herein.

## Schedule "1"

## Address for Submitting LOIs and Phase 2 Bids

**Bennett Jones LLP**
666 Burrard St
Suite #2500
Vancouver, BC V6C 2X8

Fax: •
Attn : •

**Ernst & Young Inc.**
700 West Georgia Street
Vancouver, BC V7Y 1C7

Fax: •
Attn : Mr. Philippe Mendelson, Vice President

## Schedule "D" – Stalking Horse Bid

DELIVERED BY EMAIL

October 13, 2020

URTHECAST CORP.
Unit 33-1055 Canada Place
Vancouver, BC V6C 0C3

Attention: Mr. Don Osborne
Director & Chief Executive Officer

- and to -

ERNST & YOUNG INC., as Monitor
700 West Georgia Street
Vancouver, BC V7Y 1C7

Attention: Mr. Mike Bell
Senior Vice President

Dear Sirs:

**Re: Stalking Horse Bid Letter for UrtheDaily Constellation and UrtheCast Pipeline**

This letter of intent, including the term sheet attached hereto as Exhibit "A" (the "Acquisition Term Sheet"), confirms our mutual understanding regarding the proposed material terms and conditions upon which Antarctica Infrastructure Partners, LLC ("Antarctica"), through its wholly-owned subsidiary 1269336 B.C. Ltd. and/or one or more special purpose entities affiliated with Antarctica (in any case, "Bidco"), is prepared to acquire (the "Proposed Transaction") from UrtheCast Corp., an Ontario corporation ("UrtheCast") and/or certain of UrtheCast's direct and indirect subsidiaries (together with UrtheCast, the "Sellers"), all of the assets and certain liabilities of the UrtheDaily Constellation project[1] and the UrthePipeline[2] product offering (together, the "Acquired Business"), including, without limitation, the assets set forth in Schedule "A" to the Acquisition Term Sheet (collectively, the "Acquired Assets"), in connection with a filing by the Sellers and certain of their affiliates made under the *Companies Creditors' Arrangement Act* (Canada) ("CCAA"). The Proposed Transaction will be subject to Sellers' undertaking a competitive process on the terms and conditions set out in a Sale and Investment Solicitation Process ("SISP") on terms agreed to by UrtheCast's board of directors (the "Board"), UrtheCast, Ernst & Young Inc., as CCAA monitor (the "Monitor") and the Supreme Court of British Columbia (the "Court"), and provided by UrtheCast to Antarctica and approved by the Court. The form of SISP that UrtheCast will present to the Court for approval for

[1] As that term is used in UrtheCast's annual information form dated May 4, 2020, and including all related assets, contracts, intellectual property, software, books and records and employees that are owned by the Sellers (or any of them) and that are reasonably necessary to design, complete, finance, launch and operate the UrtheDaily Constellation.
[2] As that term is used in UrtheCast's annual information form dated May 4, 2020, and including all related assets, products, contracts, intellectual property, software, books and records and employees that are owned by the Sellers (or any of them) and that are reasonably necessary to design, complete, finance, launch and operate the UrthePipeline ground segment systems.

such purpose is attached hereto as Exhibit "A." The execution and delivery of the Purchase Agreement by Antarctica and Bidco, and the execution and delivery by the Antarctica DIP Lender (as defined below) of the AC DIP Loan (as defined below) shall be subject to Antarctica's satisfaction with the form of the SISP that is approved by the Court.

In addition, conditional upon obtaining approval of this letter of intent by the Board, the Monitor, and the Court, Antarctica, through one and/or one or more other special purpose entities ("Antarctica DIP Lender"), will agree to participate in an interim senior secured financing (the "AC DIP Loan") on the terms set forth in the term sheet attached hereto as Exhibit "B" (the "AC Interim Financing Term Sheet"). Subject to the terms and conditions set forth in the AC DIP Loan, the Antarctica DIP Lender will make available to UrtheCast up to CAD$3,548,000 to fund the Sellers' requirements in accordance with the Agreed Weekly Budgets (as defined in the AC Interim Financing Term Sheet, which will include (a) any amounts owing to 1262743 B.C. LTD. under a DIP Facilities Loan Agreement made between 1262743 B.C. LTD, UrtheCast and certain affiliates of UrtheCast, approved by the Court on October 2, 2020, and (b) UrtheCast's forecast operating cash requirements for the period from the Closing Date (as defined below) to January 15, 2021) and the Third DIP Order (as defined in the AC Interim Financing Term Sheet), each of which shall be in form and substance satisfactory to the Lender.

**About Antarctica Capital**

Antarctica Infrastructure Partners, LLC is an affiliate of Antarctica Capital, LLC (together with its affiliates, "Antarctica Capital"). Antarctica Capital is a global alternative investment manager with operations in the United States, United Kingdom, and India. Antarctica Capital is a SEC registered investment adviser with a primary focus upon real assets and has assets under management in excess of USD$2 billion. Antarctica Capital's objective is to offer its investors transaction opportunities that are either off-market or require a particular set of expertise and relationships not readily available to others. This approach often leads our team towards path-breaking investment strategies or overlooked companies and assets that can be enhanced through operational transformation or consolidation strategies. Antarctica Capital has integrated investment and operating teams that permits us to take an "owner/operator" approach to our investments. Antarctica Capital remains heavily involved and embedded in shaping the direction and transformation of portfolio companies and assets. Our holistic investment approach with its emphasis on instilling strong oversight, financial discipline, technology, operational consulting, capital structure, and optimization of management and the workforce, helps to maximize value through the investment lifecycle.

We believe that the Proposed Transaction will be in the best interests of the Sellers and their respective stakeholders, including their creditors, employees, suppliers and customers, as well as the Government of British Columbia and the Government of Canada. We also believe our proposal will provide an opportunity for the Acquired Business to continue as going concerns, while facilitating completion of UrtheCast's other restructuring efforts and offering the maximum recovery for the Sellers' creditors.

**Overview of the Proposed Transaction**

The terms and conditions set forth in this letter of intent, including the Exhibits attached hereto, are not intended to be comprehensive and if, in the course of Bidco's ongoing due diligence investigations or the parties' ongoing development of the proposed acquisition structure and related negotiations, Bidco or Sellers determine that additional or modified terms and

conditions are necessary or advisable, then the parties reserve the right to address such matters, either by amending this letter of intent or by reflecting such additional or modified terms in any definitive purchase agreement (the "Purchase Agreement") that may be entered into between the parties in connection with the Proposed Transaction.

1. Terms of Proposed Transaction. Under our proposal, Bidco would purchase and acquire the Acquired Assets, and assume certain liabilities of Sellers, on the terms and subject to the conditions identified in the Acquisition Term Sheet, and as will be set out more particularly in the Purchase Agreement.

2. Sale Procedures. We understand that the Proposed Transaction will be subject to Sellers undertaking a competitive bid process which has been designed by UrtheCast and the Monitor to maximize value for Sellers and their stakeholders. Our proposal is conditional upon the Proposed Transaction being approved as the stalking horse bid for the Acquired Assets, on the terms and conditions set forth in the Acquisition Term Sheet, the SISP and the Amended and Restated Initial Order (as defined below).

3. Amended and Restated Initial Order. Our proposal is also contingent upon each of the Acquisition Term Sheet, the SISP and the AC Interim Financing Term Sheet being approved by the Court pursuant to a further modification to the initial order issued on September 4, 2020 by the Court in Vancouver Registry Action No. VLC-S-S208894, as modified by the amended and restated initial orders of the Court dated September 14, 2020, September 23, 2020 and October 2, 2020 (as modified to date and as contemplated to be modified pursuant to this letter of intent, the "Amended and Restated Initial Order"), and which Amended and Restated Initial Order shall otherwise be in form and substance acceptable to Bidco in its sole and absolute discretion.

4. Antarctica DIP Lender. In connection with the execution and delivery of this letter of intent, and subject to Antarctica DIP Lender being approved as an Interim Lender pursuant to the Amended and Restated Initial Order, Antarctica DIP Lender will enter into the AC Interim Financing Term Sheet.

5. Purchase Agreement. As soon as reasonably practical after execution of this letter of intent, the parties will commence negotiations of a definitive binding Purchase Agreement. The Purchase Agreement will be negotiated in good faith, will be subject to the mutual satisfaction of Bidco and Sellers and will contain terms and conditions consistent with those set forth in the Acquisition Term Sheet and other terms and conditions customary for transactions of this nature. Each party's obligations under this letter of intent are subject to its execution and delivery of a Purchase Agreement that is satisfactory to such party.

6. Public Announcements. None of UrtheCast, the other Sellers, Antarctica or Bidco shall make public announcements or public statements concerning the Proposed Transaction, unless such public announcement or public statement is jointly approved by all of UrtheCast, the other Sellers and Antarctica. In the event, however, that the parties are unable to agree on a public announcement or public statement at any time, and UrtheCast determines, after consultation with its legal counsel, that a public announcement or public statement is required by law at such time, then UrtheCast may issue such public statement or public announcement; provided that UrtheCast shall not identify Antarctica Capital in any public announcement or public statement without obtaining Antarctica Capital's prior written consent and UrtheCast gives the other parties advance notice of such public statement or public announcement, and an opportunity to provide comments, to the extent

practicable.

7. Designated Bidcos. Antarctica shall be entitled to designate one or more entities formed by Antarctica or its affiliates (including Bidco) to purchase specified assets (from among the Acquired Assets, as such term is defined below), to assume specified liabilities (from among the Assumed Liabilities, as such term is defined below), to perform any of the other covenants and agreements to be performed by Bidco under the Purchase Agreement and to have the rights and benefits of Bidco thereunder; provided, however, that Antarctica shall be a party to the Purchase Agreement and shall guarantee any and all obligations to the Sellers of such entities so designated by Antarctica.

8. Expense Reimbursement. The Purchase Agreement will provide that, subject to funds being available to UrtheCast under the AC DIP Loan, within three days of completion of the Proposed Transaction, UrtheCast will reimburse Antarctica for its out-of-pocket expenses (including the fees, disbursements and taxes of its professional advisors, McCarthy Tétrault LLP, Argosat Consulting LLC and KPMG LLP), not to exceed CAD$1.0 million in the aggregate incurred in connection with its due diligence investigations, structuring discussions and negotiations with UrtheCast and preparing this letter of intent, the AC DIP Loan and the Purchase Agreement.

9. Governing Law. This letter of intent, and any questions, claims, disputes, remedies or actions arising from or related to this letter of intent, and any relief or remedies sought by any party to this letter of intent, shall be governed exclusively by the laws of the Province of British Columbia and the laws of Canada applicable therein without regard to the rules of conflict of laws applied therein or any other jurisdiction.

Other than paragraph **Error! Reference source not found.**, 8 and **Error! Reference source not found.**, which are binding on the parties, this letter of intent is not intended and does not create any binding legal obligation on the part of any of UrtheCast, Antarctica, or Sellers. This letter of intent is subject to the confidentiality agreement dated June 24, 2020 made between UrtheCast and SIGA II, LLC an affiliate of Antarctica, is not intended and does not create any binding legal obligation on the part of UrtheCast, Antarctica, or Sellers to enter into any Purchase Agreement. Entering into any binding Purchase Agreement remains subject to, among other things, Antarctica's satisfactory completion of its remaining due diligence investigations, finalizing the parties' structuring discussions, negotiation of mutually acceptable definitive terms of a Purchase Agreement, obtaining approvals by the boards of directors (or similar governance bodies) of each of Antarctica, UrtheCast and the other Sellers, and obtaining approval of the Monitor

*** [The next page is the signature page] ***

If you are in agreement with the foregoing, please execute a copy of this letter and return to me.

Yours truly,

**ANTARCTICA INFRASTRUCTURE PARTNERS, LLC**

By: _____

Name:
Title:

The foregoing is Accepted and Agreed by each of the undersigned as of this ____ day of October, 2020:

**URTHECAST CORP.**

By: _____

Name:
Title:

**1185729 B.C. LTD.**

By: _____

Name:
Title:

**1185781 B.C. LTD.**

By: _____

Name:
Title:

## Exhibit "A"

## Acquisition Term Sheet

This term sheet (the "Acquisition Term Sheet") sets forth a summary of certain terms for a proposed definitive "stalking horse" acquisition agreement (the "Purchase Agreement") to be entered into between Antarctica Infrastructure Partners, LLC ("Antarctica"), 1269336 B.C. Ltd. and/or one or more special purpose entities (in any case, "Bidco") to be formed by Antarctica and UrtheCast Corp. ("UrtheCast") and/or certain of UrtheCast's direct and indirect subsidiaries (together with UrtheCast, the "Sellers"), in connection with a filing in the British Columbia Supreme Court (the "Court") (as Vancouver Registry Action No. VLC-S-S208894) by the Sellers and certain of their affiliates (the "Applicants") under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA").

This Acquisition Term Sheet is not intended and does not create any binding legal obligation on the part of either Bidco or Sellers. No legal obligation to negotiate, enter into or consummate any transaction will exist, unless and until the Purchase Agreement has been entered into by the parties, which is subject to board approval by Bidco and Sellers, satisfactory completion of confirmatory due diligence, and negotiation of final documentation. The terms and conditions set forth in this Acquisition Term Sheet are not intended to be comprehensive and if, in the course of Bidco's due diligence review or development of the proposed acquisition structure, or in the course of negotiations, Bidco or Sellers determine that additional terms and conditions, or modification to the terms and conditions set out herein, are necessary, then the parties reserve the right to address such matters.

This Acquisition Term Sheet is attached as Exhibit "A" to a letter of intent between Antarctica and the Sellers (the "Letter of Intent"). Capitalized terms used but not otherwise defined in this Acquisition Term Sheet have the meaning given to those terms in the Letter of Intent.

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| Transaction Structure: | The Proposed Transaction would be structured as a sale of assets, which may include the acquisition of all of the outstanding shares in the capital of one or more of the Sellers or other direct or indirect subsidiaries of UrtheCast, and certain of the liabilities of the Sellers. |
| Acquired Assets: | At the closing of the Proposed Transaction (the "Closing"), Bidco will acquire all of the assets, contracts, intellectual property, inventory, software, books and records comprising the UrthePipeline product offering and all of the assets, contracts, intellectual property, inventory, software, books and records that are owned by the Sellers (or any of them) and that are reasonably necessary to design, finance, complete, launch, own and operate the UrtheDaily Constellation project (collectively, the "Acquired Assets"). The Acquired Assets will include, without limitation, the assets described in the attached Schedule "A" titled "Purchased Assets" and:<br>(1) all of the equity interests of Sellers in:<br>a. 1185729 B.C. Ltd.<br>b. 1185781 B.C. Ltd.<br>c. GEOSYS U.S. ULC |

d. Geosys International Inc.
e. Geosys Brasil Ltd.
f. GEOSYS S.A.S.
g. GEOSYS Australia Pty.
h. GEOSYS Europe SARL

(collectively, the "Acquired Entities");

(2) all right, title and interest of UrtheCast and all of its affiliates in the Purchase and Sale Agreement dated November 6, 2018 (the "GEOSYS Purchase Agreement") made between Land O' Lakes, Inc. ("Land O'Lakes"), UrtheCast Corp. and 1185781 B.C. Ltd.;

(3) all right, title and interest of UrtheCast and all of its affiliates in each of the following agreements (collectively, the Subscription Agreements"):

a. UrtheDaily Constellation Subscription Purchase Agreement dated September 20, 2018 between Remote Sensing Inc. and UrtheCast;

b. UrtheDaily Constellation Subscription Purchase Agreement dated October 17, 2018 between TerraTech SAC and UrtheCast; and

c. Long Term License and Services Agreement dated January 14, 2019 between UrtheCast, Deimos Imaging SLU, GEOSYS SAS and Winfield Solutions, LLC;

(4) all equipment and tangible property of Sellers, including inventory, raw materials and work in process, to the extent they are directly related to, or required to complete and operate, the UrtheDaily Constellation and/or the UrthePipeline services segment;

(5) all contracts (other than disclaimed contracts) of Sellers, to the extent they are directly related to, or required to complete and operate, the UrtheDaily Constellation and/or the UrthePipeline services segment;

(6) all permits, licenses, leases, patents, trademarks held by Sellers, to the extent assignable, that are directly related to, or required to complete and operate, the UrtheDaily Constellation and/or the UrthePipeline;

(7) all rights, options, claims and causes of action, to the extent they are directly related to, or required to complete and operate, the UrtheDaily Constellation and/or the UrthePipeline; and

(8) all real property, fixtures and leases or other rights to the extent they are directly related to, or required to

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| | complete and operate, the UrtheDaily Constellation and/or the UrthePipeline. |
| Assumption of Liabilities: | The following liabilities, and only the following liabilities, will be assumed by Bidco at Closing:<br>(1) Assumption of UrtheCast's obligations under the GEOSYS Purchase Agreement to pay approximately CAD$17.8 million[3] in respect of the final installment payable to Land O' Lakes thereunder of approximately CAD$2.7 million[4] of accrued past due expenses, provided that Bidco shall have received from Land O' Lakes satisfactory waiver of any and all prior defaults under the GEOSYS Purchase Agreement and assurances from Land O' Lakes that the completion of the Proposed Transaction will not affect completion of the transfer of IP rights thereunder; and<br>(2) Assumption of approximately CAD$11.7 million[5] of SADI unsecured indebtedness, provided that Bidco shall have received satisfactory assurances from the government agencies under which the UrtheCast obtains low-interest loans that the completion of the Proposed Transaction will not affect the continued availability of future funding thereunder, as well as completion of the CAD$40,000,000 loan contemplated by the letter of May 15, 2020 from Innovation, Science and Economic Development Canada and that the related funding agreements remain in good standing at Closing. |
| Purchase Price: | In consideration for the Acquired Assets, Bidco will pay consideration having an aggregate value of CAD$69.3 million[6] (the "Purchase Price"), which will be comprised of the following components and payable as follows:<br>(1) CAD$1,000,000 (the "Cash Purchase Price"), CAD$500,000 of which will be payable to the Monitor, in trust, as a deposit (the "Deposit")[7] upon the parties' execution and delivery of the Purchase Agreement and the remaining CAD$500,000 (the "Final |

[3] Number to be updated prior to signing the Purchase Agreement.
[4] Number to be updated prior to signing the Purchase Agreement.
[5] Number to be updated prior to signing the Purchase Agreement.
[6] Number to be updated prior to signing the Purchase Agreement.
[7] Bidco shall have the option, in its sole discretion, to satisfy all or part of the Deposit by forgiving all or a portion (but in an equal amount) of any amount owing to the AC DIP Lender for advances made to UrtheCast under the AC DIP Loan prior to Bidco's execution and delivery of the Purchase Agreement.

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| | Payment") will be payable at closing of the Proposed Transaction (the "Closing");[8]<br><br>(2) Assumption of UrtheCast's obligations to pay approximately CAD$20.5 million[9] in respect of the sum of the final installment payable to Land O' Lakes thereunder and the aggregate amount of UrtheCast's accrued past due expenses owing to Land O'Lakes, provided that Bidco shall have received from Land O' Lakes satisfactory waiver of any prior defaults under the GEOSYS Purchase Agreement and assurances from Land O' Lakes that the completion of the Proposed Transaction will not affect completion of the transfer of IP rights thereunder;<br><br>(3) As consideration for the purchase of the Secured Debt (as defined below) Bidco will issue to UrtheCast, for the benefit of the Secured Lenders (as defined below), 35% of Bidco's non-voting equity as of the date of Closing (the "Closing Date"), which would be governed by a shareholders and/or limited partnership agreement (in any case, a "Shareholders Agreement"), providing for governance and minority approval rights, pre-emptive rights, mandatory dilution for any non-participation in the equity component of the project financing raised to develop and launch the Project (Antarctica to finance a material portion of the costs for completing the Project) and other customary provisions.<br><br>If and to the extent that UrtheCast determines to distribute any Bidco equity to its securityholders, such distribution will be conditional upon each recipient signing a joinder to the Shareholders Agreement, in form satisfactory to Antarctica. For purposes of this letter agreement, "Secured Debt" means the approximately CAD$36.1 million[10] of principal and accrued and unpaid interest and all other amounts owing to Bolzano Investments Limited, Lunar Ventures Inc., SMF Investments Limited, Skidmore Group and each of Messrs. Don Osborne, Sai Chu, William Evans, James Topham, and Mark Piegza (collectively, the "Secured Lenders").<br><br>Prior to the parties' execution of the Purchase Agreement, certain of the Secured Lenders (being |

[8] Bidco shall have the option, in its sole discretion, to satisfy all or part of the Final Payment by forgiving all or a portion (but in an equal amount) of any amount owing to the AC DIP Lender for advances made to UrtheCast under the AC DIP Loan prior to the Closing.

[9] Number to be updated prior to signing the Purchase Agreement.

[10] Number to be updated prior to signing the Purchase Agreement.

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| | Bolzano Investments Limited, Lunar Ventures Inc., SMF Investments Limited and all or most of Messrs. Don Osborne, Sai Chu, William Evans, James Topham and Mark Piegza) will enter into a Support Agreement with the Sellers, Antarctica and Bidco, confirming their support for the completion of the Proposed Transaction; and<br><br>(4) Assumption of SADI indebtedness of approximately CAD$11.7 million[11], as described above under "Assumption of Liabilities." |
| Deposit: | The Deposit (if any)[12] shall be payable by Bidco or an affiliate thereof to the Monitor, in trust, upon the parties' execution and delivery of the Purchase Agreement.<br><br>The Purchase Agreement will provide that: (a) if the Proposed Transaction closes, the Deposit and any accrued interest thereon shall be released by the Monitor at Closing and applied as partial satisfaction of the Cash Purchase Price; (b) if the Purchase Agreement is terminated by UrtheCast as a result of a material breach by Bidco or any of its affiliates that would prevent the satisfaction of the closing conditions in the Purchase Agreement prior to the Outside Date, and such material breach is not cured within five business days, the full amount of the Deposit together, with any accrued interest earned thereon, shall be released by the Monitor to the Sellers, to become the absolute property of the Sellers as liquidated damages (and not as a penalty) and as the Sellers' sole rights and remedy pursuant to the Purchase Agreement; and (c) if the Purchase Agreement is terminated for any other reason, the Deposit, together with any interest accrued thereon, shall be returned to Bidco. |
| Representations and Warranties: | Representations and warranties given by Sellers and Bidco will include fundamental representations and warranties (valid existence, due authorization, title to assets, validity of permits etc.), and, in the case of Sellers, the absence of a material adverse change with respect to the Acquired Businesses or a material breach or default under material contracts and operating representations and warranties that are customarily provided in a stalking horse bid purchase agreement for a company in CCAA and, in the case of Bidco, (i) the Proposed Transaction is on an "as is, where is" basis; (ii) it has had an opportunity to conduct any and all due diligence regarding the Acquired Assets and the Sellers prior to making its offer; (iii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Acquired Assets in making its bid; and |

[11] Number to be updated prior to signing the Purchase Agreement.
[12] See footnote #11.

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| | (iv) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Acquired Assets, or the Sellers or the completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by the Sellers. |
| Operation of the Business Prior to Closing: | Sellers will agree to customary operating covenants, including an agreement to continue operations in the normal course, *provided that* Sellers will not enter into, terminate, disclaim or materially amend any contract, terminate or fail to renew any license or hire or terminate any executive without obtaining Bidco's prior written consent.<br><br>Sellers also agree to provide weekly operating updates as well as daily cash balances and working capital updates, including rolling monthly cash flow forecasts. |
| Employees: | No decisions relating to employees that are material to the business, including dealing with furloughed employees, unions and collective bargaining arrangements, and any changes to employee compensation arrangements (including changes approved by the Court as part of the CCAA process) shall be made without prior approval of Bidco, such approval not to be unreasonably withheld.<br><br>Subject to the foregoing, Bidco anticipates that it will offer employment to certain employees of Sellers to be identified by Bidco, on terms and conditions of employment (or continued terms and conditions of employment) acceptable to Bidco. |
| Conditions to Closing: | The parties' obligations under the Purchase Agreement will be subject to the following conditions:<br><br>(1) an Order shall be issued by the Court approving the Proposed Transaction pursuant to the SISP and shall have become a final Order;<br><br>(2) a Sale Approval and Vesting Order shall be issued by the Court in form and substance satisfactory to Bidco, and shall have become a final Order;<br><br>(3) receipt of all required third party consents and regulatory approvals to complete the transfer of the Acquired Assets to Bidco, including under applicable competition and foreign investment laws;<br><br>(4) absence of laws or court orders prohibiting the transaction;<br><br>(5) all indebtedness of all of the Acquired Entities will be extinguished on or prior to the Closing, other than any obligations expressly assumed by Bidco pursuant to |

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| | the Purchase Agreement, to the satisfaction of Bidco, acting reasonably; and<br>(6) certain key employees for the Project to be identified in the Purchase Agreement will have accepted offers of employment.<br>The conditions to Bidco's obligation to consummate the Proposed Transaction would also include:<br>(1) accuracy of Sellers' representations and warranties in all material respects;<br>(2) absence of a Material Adverse Change with respect to the Acquired Business, measured from the date of the Purchase Agreement;<br>(3) receipt of all consents and other approvals required to effect the Proposed Transaction (to the extent that the transfer of any contracts, licenses or permits are not effected through the CCAA process without consent separately being needed); and<br>(4) receipt of all required permits and approvals to operate the business after the Closing, including the transfer and assignment of licenses, permits, etc. to Bidco.<br>Notwithstanding any timeline established under the SISP, the Closing Date for the transactions contemplated by the Purchase Agreement shall be as soon as practicable after all of the conditions to closing have been satisfied or waived. |
| Termination Rights: | Each of the parties would be entitled to terminate the Purchase Agreement if:<br>(1) the Closing Date does not occur on or before November 30, 2020 or, if the Closing has been delayed solely as a result of an auction involving the Acquired Business in accordance with the requirements of the SISP, December 18, 2020, or such other date as may be agreed between all of the parties to the Purchase Agreement (in any case, the "Outside Date");<br>(2) the Court, or other court or governmental authority, takes action to restrain, enjoin or otherwise prohibit the transfer of the Acquired Assets to Bidco which is not capable of appeal;<br>(3) Bidco is not the successful bidder chosen as a result of the SISP; or<br>(4) the Court does not approve the sale of the Acquired Assets to Bidco on the terms set out in the Purchase Agreement or approves an alternative transaction. |
| | Bidco would also be entitled to terminate the Purchase Agreement if: |

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| | • Land O' Lakes or any of the Sellers terminates the GEOSYS Purchase Agreement or the Winfield Long Term License and Services Agreement;<br>• UrtheCast, any of the Sellers or the Sellers' counterparties to the Subscription Agreements terminate any of the Subscription Agreements;<br>• in the event that Antarctica DIP Lender enters into the AC Interim Financing Term Sheet, any unwaived or uncured event of default occurs under the AC Interim Financing Term Sheet;<br>• the CCAA proceeding is terminated or a trustee in bankruptcy or receiver is appointed, and such trustee in bankruptcy or receiver refuses to proceed with the transactions contemplated by the Purchase Agreement;<br>• Sellers breach the Purchase Agreement and fail to cure; or<br>• either (a) the Sellers or their affiliates request or (b) the Court approves any amendments or modifications to the SISP that materially adversely affects the interests of the AC DIP Lender under the AC DIP Loan or of Bidco in respect of the Proposed Transaction |
| Break-Up Fee and Expense Reimbursement: | If the Purchase Agreement is terminated as a result of Bidco not being a successful bidder under the SISP, the Sellers shall pay Bidco a termination fee equal to 2% of the Purchase Price.<br><br>If the Purchase Agreement is terminated (except for any termination by the Sellers following a material breach by Bidco) and either a Successful Bid (as defined in the SISP) or any other sale of assets or any plan in the CCAA proceeding is completed within six months of such termination (in any case, an "Alternate Transaction"), and such Alternate Transaction results in the Sellers or any of them, or their respective stakeholders, receiving any cash at closing of such Alternate Transaction:<br>(1) UrtheCast shall promptly reimburse all reasonable third-party expenses incurred by Bidco after the signing of the Letter of Intent, if and to the extent related to the Purchase Agreement and the SISP, subject to a cap of $1.0 million; and<br>(2) UrtheCast shall pay a Break-Up Fee in an amount equal to 3.0% of the aggregate value of the consideration to be received by the Applicants and their stakeholders pursuant to the Alternate Transaction, subject to a cap of $1.5 million,<br>in each case, upon the closing of such Alternate Transaction. |

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| Limitation of Liability: | If the Purchase Agreement is terminated for Bidco breach, Sellers' sole remedy will be liquidated damages in an amount equal to 10% of the Cash Purchase Price. |
| Not a Back-Up Bid: | Bidco's bid will not be deemed to be a "Back-Up Bid" and Bidco will not be required under any circumstances to be a Back-Up Bidder. |
| Governing Law: | British Columbia |
| Dispute Resolution: | Supreme Court of British Columbia |

## SCHEDULE "A"
## PURCHASED ASSETS

**[Note: Schedule subject to detailed review by UrtheCast]**

**UrthePipeline, UrthePlatform and Value-Added Services**

All intellectual property, assets, and equipment associated with the *UrtheDaily* business, including but not limited to:

1. All software already developed or in development, including, without limitation:
    a. Raw downlinked optical and SAR Data processing services
    b. Optical satellite/sensor commissioning, image calibration and QA services
    c. Generic Satellite Imagery Improvement services for previously processed data
    d. Automated mosaic generation prototype services
    e. Next generation data platform prototype with cloud optimized formats
    f. Geospatial analytics prototypes, e.g., soil moisture maps, generic change detection
2. All products, trademarks and/or brands that constitute the UrthePipeline offering. This includes the UrthePlatform (patented API driven web-based EO satellite platform) and the Earth Data Store (ecosystem for data processing, discovery, and access: https://www.digitalsupercluster.ca/programs/data-commons/earth-data-store-2/).
3. All plans, specifications, documents, analyses and reports and all project management and engineering documentation related to the UrthePipeline, including:
    a. UrthePipeline Project Charter – Details on project scope, requirements, deliverables, schedule
    b. UrthePipeline Monthly Project Status Updates – Achievements, financial summary
    c. UrthePipeline Roadmap – Quarterly and yearly roadmaps
    d. UrthePipeline Software Engineering Processes – Engineering practices, processes and agile methodologies
    e. UrthePipeline Tasks and Work backlog – Work packages and activities for each team
    f. UrthePipeline Technical Notes (Design, Analysis, and Review) – e.g., Processing, Calibration, Architecture, Analytics
    g. UrthePipeline Satellite Test Data – E.g., Theia, Deimos-1, Deimos-2 raw data for testing
    h. UrthePipeline Requirements – Requirements to satisfy UrtheDaily Mission
    i. Marketing Materials – UrthePipeline brochures
    j. Proposals – Proposal responses to CSA, DRDC, customers, etc.
4. All intellectual property (including patents filed, approved or in process).
5. All supplier contracts (cloud compute or storage, network services, etc.) which includes AWS as the primary cloud provider and Microsoft as a research partner for free development use.
6. All automated operational services currently running, including CBERS-4 ortho improvement pipeline and the Deimos-1 raw data processing service which currently serve Geosys
7. All currently existing government contracts which includes the Canadian Space Agency, Digital Supercluster, LookNorth, and DRDC for the years 2020-2022

8. Certain employees of the Sellers (who will be identified to the Sellers in a separate schedule) to be transferred to Bidco on terms and conditions of employment acceptable to Bidco

**Geosys**

All intellectual property (owned or licensed), assets (owned or mid-transaction with Land O'Lakes) and equipment *necessary for operating Geosys as either a standalone business unit or in support of UrtheDaily*, including but not limited to:

1. All software, firmware and hardware already developed or in development
2. All products, trademarks and/or brands that constitute the Geosys product and services offering
3. All intellectual property (including patents filed, approved or in process) and intellectual property licenses (including Interim License from Land O'Lakes) and associated platforms and data archives
4. All legal entities as described in the Land O'Lakes Purchase Agreement
5. All supplier contracts, including, without limitation:
    a. Microsoft Azure – cloud storage and computing services
    b. ASE – cloud masking service
    c. Tavant – offshore development
    d. Deimos Imaging – imagery data
    e. Airbus – imagery data
    f. Iteris – weather data
    g. MeteoFrance – weather data
    h. Office leases – Maple Grove, MN (USA) and Balma, (France)
6. All customer contracts, MOUs, LOIs, sales pipeline, or other commercial agreements
7. Certain employees of the Sellers (who will be identified to the Sellers in a separate schedule) to be transferred to Bidco on terms and conditions of employment acceptable to Bidco

**UrtheDaily**

All intellectual property, assets and equipment necessary for developing and operating the UrtheDaily constellation, including but not limited to:

1. All software, firmware and hardware already developed or in development
2. All products, trademarks and/or brands that constitute the UrtheDaily offering
3. All technical documentation associated with the UrtheDaily program. This includes technical reports describing the UrtheDaily design, technology and the Concept of Operations, Technical Specifications for elements of the system, Analyses Reports, and Analyses Source Files (e.g., spreadsheets) providing technical budgets and performing specific analyses, including:
    a. MRD – Mission Requirements Document
    b. Conops – Mission concept of operations
    c. SRS – System requirements specification
    d. Space Segment RS – Space segment requirements specification
    e. Calibration RS – Camera calibration requirements specification
    f. GS Spec – Ground Segment system requirements specification
    g. Launch Vehicle IRD – Launch Vehicle Interface Requirements Document, between spacecraft and Launch vehicle

   h. FOS RS – Flight Operation System Requirements Specification
   i. Space Segment Description – Space Segment Technical Description
   j. EM Camera Test Description – Description of the EM UrtheDaily Camera that was built and the tests undertaken
   k. Spreadsheets – Coverage Gap Calculator, Onboard Data Rates, Propellant & Delta-V Calculations, Pointing Control Impact on MTF
   l. Analyses Reports – EDS Mission Analysis Report
   m. Informal Technical Notes – CMOSIS CMV Detector family space mission history
   n. Vendor Data – SSTL UrtheDaily Technical Presentation, CMV12000 detector datasheet, GSN Service Provider Proposals
4. All Project Management related documentation related to the UrtheDaily Program that includes plans, schedules and Statements of Work for suppliers that are developing elements of the UrtheDaily system, including:
   a. PMP – Project management plan
   b. SEMP – System engineering management plan
   c. WBS – Work Breakdown Structure
   d. WPDs – Work package descriptions
   e. Master Schedule – Mission master schedule including detailed schedule for Space segment and major activities for WBS
   f. PBS – Product breakdown structure, preliminary
   g. Risk Register – Mission risk register
   h. Charter – UrtheDaily Program Charter
   i. SS SOW – UrtheDaily Space Segment Statement of Work
   j. LV SOW – UrtheDaily Launch Vehicle Statement of Work
   k. GSN RFP – RFP for GSN services which includes key GSN requirements & SOW
5. All supplier proposals and contracts. This includes the SSTL subcontract for the Satellites, Launch Vehicle Subcontract, L1 Calibration Services Contract, Ground Station Network Service (GSN) Contract, Flight Operations System ground segment hardware and AWS Cloud Compute, cloud compute, storage and network services contract.
6. All customer Service Level Agreement (i.e., FPP contracts), MOUs and LOIs, backlog, sales pipeline, or other agreements
7. Certain employees of the Sellers (who will be identified to the Sellers in a separate schedule) to be transferred to Bidco or an affiliate on terms and conditions of employment acceptable to Bidco

# Exhibit "A"

## FORM OF SISP

## Exhibit "A"

## Sale and Investment Solicitation Process Outline

### Introduction

On September 4, 2020, UrtheCast Corp., UrtheCast International Corp., UrtheCast USA Inc., 1185729 B.C. Ltd. and the other petitioner parties set out on Schedule A (collectively, the "**Petitioners**" or "**UrtheCast Group**") to the initial order (the "**Initial Order**") granted by the Supreme Court of British Columbia (the "**Court**"), obtained relief under the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") from the Court that, among other things, commenced the CCAA proceedings (the "**CCAA Proceedings**"), granted an initial stay of proceedings in respect of the Petitioners (the "**Stay**") and appointed Ernst & Young Inc., as monitor (the "**Monitor**").

On September 14, 2020, the Petitioners obtained an amended and restated version of the Initial Order from the Court (the "**Amended and Restated Initial Order**") that, among other things, extended the Stay to October 2, 2020, authorized a limited sales and investment solicitation process for certain camera equipment owned by the Petitioners and authorized an interim debtor-in-possession financing facility from 1262743 B.C. Ltd. (the "**Existing DIP Lender**") providing for borrowings of up to US$1,000,000 (the "**Existing DIP**") and the grant of a priority charge (the "**Existing DIP Lender's Charge")** to the Existing DIP Lender as security for borrowings under the Existing DIP.

On September 21, 2020, the Petitioners obtained a further amended and restated version of the Initial Order from the Court (the "**Second Amended and Restated Initial Order**") that, among other things, authorized an additional interim debtor-in-possession financing from HCP-FVL, LLC, an affiliate of Hale Capital Partners L.P. (the "**Second DIP Lender**") providing for borrowings of up to US $5,000,000 (the "**Second DIP**") pursuant to the DIP Facilities Loan Agreement dated as of September 21, 2020 (the "**Second DIP Agreement**").

On October 2, 2020, the Petitioners obtained an order of the Court (the "**Stay Extension Order**") that, among other things extended the Stay to December 18, 2020.

On October 16, 2020, the Petitioners obtained an order from the Court that amongst other things:

(a) authorized the Petitioners to pursue all avenues of refinancing or sale of its business or property, in whole or part, subject to prior approval of the Court before any material refinancing or sale is concluded;

(b) approved the Sale and Investment Solicitation Process set forth herein (the "**SISP**");

(c) approved an additional interim debtor-in-possession financing facility from an affiliate of Antarctica Infrastructure Partners, LLC (the "**AC DIP Lender**"), providing for borrowings of up to CAD $3,548,000 (the "**Stalking Horse DIP**") and the grant of a priority charge (the "**AC DIP Lender's Charge")** to the AC DIP Lender as security for borrowings under the Stalking Horse DIP, ranking in priority to the Existing DIP Lender's Charge;

(d) approved and accepted for the purpose of conducting a "stalking horse" solicitation in accordance with the SISP procedures set out in this this document (the "**SISP Process**

**Outline**") that certain letter agreement dated October 13, 2020 between the Petitioners and the Stalking Horse Bidder, providing for a potential sale (the "**Stalking Horse Bid**") of the Applicants' UrtheDaily Constellation project and UrthePipeline business (together, the "**Designated Assets**") to 1269336 B.C. Ltd. the Stalking Horse Bidder or a designated affiliate, including the payment of an expense reimbursement (the "**Expense Reimbursement**") by the Petitioners to the Stalking Horse Bidder as contemplated by the Stalking Horse Bid; and

(e) approved the procedures set forth in this SISP Process Outline.

To facilitate an efficient and thorough SISP in the face of UrtheCast's acute liquidity challenges, the Petitioners have:

(a) created a form of non-disclosure agreement ("**NDA**") and established a confidential online data site to facilitate due diligence investigations by Qualified Bidders (defined below) who enter into a NDA with UrtheCast Corp.; and

(b) finalized a list of potential bidders, including (i) parties that have approached the Petitioners or the Monitor indicating an interest in the Opportunity (defined below), (ii) domestic and international strategic and financial parties who UrtheCast Group in consultation with the Monitor, believe could be interested in purchasing all or part of the assets or investing in UrtheCast Group pursuant to the SISP (including, without limitation, any parties with whom were in contact prior to the Initial Order as part of UrtheCast Group's strategic review process) and (iii) any other parties reasonably suggested by a stakeholder as a potential bidder who may be interested in the Opportunity (collectively, "**Known Potential Bidders**").

**Opportunity**

1. The SISP is intended to solicit interest in and opportunities for a sale of or investment in all or part of the assets, property, business operations and undertaking (the "**Opportunity**") of the Petitioners and their subsidiaries (collectively, the "**UrtheCast Group**"). The Opportunity may include one or more of a recapitalization, arrangement or other form of investment in or reorganization of the business and affairs of the UrtheCast Group as a going concern or a sale of all, substantially all or one or more components of UrtheCast Group's assets, including without limitation, the sale of the shares of one or more of the corporations comprising the UrtheCast Group and its business operations (the "**Assets**") as a going concern or otherwise.

2. Except to the extent otherwise set forth in a definitive sale or investment agreement with a successful bidder, any sale of the Assets or investment in UrtheCast Group will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by any member of the UrtheCast Group, the Monitor or any of their respective agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of UrtheCast Group in and to the Assets to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders.

## Timeline

3. The following table sets out the key milestones under the SISP:

| Milestone | Deadline |
|---|---|
| Teaser Letter sent to potential Known Potential Bidders | As soon as practicable and, in any case, not later than October 16, 2020 |
| Phase 1 Bid Deadline | November 6, 2020 |
| Phase 2 Bid Deadline | To be specified in Phase 2 Bid Process Letter, but in any case not later than November 18, 2020 |
| Auction (if required) | November 23, 2020 |

4. In recognition that certain of the UrtheCast Group Assets, including but not limited to the synthetic aperture radar ("**SAR**") and Deimos assets, have already been subject to extensive marketing, UrtheCast Group may, with the consent of the Monitor and in consultation with affected stakeholders, shorten any of the deadlines specified above.

## Solicitation of Interest: Notice of the SISP

5. The SISP will include a notification process and up to two phases of activity for qualified interested bidders ("**Phase 1**" and "**Phase 2**", respectively). As soon as reasonably practicable, but in any event by no later than October 16, 2020:

   (a) UrtheCast Group will cause a notice of the SISP (and such other relevant information which UrtheCast Group, in consultation with the Monitor, considers appropriate) (the "**Notice**") to be published in such publications as UrtheCast Group in consultation with the Monitor, consider appropriate, if any; and

   (b) UrtheCast Group will issue a press release setting out the information contained in the Notice and such other relevant information which UrtheCast Group considers appropriate for dissemination in Canada and major financial centres in the United States.

## Stalking Horse Protections

6. Unless and until the Stalking Horse Bid has been completed or terminated by one of the parties in accordance with its terms, or amended to provide expressly to the contrary, the Stalking Horse Bidder will be afforded complete and timely access to (a) all confidential information regarding the Opportunity that is shared with any Potential Bidder (defined below), (b) the Bid Process Letter (defined below), and (c)a bi-weekly status update from the Monitor regarding the status of the SISP generally, including an update on whether there are any Qualified Bidders (defined below), Qualified Bids (defined below) received from Phase 2 Qualified Bidders (defined below), Competing Bids (defined below) and/or Compliant Competing Bid (as defined below), however this update will not provide the Stalking Horse Bidder any confidential information about these bidders or the terms of their bids if they include, in whole or in part, the Designated Assets (defined below) unless

and until a Successful Bidder (defined below) is determined for the Designated Assets and the SISP is proceeding to the Auction (defined below). For certainty, nothing is this SISP Process Outline is intended to derogate from any contractual rights of the Stalking Horse Bidder in the Stalking Horse Bid (including in any definitive agreement that may be entered into in respect of the Stalking Horse Bid), including the Stalking Horse Bidder's right to participate in the Auction SISP process, to be paid a break fee and to have certain of its expenses reimbursed.

**PHASE 1: NON-BINDING LOIs**

**Phase 1 Qualified Bidders**

7. Any Known Potential Bidder or other third party who contacts any of the Petitioners or Monitor to express interest in participating in the SISP (each, a "**Potential Bidder**") must provide an executed NDA to the Monitor and provide a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder.

8. A Potential Bidder (who has delivered the executed NDA and letter as set out above) will be deemed a "**Phase 1 Qualified Bidder**" only if UrtheCast Group in its reasonable business judgment and in consultation with the Monitor, determines that such Potential Bidder is likely, based on the availability of financing, experience and other considerations, to be able to timely consummate a sale or investment pursuant to the SISP.

9. For certainty, the Stalking Horse Bidder will be deemed a Phase 1 Qualified Bidder for the purposes of the SISP and, unless terminated by the Stalking Horse Bidder or UrtheCast Corp. in accordance with its terms, the Stalking Horse Bid will be deemed a Qualified LOI and the Stalking Horse Bidder will not be required to submit any other bid during Phase 1 of the SISP.

10. At any time during Phase 1 of the SISP, UrtheCast Group may, in their reasonable business judgment and after consultation with and the consent of the Monitor, eliminate a Phase 1 Qualified Bidder (other than the Stalking Horse Bidder) from the SISP, in which case such bidder will be eliminated from the SISP and will no longer be a "Phase 1 Qualified Bidder" for the purposes of the SISP.

11. UrtheCast Group, in consultation with the Monitor, reserves the right to limit any Phase 1 Qualified Bidder's (other than the Stalking Horse Bidder's) access to any confidential information (including any information in the data room) and to customers and suppliers of UrtheCast Group, where, in UrtheCast Group's opinion after consultation with the Monitor, such access could negatively impact the SISP, the ability to maintain the confidentiality of the confidential information, the UrtheCast Group or the Assets.

12. Potential Bidders must rely solely on their own independent review, investigation and/or inspection of all information of the UrtheCast Group and the Assets in connection with their participation in the SISP and any transaction they enter into with UrtheCast Group.

**Non-Binding Letters of Intent from Qualified Bidders**

13. A Phase 1 Qualified Bidder (other than the Stalking Horse Bidder) that wishes to pursue the Opportunity further must deliver a non-binding letter of intent (an "**LOI**") to the Monitor

and UrtheCast Group at the addresses specified in Schedule "1" attached hereto (including by email or fax transmission), so as to be received by them not later than 5:00 PM (Pacific Time) on or before November 6, 2020, or such other date as the Monitor may advise in accordance with paragraph 4(the "**Phase 1 Bid Deadline**").

14. Subject to paragraph 13, an LOI so submitted will be considered a qualified LOI (a "**Qualified LOI**") only if:

(a) it is submitted on or before the Phase 1 Bid Deadline by a Phase 1 Qualified Bidder;

(b) it contains an indication of whether the Phase 1 Qualified Bidder is proposing:

(i) to acquire all, substantially all or a portion of the Assets (a "**Sale Proposal**"), or

(ii) a recapitalization, arrangement or other form of investment in or reorganization of the UrtheCast Group (an "**Investment Proposal**");

(c) in the case of a Sale Proposal (other than the Stalking Horse Bid), it identifies or contains the following:

(i) the purchase price or price range in Canadian dollars, including details of any liabilities to be assumed by the Phase 1 Qualified Bidder and key assumptions supporting the valuation;

(ii) a description of the Assets that is expected to be subject to the transaction and any of the Assets expected to be excluded;

(iii) a description of the Phase 1 Qualified Bidder's proposed treatment of material agreements and employees (for example, anticipated employment offers);

(iv) a specific indication of the financial capability of the Phase 1 Qualified Bidder and the expected structure and financing of the transaction (including, but not limited to, the sources of financing to fund the acquisition, preliminary evidence of the availability of such financing or such other form of financial disclosure and credit-quality support or enhancement that will allow UrtheCast Group and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Phase 1 Qualified Bidder's financial or other capabilities to consummate the transaction and to perform all obligations to be assumed in such transaction; and the steps necessary and associated timing to obtain financing and any related contingencies, as applicable);

(v) a description of the conditions and approvals required for the Phase 1 Qualified Bidder to be in a position to submit a final and binding offer, including any anticipated corporate, securityholder or other internal approvals and any anticipated impediments for obtaining such approvals;

(vi) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;

(vii) a description of all conditions to closing that the Phase 1 Qualified Bidder expects to include in its final and binding offer, including without limitation any regulatory approvals and any form of agreement required from a government body, stakeholder or other third party ("**Third Party Agreement**") and an outline of the principal terms thereof; and

(viii) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;

(d) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment;

(ii) the aggregate amount of the equity and/or debt investment to be made in the UrtheCast Group in Canadian dollars;

(iii) key assumptions supporting the Phase 1 Qualified Bidders' valuation;

(iv) a description of the Phase 1 Qualified Bidder's proposed treatment of any liabilities, material contracts and employees;

(v) the underlying assumptions regarding the pro forma capital structure (including the form and amount of anticipated equity and/or debt levels, debt service fees, interest or dividend rates, amortization, voting rights or other protective provisions (as applicable), redemption, prepayment or repayment attributes and any other material attributes of the investment);

(vi) a specific indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the transaction (including, but not limited to, the sources of capital to fund the investment, preliminary evidence of the availability of such capital or such other form of financial disclosure and credit-quality support or enhancement that will allow UrtheCast Group and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Phase 1 Qualified Bidder's financial or other capabilities to consummate the transaction, steps necessary and associated timing to obtain such capital and any related contingencies, as applicable, and a sources and uses analysis);

(vii) a description of the conditions and approvals required for the Phase 1 Qualified Bidder to be in a position to submit a final and binding offer, including any anticipated corporate, securityholder or other internal approvals and any anticipated impediments for obtaining such approvals;

(viii) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;

(ix) a description of all conditions to closing that the Phase 1 Qualified Bidder expects to include in its final and binding offer, including without limitation any regulatory approvals and any Third Party Agreement required and an outline of the principal terms thereof; and

(x) any other terms or conditions of the Investment Proposal which the Phase 1 Qualified Bidder believes are material to the transaction;

(e) in the case of

(i) a Sale Proposal for Assets that include any of the Designated Assets, or

(ii) an Investment Proposal that contemplates taking any security interest in any of the Designated Assets or that could reasonably be expected to take longer to complete than the sale of the Designated Assets to the Stalking Horse Bidder pursuant to the Stalking Horse Bid (any Sale Proposal or Investment Proposal referred to in this subsection (e) being referred to as a "**Conflicting Bid**"),

such Conflicting Bid provides for payment of the expense reimbursement and break fee (it being understood and agreed that only the Stalking Horse Bidder will be entitled to any bid protections including expense reimbursement and a break fee) and provides that, at a minimum and on closing of the Conflicting Bid, cash proceeds will be paid in an amount which is at least equal to the sum of: (A) the amount of cash payable under the Stalking Horse Bid, (B) the amount of obligations being credit bid and debt assumed (exclusive of cure costs) in the Stalking Horse Bid, (C) the amount of the Expense Reimbursement, (D) the amount of any break fee payable under the Stalking Horse Bidder, (E) the principal and any accrued and unpaid interest owing under the Stalking Horse Bid DIP and the Existing DIP, plus (F) a minimum overbid amount of CAD $250,000 (the sum of such amounts in clauses (A) through (F) of this paragraph 14(e) being referred to as the "**Minimum Purchase Price**") and provides that, upon closing of the Conflicting Bid, the Stalking Horse DIP will be repaid in full and all amounts owing to the Stalking Horse Bidder (including the Stalking Horse's reimbursable expenses and break fee) will be paid at closing (a Conflicting Bid that satisfies the Minimum Purchase Price and other requirements of this clause being referred to as a "**Compliant Conflicting Bid**"); and

(f) in the case of either a Sale Proposal or an Investment Proposal, it contains such other information as reasonably requested by UrtheCast Group in consultation with the Monitor.

15. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

**Preliminary Assessment of Phase 1 Bids and Subsequent Process**

16. Following the Phase 1 Bid Deadline, UrtheCast Group, in consultation with the Monitor, will assess the Qualified LOIs. If it is determined by UrtheCast Group in consultation with the Monitor, that a Phase 1 Qualified Bidder that has submitted a Qualified LOI: (i) has a

bona fide interest in completing a Sale Proposal or Investment Proposal (as the case may be); and (ii) has the financial capability (based on availability of financing, experience and other considerations) to consummate such a transaction based on the financial information provided, then such Phase 1 Qualified Bidder will be deemed a "**Phase 2 Qualified Bidder**", provided that UrtheCast Group may, in their reasonable business judgment and after consultation with and with the approval of the Monitor, limit the number of Phase 2 Qualified Bidders (and thereby eliminate some bidders from the process) taking into account the factors identified in paragraph 18 below and any material adverse impact on the operations and performance of UrtheCast Group. Only Phase 2 Qualified Bidders shall be permitted to proceed to Phase 2 of the SISP.

17. For certainty, the Stalking Horse Bidder will be deemed a Phase 2 Qualified Bidder for the purposes of the SISP and, unless terminated by the Stalking Horse Bidder or UrtheCast Corp. in accordance with its terms, the Stalking Horse Bid will be deemed a Qualified Bid and the Stalking Horse Bidder will not be required to submit any other bid during Phase 2 of the SISP.

18. As part of the assessment of Qualified LOIs and the determination of the process subsequent thereto, UrtheCast Group, in consultation with the Monitor and with the approval of the Monitor, shall determine the process and timing to be followed in pursuing Qualified LOIs based on such factors and circumstances as they consider appropriate in the circumstances including, but not limited to: (i) the number of Qualified LOIs received, (ii) the extent to which the Qualified LOIs relate to the same Assets or involve Investment Proposals predicated on certain Assets, (iii) the scope of the Assets to which any Qualified LOIs may relate, and (iv) whether to proceed by way of sealed bid or auction (with or without a stalking horse bidder) with respect to some or all of the Assets (other than the Designated Assets). With respect to the Designated Assets, an auction shall be held in accordance with the auction process set out below (the "Auction") where UrtheCast Group in consultation with the Monitor, determines that one or more, or a combination thereof, of the Qualified Bids constitutes a Superior Bid (as defined below).

19. Upon the determination by UrtheCast Group, in consultation with the Monitor and with the approval of the Monitor, of the manner in which to proceed to Phase 2 of the SISP, UrtheCast Group, in consultation with and with the approval of the Monitor, will prepare a bid process letter for Phase 2 (the "**Bid Process Letter**"), and the Bid Process Letter will be (i) sent by the Monitor to all Phase 2 Qualified Bidders, and (ii) posted by the Monitor on the website the Monitor maintains in respect of this CCAA proceeding.

20. Notwithstanding the process and deadlines outlined above with respect to Phase 1 of the SISP and the process to supplement Phase 2 by way of the Bid Process Letter:

    (a) UrtheCast Group may, at any time bring a motion to seek approval of a stalking horse agreement in respect of some or all of the assets (excluding the Designated Assets) or the UrtheCast Group and related bid procedures in respect of such Assets or to establish further or other procedures for Phase 2; and

    (b) If no Compliant Conflicting Bid is received by UrtheCast Group on or before the Phase 1 Bid Deadline, the Petitioners will promptly bring an application seeking the granting of an order by the Court authorizing the Petitioners to proceed with the sale of the Designated Assets to the Stalking Horse Bidder in accordance with the terms and subject conditions of the Stalking Horse Bid.

## PHASE 2: FORMAL OFFERS AND SELECTION OF SUCCESSFUL BIDDER

21. Paragraphs 22 to 32 below and the conduct of Phase 2 are subject to paragraphs 18, 19, and 20 and any adjustments made to Phase 2 in accordance with the Bid Process Letter and any further Court order regarding the SISP.

### Due Diligence

22. UrtheCast Group in consultation with the Monitor, shall in their reasonable business judgment and subject to competitive and other business considerations, afford each Phase 2 Qualified Bidder (which shall be deemed to include the Stalking Horse Bidder, if the Stalking Horse Bid has not been completed in accordance with paragraph 20(b) or terminated by one of the parties in accordance with its terms) such access to due diligence materials and information relating to the Assets and UrtheCast Group as they deem appropriate. Due diligence access may include management presentations, on-site inspections, and other matters which a Phase 2 Qualified Bidder may reasonably request and as to which UrtheCast Group in their reasonable business judgment and after consulting with the Monitor, may agree. The UrtheCast Group will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Phase 2 Qualified Bidders and the manner in which such requests must be communicated. Neither the UrtheCast Group nor the Monitor will be obligated to furnish any information relating to the Assets or UrtheCast Group to any person other than to Phase 2 Qualified Bidders. Further and for the avoidance of doubt, selected due diligence materials may be withheld from certain Phase 2 Qualified Bidders if UrtheCast Group in consultation with the Monitor, determine such information to represent proprietary or sensitive competitive information.

### Formal Binding Offers

23. Phase 2 Qualified Bidders (other than the Stalking Horse Bidder, which will be deemed to have satisfied this paragraph 23 by delivering a definitive agreement of purchase and sale to effectuate the transactions contemplated by the Stalking Horse Bid, as the same may be amended by the parties thereto) that wish to make a formal offer to purchase or make an investment in UrtheCast Group or its Assets shall submit a binding offer that complies with all of the following requirements prior to the date set out the Bid Process Letter (the "**Phase 2 Bid Deadline**"):

    (a) the bid shall comply with all of the requirements set forth in respect of Phase 1 Qualified LOIs, including without limitation paragraph 14(e);

    (b) the bid (either individually or in combination with other bids that make up one bid) is an offer to purchase or make an investment in some or all of the Assets or UrtheCast Group and is consistent with any necessary terms and conditions communicated to Phase 2 Qualified Bidders;

    (c) the bid includes a letter stating that the Phase 2 Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder (as defined below), provided that if such Phase 2 Qualified Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the transaction with the Successful Bidder;

(d) the bid includes duly authorized and executed transaction agreements, including the purchase price, investment amount and any other key economic terms expressed in Canadian dollars (the "**Purchase Price**"), together with all exhibits and schedules thereto, all applicable ancillary agreements with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such agreements), and proposed order to approve the sale by the Court;

(e) the bid includes written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed transaction, that will allow UrtheCast Group and the Monitor to make a determination as to the Phase 2 Qualified Bidder's financial and other capabilities to consummate the proposed transaction;

(f) the bid is not conditioned on (i) the outcome of unperformed due diligence by the Phase 2 Qualified Bidder, apart from, to the extent applicable, to the disclosure of due diligence materials that represent proprietary or sensitive competitive information which was withheld in Phase 2 from the Phase 2 Qualified Bidder and/or (ii) obtaining financing;

(g) the bid fully discloses the identity of each entity that will be entering into the transaction or the financing (including through the issuance of debt in connection with such bid), or that is participating or benefiting from such bid, and such disclosure shall include, without limitation: (i) in the case of a Phase 2 Qualified Bidder formed for the purposes of entering into the proposed transaction, the identity of each of the actual or proposed direct or indirect equity holders of such Phase 2 Qualified Bidder and the terms and participation percentage of such equity holder's interest in such bid; and (ii) the identity of each entity that has or will receive a benefit from such bid from or through the Phase 2 Qualified Bidder or any of its equity holders and the terms of such benefit;

(h) the bid includes a commitment by the Phase 2 Qualified Bidder to provide a non-refundable deposit in the amount of not less than 10% of the purchase price offered upon the Phase 2 Qualified Bidder being selected as the Successful Bidder and in any event, prior to service of the materials for the Sale Approval Motion (as defined below);

(i) the bid includes acknowledgements and representations of the Phase 2 Qualified Bidder that: (i) the transaction is on an "as is, where is" basis; (ii) it has had an opportunity to conduct any and all due diligence regarding the Assets and UrtheCast Group prior to making its offer (apart from, to the extent applicable, the disclosure of due diligence materials that represent proprietary or sensitive competitive information which were withheld in Phase 2 from the Phase 2 Qualified Bidder); (iii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; and (iv) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Assets, or UrtheCast Group or the completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by UrtheCast Group;

(j) the bid includes evidence, in form and substance reasonably satisfactory to UrtheCast Group, in consultation with the Monitor, of authorization and approval from the Phase 2 Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction agreement(s) submitted by the Phase 2 Qualified Bidder;

(k) the bid contains other information required by UrtheCast Group or the Monitor including, without limitation, such additional information as may be required in the event Phase 2 is supplemented in accordance with paragraph 19 to contemplate that an auction of certain Assets be conducted; and

(l) the bid is received by the Phase 2 Bid Deadline.

24. Following the Phase 2 Bid Deadline, UrtheCast Group in consultation with the Monitor, will assess the Phase 2 bids received. UrtheCast Group, in consultation with the Monitor, will designate the most competitive bids that comply with the foregoing requirements to be "**Qualified Bids**". No Phase 2 bids received shall be deemed not to be Qualified Bids unless the Monitor so approves. Only Phase 2 Qualified Bidders whose bids have been designated as Qualified Bids are eligible to become the Successful Bidder(s).

25. The Monitor shall notify each Phase 2 Qualified Bidder in writing as to whether its bid constituted a Qualified Bid within three (3) business days of the Phase 2 Bid Deadline, or at such later time as UrtheCast Group in consultation with the Monitor, deem appropriate.

26. UrtheCast Group may, in consultation with the Monitor, aggregate separate bids from unaffiliated Phase 2 Qualified Bidders (if, and only if, such aggregation is reasonably practicable to effect a transaction without overlap) to create one "Qualified Bid".

**Evaluation of Competing Bids**

27. A Qualified Bid will be evaluated based upon several factors, including, without limitation, items such as the Purchase Price and the net value provided by such bid, the claims likely to be created by such bid in relation to other bids, the identity, circumstances and ability of the Phase 2 Qualified Bidder to successfully complete such transactions, the proposed transaction documents, the effects of the bid on the stakeholders of UrtheCast Group, factors affecting the speed, certainty and value of the transaction (including any regulatory approvals or third party contractual arrangements required to close the transactions), the Assets included or excluded from the bid, any related restructuring costs, and the likelihood and timing of consummating such transactions, each as determined by UrtheCast Group and the Monitor.

28. A Qualified Bid will be deemed a Superior Bid where a credible, unconditional and financially viable third party offer, or combination of offers for (A) the acquisition of all, substantially all or certain of the Designated Assets; or (B) an investment, restructuring, recapitalization, refinancing or other reorganization of the UrtheCast Group, the terms of which offer are no less favourable and no more burdensome or conditional than the terms contained in the Stalking Horse Asset Purchase Agreement, and which at a minimum, alone, or in a combination with other offers, includes:

(a) a payment in cash in excess of CAD $250,000 of the aggregate of the total consideration payable pursuant to the Stalking Horse APA, being CAD $69.3 million;

(b) a payment in cash in the amount necessary to fully pay the Stalking Horse bidder's break fee and expense reimbursement together with any CCAA priority amounts owing, including any interim financing obligations as at the closing of such transaction; and

(c) a payment in cash of all priority charges and an assumption of liabilities to satisfy and payment of all cure costs required to the closing of such transaction.

**Selection of Successful Bid**

29. UrtheCast Group, in consultation with the Monitor, (a) will review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated between UrtheCast Group, in consultation with the Monitor, and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations, and (b) identify the highest or otherwise best bid (the "**Successful Bid**"), and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") for any particular Assets or UrtheCast Group, in whole or part. UrtheCast's determination of any Successful Bid, with the assistance of the Monitor, shall be subject to approval by the Court and in the case of the Designated Assets, where the Successful Bid constitutes a Superior Bid, the UrtheCast Group will proceed to an auction (the "Auction").

30. For certainty, notwithstanding the process and deadlines outlined above with respect to Phase 2 of the SISP, if no binding offer for a Compliant Conflicting Bid is received by UrtheCast Group during Phase 2 on or before the Phase 2 Bid Deadline, then the Petitioners will promptly bring an application seeking the granting of an order by the Court authorizing the Petitioners to proceed with the sale of the Designated Assets to the Stalking Horse Bidder in accordance with the terms and subject conditions of the Stalking Horse Bid. UrtheCast Group shall have no obligation to enter into a Successful Bid (excluding the Stalking Horse Bid, if applicable), and it reserves the right, after consultation with the Monitor to reject any or all Phase 2 Qualified Bids.

**Auction**

31. The Auction shall run in accordance with the following procedures, which may be modified by the UrtheCast Group in its discretion, after consultation with the Monitor:

(a) prior to the Auction Monitor shall have identified the Superior Offer and all bidding at the Auction shall be irrevocably made on the terms of the Superior Offer, except for price/investment amount and certain other identified business terms;

(b) the Monitor will provide to all Qualified Bidders the material terms and conditions of the Superior Offer (the "**Starting Bid**") and each Qualified Bidder must inform the UrtheCast Group whether it intends to participate in the Auction (the parties who so inform the UrtheCast Group, that they intend to participate are the "**Auction Bidders**");

(c) Only representatives of the Auction Bidders, the UrtheCast Group, the Monitor, the DIP Lenders and such other persons permitted by the UrtheCast Group and the Monitor (and the advisors to each of the foregoing) are entitled to attend the Auction;

(d) At the commencement of the Auction, each Auction Bidder shall be required to confirm that it has not engaged in any collusion with any other Auction Bidder to detrimentally affect the price for any sale;

(e) Only the Auction Bidders will be entitled to make any Subsequent Bids (as defined herein);

(f) All Subsequent Bids presented during the auction shall be made and received in one room on an open basis. All Auction Bidders will be entitled to be present for all Subsequent Bids at the Auction with the understanding that the true identity of each Auction Bidder at the Auction will be fully disclosed to all other Auction Bidders at the Auction and that all material terms of each Subsequent Bid will be fully disclosed to all other Auction Bidders throughout the entire Auction;

(g) All Auction Bidders must have at least one individual representative with authority to bind such Auction Bidder present in person at the Auction;

(h) The UrtheCast Group, after consultation with the Monitor, may employ and announce at the auction additional procedural rules that are reasonable under the circumstances, (e.g. the amount of time allotted to make Subsequent Bids, requirement to bid in each round, and the ability of multiple Auction Bidders to combine to present a single bid) for conducting the auction, provided that such rules are (i) not inconsistent with any applicable law, and (ii) disclosed to each Auction Bidder at the auction;

(i) Bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by an Auction Bidder (a "**Subsequent Bid**") that the UrtheCast Group determines, after consultation with the Monitor, is (A) for the first round, a higher or otherwise better offer than the Starting Bid, and (B) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (as defined herein); in each case by at least the Minimum Incremental Overbid. Each bid at the auction shall provide net value to the UrtheCast Group of at least CAD $100,000 (the "**Minimum Incremental Overbid**") over the Starting Bid or the Leading Bid (as defined herein), as the case may be; provided however that the UrtheCast Group, after consultation with the Monitor, shall retain the right to modify the incremental requirements at the Auction and provided further that the UrtheCast Group, in determining the net value of an incremental bid, shall not be limited to evaluating the incremental dollar value of such bid and may consider other factors. After each Subsequent Bid, the UrtheCast Group shall, after consultation with the Monitor, announce whether such bid (including the value and material terms thereof) is higher or otherwise better than the prior bid (the "**Leading Bid**"). A round of bidding will conclude after each Auction Bidder has the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid;

(j) If, in any round of bidding, no new Subsequent Bid is made that becomes a Leading Bid, the Auction shall be closed;

(k) The Auction shall be closed by midnight on the day of the Auction unless extended for a further 24 hour period by the UrtheCast Group with the approval of the Monitor;

(l) No bids (from Auction Bidders or otherwise) shall be considered after the conclusion of the Auction; and

(m) At the close of the Auction, the Monitor shall identify the winning bid (the "**Auction Successful Bid**"). At the conclusion of the Auction, the Monitor will notify the other bidders of the identities of the bidders of the Auction Successful Bid. (n) following conclusion of the Stalking Horse Scenario Auction, the UrtheCast Group, with the assistance of the Monitor, may finalize a definitive agreement or agreements in respect of the Stalking Horse Auction Successful Bid and the Stalking Horse Auction Backup Bid, respectively, if any, conditional upon approval of the Court.

32. All other bids received at the Auction shall be deemed rejected on the earlier of: (i) the date of closing of the Auction Successful Bid, and (ii) confirmation from the Monitor that the bid has been rejected.

**Sale Approval Motion Hearing**

33. At the hearing of the motion to approve any transaction with a Successful Bidder (which would include the Stalking Horse Bidder in the circumstances contemplated by paragraphs 20(b) or 29 (the "**Sale Approval Motion**"), UrtheCast Group shall seek, among other things, approval from the Court to consummate any Successful Bid. All the Phase 2 Qualified Bids other than the Successful Bid, if any, shall be deemed rejected by UrtheCast Group on and as of the date of approval of the Successful Bid by the Court.

**Confidentiality, Stakeholder/Bidder Communication and Access to Information**

34. All discussions regarding an LOI, Sale Proposal or Investment Proposal must be directed through the Monitor. Under no circumstances should the management of the UrtheCast Group or any stakeholder of UrtheCast Group be contacted directly without the prior consent of the Monitor. Any such unauthorized contact or communication could result in exclusion of the interested party from the SISP process.

35. Participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Phase 1 Qualified Bidders, LOIs, Phase 2 Qualified Bidders, Phase 2 Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between UrtheCast Group, the Monitor and such other bidders or Potential Bidders in connection with the SISP, except to the extent UrtheCast Group with the approval of the Monitor and consent of the applicable participants, are seeking to combine separate bids from Phase 1 Qualified Bidders or Phase 2 Qualified Bidders.

**Supervision of the SISP**

36. The participation of UrtheCast Group in the SISP will be directed by UrtheCast Corp.'s board of directors.

37. The Monitor will participate in the conduct of the SISP in the manner set out in this SISP Process Outline and the Initial Order and is entitled to receive all information in relation to the SISP.

38. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between UrtheCast Group and any Phase 1 Qualified Bidder, any Phase 2 Qualified Bidder (other than the Stalking Horse Bidder) or any other party, other than as specifically set forth in a definitive agreement that may be signed with UrtheCast Group.

39. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any LOI, Phase 2 bid, due diligence activities, and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

40. UrtheCast Group shall have the right to modify the SISP (including, without limitation, pursuant to the Bid Process Letter) provided always that the outside date for closing a transaction of purchase and sale of the Designated Assets will only be amended with the written consent of the Stalking Horse Bidder) with the prior written approval of the Monitor if, in their reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP; provided that the Service List in this CCAA proceeding shall be advised of any substantive modification to the procedures set forth herein.

## Schedule "1"

## Address for Submitting LOIs and Phase 2 Bids

**Bennett Jones LLP**
666 Burrard St
Suite #2500
Vancouver, BC V6C 2X8

Fax: •
Attn : •

**Ernst & Young Inc.**
700 West Georgia Street
Vancouver, BC V7Y 1C7

Fax: •
Attn : Mr. Philippe Mendelson, Vice President

## Exhibit "B"

## AC INTERIM FINANCING TERM SHEET

**DIP FACILITY LOAN AGREEMENT**
**DATED AS OF OCTOBER 1, 2020**

Summary of Terms and Conditions ("**Term Sheet**")
CAD $3,548,000 Secured Super-Priority Debtor-in-Possession Credit Facilities

This document is highly confidential and neither this document nor the identity of the lender listed on the signature page hereof ("**Lender**") shall be disclosed to any person other than UrtheCast Corp., its subsidiaries (collectively "**UrtheCast**") or its financing advisors (insofar as such advisors have been informed of, and agree to abide by, the confidentiality of this Term Sheet), and as required to be disclosed in connection with any court proceeding contemplated herein, without the prior written consent of Lender. Term Sheet is subject to the terms of the Confidentiality Agreement dated June 24, 2020 by and among SIGA II, LLC (an affiliate of Antarctica Capital LLC) and UrtheCast.

| | |
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| **Borrower**: | UrtheCast Corp. (an Ontario, Canada corporation), 1185729 B.C. Ltd. (a British Columbia, Canada corporation), 1185781 B.C. Ltd. (a British Columbia, Canada corporation), UrtheCast International Corp. (a Canadian corporation), Geosys Holding, ULC (was Geosys Technology Holding LLC) (a British Columbia, Canada corporation) and Urthedaily Corp. (a British Columbia, Canada corporation) (collectively, the "**CAD Borrower**"), and Geosys Europe Sarl (a Switzerland corporation), UrtheCast USA Inc. (a Delaware, USA corporation), Geosys-Int'l, Inc. (a USA corporation) and Geosys S.A.S. (a France corporation) (collectively with the CAD Borrower, the "**Borrower**") during the pendency of the CCAA (as defined below) proceeding (the "**CCAA Proceeding**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") commenced pursuant to an initial order (the "**Initial Order**") issued on September 4, 2020 by the Supreme Court of British Columbia, Vancouver Registry Action No. VLC-S-S208894 (the "**CCAA Court**"), as modified by the amended and restated initial order of the CCAA Court dated September 14, 2020 (the "**ARIO**") |
| **Guarantors**: | Deimos Imaging S.L.U., DOT Imaging S.L.U., Geosys Australia Pty, Geosys do Brasil Sistemas de Informacao Agricolas Ltda., Urthecast Holdings (Malta) Limited, UrtheCast Imaging S.L.U., UrtheCast Investments (Malta) Limited and each of the existing and future affiliates and direct and indirect subsidiaries of the Borrower deemed necessary by the Lender in its sole discretion (collectively, the "**Guarantors**" and, together with the Borrower, the "**Debtors**" or "**CCAA Debtors**") shall provide unconditional secured (subject to applicable law) guarantees of payment and not of collection in form satisfactory to the Lender. |
| **Lender**: | An affiliate of Antarctica Infrastructure Partners LLC |
| **DIP Facility**: | A facility consisting of a CAD $3,548,000 term loan facility (the "**DIP Facility**"). Subject to the conditions set forth below and the final loan documents, the Borrower may draw down funds under the DIP Facility in tranches consisting of: (i) an initial tranche in the amount of CAD $1,267,000 (the "**Initial Tranche**") on November 6, 2020; (ii) a second tranche in the amount of CAD $733,000 (the "**Second** |

| | |
|---|---|
| | **Tranche**"); and (iii) a third tranche in the amount of CAD $1,548,000 (the "**Third Tranche**") provided that no advances (an "**Advance**") shall be made if there is an Event of Default hereunder, or the Borrower is in default of any term of the DIP Facility and such default is continuing. |
| **Use of Proceeds**: | The proceeds of the DIP Facility shall only be advanced to and used by the CCAA Debtors in accordance with the Agreed Weekly Budgets (as defined below) and Third DIP Order (as defined below), each of which shall be in form and substance satisfactory to the Lender in its sole discretion. The CCAA Debtors shall not utilize the DIP Facility for any other purpose without the prior written approval of the Lender (in its sole discretion). Except as set out in the Agreed Weekly Budget, the DIP Facility may not be used to pay any outstanding principal amount, accrued and unpaid interest, exit fees, expenses or any other amounts owning in respect of any existing debtor-in-possession financing, with the exception that it is agreed, that the Second Tranche shall be used to pay any amounts outstanding pursuant to the interim debtor-in-possession financing facility from 1262743 B.C. Ltd. The DIP Facility may not be used in connection with any investigation (including discovery proceedings), initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation against or adverse to the Lender or its affiliates or any of their interests (whether direct or indirect). |
| **Direct Advance Condition**: | The Borrower shall not use, advance or flow any funds from the DIP Facility to any CCAA Debtor located outside of Canada (a "**Foreign CCAA Debtor**"), including without limitation, the United States, France, Spain or Switzerland unless and until the Lender is satisfied that the Lender has a first priority lien and charge in any such foreign jurisdiction in form and substance (and/or court order) satisfactory to the Lender in its sole discretion (the "**Direct Advance Condition**"). |
| **Closing Date**: | The closing date for the DIP Facility shall be November 6, 2020 or such later date as may be agreed to by the Lender in its sole discretion (the "**Closing Date**"). |
| **Evidence of Indebtedness**: | The Lender shall open and maintain accounts and records evidencing advances and repayments under the DIP Facility and all other amounts owing from time to time hereunder. The Lender's accounts and records constitute, in the absence of manifest error, *prima facie* evidence of the indebtedness of the CCAA Debtors to the Lender pursuant to the DIP Facility. |
| **Currency**: | Unless otherwise stated, all monetary denominations shall be in lawful currency of the Canada. |
| **Interest Rate**: | All amounts owing hereunder on account of the principal, overdue interest, costs, fees and expenses shall bear interest at the rate of 17.5% per annum payable in cash monthly in arrears on the last day of each calendar month. To the extent permitted by applicable law, upon the occurrence of an Event of Default (as defined below), interest shall accrue and be calculated and compounded at a rate of 20% per annum. |

**Standby Fee:** The Borrower shall pay the Lender a standby fee of 2% per annum on any undrawn portion of the DIP Facility. Such fee shall be calculated daily and payable monthly in arrears on the last day of each calendar month.

**Commitment Fee:** The Borrower shall pay to the Lender a non-refundable pro-rated commitment fee of 3% of each amount advanced under the DIP Facility, which initial pro-rated fee shall be payable on the Closing Date.

**Other Costs and Expenses:** The Borrower shall pay, monthly after the Closing Date, all costs and expenses of the Lender for all out-of-pocket due diligence and travel costs and all reasonable fees, costs, expenses and disbursements of outside counsel, appraisers, field auditors, and any financial consultant in connection with the drafting, negotiating and administration of the DIP Facility, including any costs and expenses incurred by the Lender in connection with the enforcement of its security, any of the rights and remedies available hereunder or under any order of the CCAA Court or under the Guarantees or any related security.

**Repayment and Maturity Date:** All amounts owing to the Lender under the DIP Facility shall be due and payable on the earliest of the occurrence of the following:

(i) January 15, 2021;

(ii) the implementation of a plan of compromise or arrangement within the CCAA proceedings (a "**Plan**") which has been approved by the requisite majorities of the applicable CCAA Debtors' creditors and by order entered by the CCAA court (the "**Sanction Order**") and by the Lender;

(iii) conversion of the CCAA proceeding into a proceeding under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**")

(iv) on the sale of any of the assets of any CCAA Debtor outside of the ordinary course of business which is not consented to by the Lender in writing (collectively, the "**Approval Conditions**")), including any sale of assets pursuant to a sales and investment solicitation process are for a value in excess of CAD $50,000 without first having received approval from the CCAA Court (unless the Lender agrees otherwise in its sole discretion); and

(v) an Event of Default (as defined below) in respect of which the Lender has elected in its sole discretion to accelerate all amounts owing and demand repayment;

(such earliest date being the "**Maturity Date**").

The Lender's commitment to make further advances under the DIP Facility shall expire on the Maturity Date and all amounts outstanding under the DIP Facility shall be permanently and indefeasibly repaid in full and in cash no later than the Maturity Date without the Lender

being required to make demand upon the Borrower or other parties or to give notice that the DIP Facility has expired and that the obligations thereunder are due and payable. The Sanction Order shall not discharge or otherwise affect in any way any of the obligations of the CCAA Debtors to the Lender under the DIP Facility other than after the permanent and indefeasible payment in cash to the Lender of all obligations under the DIP Facility on or before the date that the Plan is implemented.

**Mandatory Prepayments and Commitment Reduction:** Unless the Lender consents in writing otherwise, the Borrower is required to prepay amounts outstanding under the DIP Facility:

(i) upon the receipt of net cash proceeds from the issuance by any of the CCAA Debtors of any indebtedness for borrowed money;

(ii) upon receipt of insurance proceeds or expropriation awards by any of the CCAA Debtors;

(iii) upon receipt of net cash proceeds from the sale of any of the Collateral (as defined below) except for sales of inventory in the ordinary course of business by any of the CCAA Debtors;

(iv) any receipt by any of the CCAA Debtors of cash proceeds outside of the ordinary course that is not expressly contemplated in the Agreed Weekly Budget (except for proceeds from new customer contracts); and

(v) upon receipt of net cash proceeds from the sale or issuance of any equity interests (as such term is defined or used in any applicable securities laws and legislation) in any of the CCAA Debtors or the receipt of capital contributions by any of the CCAA Debtors.

Any prepayment required hereunder shall be a permanent reduction of the DIP Facility and may not be re-borrowed without the prior written consent of the Lender in its sole discretion.

**Optional Prepayment:** The DIP Facility may be repaid at any time, in whole or in part, prior to the Maturity Date on not less than two (2) business days' notice to the Lender.

**Lender Account:** All payments to the Lender, in addition to payments made to the Lender under the cash management arrangements, shall be made by wire transfer to the account specified in writing to the Borrower from time to time.

**Agreed Budgets:** The CCAA Debtors shall provide the Lender with a 13-week cash flow (the "**Agreed Weekly Budget**") reviewed by the Monitor, which shall be filed with the CCAA Court in connection with the CCAA Proceedings. The Agreed Weekly Budget shall be form and substance satisfactory to the Lender and shall reflect, on a line item basis, among other things, anticipated cash flow, cash receipts and

disbursements, sales. The Lender may, in its sole discretion, require changes to the format of the Agreed Weekly Budget and the details provided therein including, without limitation, information on a line item basis as to (i) projected cash receipts; (ii) projected disbursements (including ordinary course operating expenses, restructuring expenses, including professional fees), capital and maintenance expenditures; and (iii) such other matters as may be reasonably required by the Lender. The Agreed Weekly Budget shall be rolled forward on a weekly basis and its format and the detail provided therein may only be amended and modified with the prior written consent of the Lender in its sole discretion.

On the Thursday of each week, the CCAA Debtors shall provide to the Lender a variance report (the "**Weekly Budget Variance Report**") showing on a line-by-line basis actual receipts and disbursements and the total available liquidity for the last day of the prior week for the cumulative period since the commencement of the CCAA proceeding and for a rolling cumulative four week period once the CCAA Proceedings have been pending for four weeks and noting therein all variances on a line-by-line basis from the amounts in the Agreed Weekly Budget and shall include explanations for all negative variances in excess of fifteen percent (15%) and shall be certified by the Chief Financial Officer of the Borrower and approved by the Monitor. The first Weekly Budget Variance Report shall be delivered on November 19, 2020.

**Conditions Precedent to DIP Advances:**

No advance shall be made under the DIP Facility until the following conditions precedent (the "**Funding Conditions**") have been satisfied or waived in writing, as determined by the Lender in its sole discretion, acting reasonably:

1. The Borrower shall have served an application for an order or orders, in a form and substance satisfactory to the Lender in its sole discretion, approving this Term Sheet, the DIP Facility, the cash management arrangements, granting the DIP Lender's Charge (as defined below), the Sales and Investment Solicitation Process (the "**SISP**") attached hereto as Schedule "A", and approval of the Stalking Horse Bid Letter (the "**Stalking Horse Bid Letter**") attached hereto as Schedule "B" (the "**Third DIP Order**") on or before October 16, 2020. Notice of the application for the Third DIP Order shall include any party required by the Lender in its sole discretion, acting reasonably. For greater certainty, the Third DIP Order shall provide, *inter alia*: (i) for the approval of the DIP Term Sheet, the DIP Facility, (ii) for the granting of a charge (the "**DIP Lender's Charge**") over all of the Property (as defined in the ARIO) of all of the CCAA Debtors and shall secure all obligations owing by the CCAA Debtors to the Lender hereunder, including without limitation, all principal, interest, fees, costs and expenses (including professional fees) (collectively the "**DIP Obligations**"), which, pursuant to the Third DIP Order, shall rank in priority to all other liens, charges, mortgages, hypothecs, adverse rights or claims, deemed trusts, grants (including any licensing rights provided to any person other than customers or licensees in the ordinary course of business), encumbrances,

security interests of every kind and nature (including, without limitation, the current debtor-in-possession financing) (collectively, "**Liens**") granted by the CCAA Debtors against any of the Property of any of the CCAA Debtors of any kind other than an administration charge granted by the CCAA Court to a maximum of CAD $500,000 (the "**Administration Charge**"); (iii) that such Third DIP Order may not be rescinded, amended or revised without at least five (5) business days' notice to the Lender and its counsel and shall not stay the rights of the Lender hereunder or under the DIP Credit Documentation (as defined below); (iv) that the Lender and the DIP Facility (including any participation rights hereunder) shall be unaffected under any plan of arrangement in respect of the CCAA Debtors; and (v) for such amendments to the ARIO as may be required by the Lender in its sole discretion;

2. The Third DIP Order shall have been issued and shall not have been amended, restated, rescinded or modified, or be subject to pending a motion, application or other proceeding to amend, restate, rescind, vary or modify, in a manner that, in the Lender's sole opinion, adversely affects the rights or interests of the Lender without the written consent of the Lender;

3. Any and all existing debtor-in-possession financings (including, without limitation, the debtor-in-possession financings provided to the Borrower (or any of them) by HCP-FVL, LLC and/or 1262743 B.C. Ltd.) shall have been repaid in full and subordinated to the Lender pursuant to a Court Order (as defined below) or a fully enforceable executed subordination agreement;

4. The Lender shall have approved the applicable Agreed Weekly Budget;

5. All outstanding fees and expenses payable to the Lender shall have been paid or will be paid within such time as is acceptable to the Lender in its sole discretion, acting reasonably;

6. There shall be no Liens (including any license rights granted to any secured party) existing (registered, inchoate or otherwise) that rank in priority to or *pari passu* with the DIP Lender's Charge other than the Administration Charge;

7. The CCAA Debtors shall be in compliance in all material respects with the timetables in the SISP;

8. The DIP Credit Documentation (as defined below) shall be satisfactory to the Lender in its sole discretion, acting reasonably, and the Lender shall be in receipt of fully executed copies of the DIP Credit Documentation;

9. The Lender shall be satisfied that the CCAA Debtors have complied and are continuing to comply, in all material respects, with

all applicable laws, regulations, policies in relation to their property and business, other than as may be permitted under any order of the CCAA Court (each a "**Court Order**") which is satisfactory to the Lender in its sole discretion;

10. No Event of Default shall have occurred that is continuing or will occur as a result of the requested advance;

11. All amounts due and owing to the Lender at the time of an advance under the DIP Facility shall have been paid or shall be paid from the requested advance;

12. The Lender shall have been satisfied that all motions, orders and other pleadings and related documents filed or submitted to the CCAA Court by the CCAA Debtors shall be consistent in all material respects with the terms hereof and all orders entered by the CCAA Court shall not be inconsistent with or have an adverse impact in any material respect on the terms of the DIP Facility or the interests of the Lender;

13. Any necessary third party approvals to preserve or perfect the DIP Lender's Charge shall have been obtained;

14. The Lender shall be in receipt of executed copies of guarantees and security, in form and substance satisfactory to the Lender in its sole discretion, from each of the Guarantors;

15. No material portion of the Collateral be lost or stolen; and

16. There has been no fact, circumstance, change or event (whether in respect of termination, usage, value, implementation of set off rights, or any other matter) in respect of those certain Interim License and Services Agreement among Winfield, Urthecast Corp., Geosys-Int'l, Inc., Geosys Australia Pty, Geosys Europe Sarl, Geosys S.A.S. and Geosys do Brasil sistemas de Informacao Agriocola Ltda, or that certain Purchase and Sale Agreement of Certain Subsidiaries of Land O'Lakes Inc. and Certain Platform Assets dated November 6, 2018 (collectively, the "**Winfield Agreements**"), that, in the Lender's opinion, acting reasonably, would adversely affect the Lender in any material respect, its security or interests, the Collateral.

No advance shall be made under the Second Tranche until the: (i) Funding Conditions have been satisfied or waived in writing, as determined by the Lender in its sole discretion, acting reasonably; and (ii) transaction of purchase and sale as contemplated by the Stalking Horse Bid Letter has closed (such determination to be made in accordance with the provisions of the definitive asset purchase agreement).:

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| | The Third Tranche will be advanced seven days following the transfer of the Designated Assets (as defined in the SISP). |
| **DIP Facility Security and Documentation:** | The DIP Obligations shall be secured by (the "DIP Security"):<br><br>1. the DIP Lender's Charge;<br><br>2. any Recognition Order; and<br><br>3. such other security documentation as may be required by the Lender from time to time in its sole discretion, which shall include customary ULC carve out provisions.<br><br>If required by the Lender, the DIP Security shall be a perfected first priority charge and not subject to subordination other than in respect of the Administration Charge. |
| **Deposit Accounts:** | The CCAA Debtors shall maintain all cash in bank accounts designated by the Borrower at a financial institution approved by the Lender ("**Approved Depository Banks**"). |
| **Monitor:** | The Lender shall be authorized by the Third DIP Order to have direct discussions with the Monitor and to receive information from the Monitor as requested by the Lender from time to time. |
| **Indemnity:** | The CCAA Debtors agree, jointly and severally, to indemnify and hold harmless the Lender, its affiliates and their respective shareholders, officers, directors, employees, advisors, partners and agents (each, an "**indemnified person**") from and against any and all losses, claims, damages, liabilities, and expenses to which any such indemnified person may become subject or may incur arising out of or in connection with the DIP Facility, the proposed or actual use of the proceeds of the DIP Facility, the CCAA Proceeding, participation in any sales process or resulting from the DIP Credit Documentation, and the use of the proceeds thereof, or any claim, litigation, investigation or proceeding relating to any of the foregoing regardless of whether any indemnified person is a party thereto, and to reimburse each indemnified person upon demand for any documented legal or other expenses incurred in connection with investigating or defending any of the foregoing, provided that the foregoing indemnity will not, as to an indemnified person, apply to losses, claims, damages, liabilities or related expenses to the extent (i) they are found by a final, non-appealable judgment of a court to arise directly from the willful misconduct or gross negligence of such indemnified person. This indemnification shall survive whether or not the transactions set out herein are consummated. Further, the Lender shall not be responsible or liable to any CCAA Debtor or any other person for any lost profits, consequential or punitive damages. |
| **Representations and Warranties:** | Each of the CCAA Debtors represents and warrants to the Lender, upon which the Lender relies in entering into this Term Sheet and the other DIP Credit Documentation, that |

1. The transactions contemplated by this Term Sheet and the other DIP Credit Documentation:

(a) upon the granting of the Third DIP Order, are within the powers of the CCAA Debtors;

(b) have been duly authorized, executed and delivered by or on behalf of the CCAA Debtors;

(c) upon the granting of the Third DIP Order, constitute legal, valid and binding obligations of the CCAA Debtors;

(d) upon the granting of the Third DIP Order, do not require the consent or approval of, registration or filing with, or any other action by, any governmental authority, other than filings which may be made to register or otherwise record the DIP Lender's Charge or any DIP Security;

2. The business operations of the CCAA Debtors and their direct and indirect subsidiaries have been and will continue to be conducted in material compliance with all applicable laws of each jurisdiction in which each such business has been or is being carried on subject to the provisions of any Court Order;

3. As at the date of this Term Sheet, all Priority Payables (as defined below) that are due and payable by the CCAA Debtors have been paid.

4. The CCAA Debtors legally or beneficially owns all of their respective cash, intellectual property, contracts, operations and material assets.

5. All of the CCAA Debtors' material assets, cash, intellectual property, contracts and operations are located in Canada, the United States, France, Spain and Switzerland.

6. Each of the CCAA Debtors and their direct and indirect subsidiaries own all intellectual property and material contracts and has obtained all material licences and permits required for the operation of its business, which intellectual property, material contracts, licences and permits remain, and after the DIP Facility, will remain in full force and effect. No proceedings have been commenced to revoke or amend any of such intellectual property, material contracts, licences and permits;

7. Except as set out in Schedule "B" hereto, each of the CCAA Debtors and their direct and indirect subsidiaries has paid where due its obligations for payroll, employee source deductions, Harmonized Sales Tax, value added taxes and is not in arrears in respect of these obligations;

8. None of the CCAA Debtors and their direct and indirect subsidiaries has any defined benefit pension plans or similar plans;

9. All written factual information provided by or on behalf of the CCAA Debtors to the Lender in the data room entitled "Datasite: Atlas DataRoom 2019" as constituted as of the date hereof for the purposes of or in connection with this Term Sheet or any transaction contemplated herein is true and accurate in all material respects on the date as of which such information is dated or certified and is not incomplete by omitting to state any fact necessary to make such information (taken as a whole) not materially misleading at such time in light of the circumstances under which such information was provided. In particular, and without limiting the generality of the foregoing all information regarding the CCAA Debtors' and its direct and indirect subsidiaries' corporate structure is true and complete, all public filings and financial reports are complete and true in all material respects and the CCAA Debtors have provided the Lender with all material information regarding all intellectual property, including, without limitation, patents, copyright, material contracts, cash, bank accounts, assets, jurisdictions, operations, source codes, title information and opinions and environmental reports affecting or relating to the Property (as defined in the ARIO) of the CCAA Debtors;

**Affirmative Covenants:**

In addition to all other covenants and obligations contained herein, the CCAA Debtors agree and covenant to perform and do each of the following until the DIP Facility is permanently and indefeasibly repaid in full and cancelled:

1. Comply with the provisions of the Court Orders made in the CCAA Proceeding and any foreign proceedings including, without limitation, the Third DIP Order and the proceedings commenced by, *inter alios*, UrtheCast Corp. under and pursuant to Chapter 15, Title 11 of the United States *Code* in the United States Bankruptcy Court for the District of Minnesota;

2. Utilize the DIP Facility only in accordance with the terms hereof and the applicable Agreed Weekly Budget;

3. Pay when due, or otherwise provide confirmation satisfactory to the Lender that payment arrangements satisfactory to the Lender have been entered into by the CCAA Debtors, to pay all claims which rank prior to the indebtedness and security held by the Lender, in any jurisdiction, from the CCAA Debtors (the "**Priority Payables**"), not consented to in writing by the Lender, or a claim or Lien pursuant to any law, statute, regulation or otherwise, which ranks or is capable of ranking in priority to or *pari passu* with the Lender's security in any jurisdiction or otherwise in priority to any claim for the repayment of any amount owing under the DIP Facility, including without limitation,

all amounts owing to any federal, provincial, municipal or other government entity or Crown corporation, all statutory, actual or deemed trusts, all withholdings and source deductions, all accrued and unpaid payroll and employee claims, including vacation pay, and all amounts owing to any person having a Lien, encumbrance, trust or charge ranking in priority to the Lender's security.

4. Comply with any timetable or process established from time to time by the CCAA Court including, without limitation, the SISP, for the sale of all or part of the assets of the CCAA Debtors and/or their direct and indirect subsidiaries or solicitation of investment in any of the CCAA Debtors and/or their direct and indirect subsidiaries as part of the CCAA Proceedings or in anticipation of a Plan and obtain the approval for such timetable or process from the Lender;

5. Allow the Lender and its advisors full access to the books and records of the CCAA Debtors and/or their direct and indirect subsidiaries on one business day's notice and during normal business hours and cause management thereof to fully cooperate with the Lender and its advisors;

6. Provide the Lender with draft copies of all motions, applications, proposed orders or other material or documents that any of them intend to file within the CCAA Proceeding at least three (3) business days prior to any such filing or, where it is not practically possible to do so with as much notice as possible prior to any such filing;

7. The Third DIP Order, and any other Court Orders which are being sought by the CCAA Debtors shall be submitted to the CCAA Court in a form confirmed in advance to be satisfactory to the Lender, acting reasonably, subject to any amendments required by the CCAA Court and the Monitor and acceptable to the Lender;

8. Any and all materials of the CCAA Debtors in respect of a proposed Plan or any other transaction or solicitation process seeking the investment in or refinancing of the CCAA Debtors and/or their direct and indirect subsidiaries, the sale or process for the selling of all or any part of the assets of the CCAA Debtors and/or their direct and indirect subsidiaries or any other restructuring of the CCAA Debtors' businesses and operations, including any liquidation, bankruptcy or other insolvency proceeding in respect of any of the CCAA Debtors (a "**Restructuring Option**") that does not contemplate the indefeasible repayment in full and in cash of the DIP Facility shall only be submitted to the CCAA Court in or presented to any stakeholder of the CCAA Debtors in a form that is satisfactory to the Lender in its sole discretion, acting reasonably, and has been provided to the Lender at least three (3) business days prior to any such filing or, where it is not practically possible to do so, with as much notice as possible prior to any such filing;

9. The CCAA Debtors shall promptly advise the Lender of, and provide copies of, any proposal received from a third party in respect of a Restructuring Option or any other transaction to be carried out pursuant to or as part of a Plan and, thereafter, shall advise the Lender of the status of any such proposal as well as any material amendments to the terms thereof;

10. Unless such payments are first approved by the Lender, none of the CCAA Debtors shall:

(i) increase any termination or severance entitlements or pay any termination or severance payments or modify any compensation or benefit plans whatsoever; or

(ii) establish or make any payments by way of a "key employee retention plan" except as otherwise disclosed in the Agreed Weekly Budget and the application materials filed in respect of the ARIO;

11. Provide to the Lender a weekly status update regarding the status of the CCAA Proceeding and their restructuring process including, without limitation, reports on the progress of any Plan, Restructuring Option, and any information which may otherwise be confidential subject to same being maintained as confidential by the Lender;

12. Inform the Lender on a timely basis of all material developments (as determined by the Lender in its sole discretion) with respect to the business and affairs of the CCAA Debtors and their direct and indirect subsidiaries, the development of a Plan and/or a Restructuring Option;

13. Deliver to the Lender the reporting required under this Term Sheet on or before the timelines required herein and such other reporting and other information from time to time as is reasonably requested by the Lender, in form and substance satisfactory to the Lender, on or before the timeline required by the Lender;

14. The CCAA Debtors shall deliver to the Lender: (i) within one business day of delivery thereof to the Monitor, copies of all financial reporting provided to the Monitor; and (ii) within one business day of receipt from the Monitor any reports or other commentary or analysis received by the CCAA Debtors from the Monitor regarding the financial position of the CCAA Debtors or otherwise;

15. Use the proceeds of the DIP Facility and other cash on hand only in a manner consistent with the terms hereof and the Agreed Weekly Budgets in all material respects to the extent reasonably practicable in the circumstances;

16. Provide the Lender with copies of all general communications out of the ordinary course, or any communication in respect of the CCAA Proceeding, to customers, suppliers, employees and other stakeholders simultaneously with the distribution thereof to such persons;

17. Preserve, renew, maintain and keep in full force its corporate existence and its material licenses, permits, approvals, contracts, and intellectual property rights required in respect of its business, properties, assets or any activities or operations carried out therein and maintain its properties and asset in good working order having regard to the current cessation of operations;

18. Pay all taxes, permitting and licence fees, Priority Payables not consented to in writing by the Lender, and to preserve the Collateral to avoid any Lien thereon and pay all amounts due under any critical supplier contracts as and when due and payable;

19. Maintain all insurance with respect to the Collateral in existence as of the date hereof;

20. Forthwith notify the Lender of the occurrence of any Event of Default, or of any event or circumstance that, with the passage of time, may constitute an Event of Default;

21. Execute and deliver the DIP Credit Documentation, including such security agreements, guarantees, financing statements, discharges, opinions or other documents and information, as may be reasonably requested by the Lender in connection with the DIP Facility, which documentation shall be in form and substance satisfactory to the Lender;

22. Pay upon request by the Lender all documented fees and expenses of the Lender (including professional fees) provided, however, that if any such fees and expenses incurred after the date of this Term Sheet are not paid by the Borrower, the Lender may in its discretion (i) deduct such fees and expenses from any advance of the DIP Facility, or (ii) pay all such fees and expenses whereupon such amounts shall be added to and form part of the DIP Obligations and shall reduce the availability under the DIP Facility; and

23. Pay when due all principal, interest, fees and other amounts payable by the Borrower under this Term Sheet and under any other DIP Credit Documentation on the dates, at the places and in the amounts and manner set forth herein or therein (as the case may be).

24. Notwithstanding any of the provisions of this Term Sheet, the Lender shall not be entitled to receive information regarding the identity of bidders or prospective bidders participating in any such SISP, the terms of any bids received or similar information in

connection with the SISP for the Designated Assets that would customarily not be available to a prospective bidder participating in a SISP (the "SISP Information") until the SISP provides for such disclosure in the Auction (as defined in the SISP). The Lender shall be entitled to receive SISP Information in respect of any asset subject to the SISP that the Lender declares to the Monitor that the Lender will not submit a bid for such asset in the SISP, provided that the asset is not included in a broader bid for additional assets including the Designated Assets which are part of the Stalking Horse Bid.

**Guarantee:** Prior to any advance of the DIP Facility, the Borrower will cause its other affiliates and subsidiaries (including the CCAA Debtors) to grant guarantees of payment to the Lender and to grant charges on their assets to secure the DIP Obligations. However, no such guarantee or security will be required for those subsidiaries which the Lender in its sole discretion, acting reasonably, determines to have no material value. Any such subsidiary which provides a guarantee shall thereafter be included as a "Guarantor".

**Negative Covenants:** Each of the CCAA Debtors covenants and agrees not to do the following, other than with the prior written consent of the Lender from and after the date hereof:

1. Except as contemplated by this Agreement or any Court Order, make any payment, without consent of the Lender, of any debt or obligation existing as at the date of the Initial Order (being September 4, 2020) (the "**Pre-Filing Debt**");

2. Transfer any funds to any other CCAA Debtors or related party thereof in any foreign jurisdiction prior to obtaining a first priority security interest and Lien in all of the CCAA Debtors' assets, property and undertaking located in such jurisdiction, in accordance with applicable law of such jurisdictions, and providing the Lender with executed copies of all documents required by the Lender (including, if requested by the Lender, an opinion from Borrower's counsel in form and substance satisfactory to the Lender) in order to establish a valid, binding and enforceable first priority security interest (and court order) in all of the assets, property and undertaking of the CCAA Debtors with material assets in such jurisdiction;

3. Create, incur or permit to exist, or permit any subsidiary to incur or permit to exist, any indebtedness for borrowed money or contingent liabilities, or issue any new securities (as such term has the meaning ascribed thereto under applicable law), other than Pre-Filing Debt, the DIP Facility, and post-filing accounts payable in the ordinary course of business;

4. Make any payments contrary to the provisions hereof or outside the ordinary course of business without the prior written consent of the Lender;

5. Sell, assign, lease, gift, transfer, convey or otherwise dispose of any of the Collateral except for sales contemplated by the Third DIP Order and sales of inventory in ordinary course of business;

6. Except for as contemplated herein or as otherwise consented to by the Lender, permit any new Liens to exist on any of the properties or assets of the CCAA Debtors or any of their direct or indirect subsidiaries other than the Liens in favour of the Lender as contemplated by this Agreement;

7. Shall not issue any notice to disclaim or resiliate any agreement pursuant to section 32 of the CCAA without the express written consent of the Lender, in its sole discretion, acting reasonably;

8. Create or permit to exist any other Lien which is senior to or *pari passu* with the DIP Lender's Charge except the Administration Charge;

9. Make any investments in or loans to or guarantee the debts or obligations of any other person or entity or permit any of its subsidiaries to do so;

10. Make any distribution, advance, loan, investment, gift, transfer, loan or other distribution, transaction, conveyance or assignment contrary to the provisions hereof or to any related party without the prior written consent of the Lender in its sole discretion;

11. Enter any restrictive covenants or agreements which might affect the value or liquidity of any Collateral

12. Present, seek the approval of or support any Restructuring Option without prior written consent of the Lender, acting reasonably, unless at the time of such presentment, approval or support, the DIP Facility have been indefeasibly repaid in full in cash.

13. Change or permit any subsidiary to change its jurisdiction of incorporation or registered office;

14. Change its name, fiscal year end or accounting policies or amalgamate, consolidate with, merge into, dissolve or enter into any similar transaction with any other entity without the writtenconsent of the Lender or permit any subsidiary to do so;

15. Terminate any key employees of the CCAA Debtors, including those involved in maintaining the Collateral, without the written consent of the Lender acting reasonably;

16. Provide or seek or support a motion by another party for a charge against any Property (as defined in the ARIO) of any of the CCAA Debtors that ranks equally or in priority to the charge of the Lender without the prior written consent of the Lender;

17. Distribute, loan, advance or otherwise use or transfer any advance or monies under the DIP Facility to any Foreign CCAA Debtor except upon satisfaction of the Direct Advance Condition and in accordance with an approved Foreign Advance Notice, or as otherwise may be agreed to by the Lender in its sole discretion;

18. Agree to a Restructuring Option without the prior written consent of the Lender, acting reasonably; and

19. Carry out any changes to the composition (including the addition, removal or replacement of directors or officers) of the board of directors or the officers (including any chief restructuring officer) of any of the CCAA Debtors or their direct and indirect affiliates or subsidiaries without the prior written consent of the Lender.

**Events of Default**

The occurrence of any one or more of the following events shall constitute an event of default (each, an "**Event of Default**") under this Term Sheet if such event of default is not cured within two (2) business days of the Borrower receiving notice of the event of default (to the extent such event of default is capable of being cured):

1. Any Court Order or Recognition Order is dismissed, stayed, reversed, vacated, amended or restated and such dismissal, stay, reversal, vacating, amendment or restatement adversely affects or would reasonably be expected to adversely affect the interests of the Lender in a material manner, unless the Lender has consented thereto;

2. Any Court Order is issued which adversely affects or would reasonably be expected to adversely affect the interests of the Lender in a material manner, unless the Lender has consented thereto in writing including, without limitation:

(a) the issuance of an order dismissing the CCAA Proceeding or lifting the stay imposed within the CCAA Proceeding to permit the enforcement of any security or claim against any of the CCAA Debtors or the appointment of a receiver and manager, receiver, interim receiver or similar official or the making of a bankruptcy order against any of the Debtors;

(b) the issuance of an order granting any other claim or a Lien of equal or priority status to that of the DIP Lender's Charge except as permitted by the Lender in its sole discretion;

(c) the issuance of an order staying, reversing, vacating or otherwise modifying the DIP Credit Documentation or the provisions of any Court Order affecting the Lender or the Collateral, or the issuance of an order adversely impacting the rights and interests of the Lender, in each case without the consent of the Lender;

(d) the failure of the CCAA Debtors to diligently oppose any party that brings an application or motion for the relief set out in (a) through (c) above and/or fails to secure the dismissal of such motion or application within 10 days from the date that such application or motion is brought;

3. Any sales or investor solicitation process is proposed to the CCAA Court by any of the CCAA Debtors without the prior written consent of the Lender, which consent shall not be unreasonably withheld;

4. Any CCAA Debtor presents, seeks the approval of or supports any Restructuring Option without the prior written consent of the Lender, which consent shall not be unreasonably withheld;

5. Failure of the CCAA Debtors to pay any amounts when due and owing by any of the CCAA Debtors hereunder;

6. Any of the Debtors cease to carry on business or operate or maintain their properties in the ordinary course as it is carried on as of the date hereof, except where such cessation is consented to by the Lender in writing;

7. Any representation or warranty by any of the CCAA Debtors herein or in any DIP Credit Documentation shall be incorrect or misleading in any material respect when made or any breach by any of the CCAA Debtors of any of the terms hereunder;

8. A Court Order is made, a liability arises or an event occurs, including any change in the business, assets, or conditions, financial or otherwise, any of the CCAA Debtors, that will in the Lender's judgment, acting reasonably, materially further impair the CCAA Debtors' financial condition, operations or ability to comply with its obligations under this Term Sheet, any DIP Credit Documentation or any Court Order or carry out a Plan or a Restructuring Option acceptable to the Lender;

9. Any material violation or breach of any Court Order by any of the Debtors;

10. Failure of the CCAA Debtors to perform or comply in any material respect with any term or covenant of this Term Sheet or any other DIP Credit Documentation;

11. Failure to maintain a cumulative net cash flow, for the CCAA Debtors on a consolidated basis which is at all times within 15% of the amounts set out in the Agreed Weekly Budget (measured weekly) and failure to provide an updated Agreed Weekly Budget, as required on a rolling basis, which shows sufficient liquidity to meet all of the projected cash requirements of the CCAA Debtors until the Maturity Date;

12. If any of senior officers cease to be senior officers of the CCAA Debtors and are not replaced with persons acceptable to the Lender;

13. Any proceeding, motion or application is commenced or filed by the CCAA Debtors, or if commenced by another party, supported or otherwise consented to by the CCAA Debtors, seeking the invalidation, subordination or other challenging of the terms of the DIP Facility, the DIP Lender's Charge, this Term Sheet, the CCAA stay of proceedings, any foreign court recognition order (each, a "Recognition Order") , or any of the other DIP Credit Documentation or approval of any Plan or Restructuring Option which does not have the prior written consent of the Lender;

14. Any of the CCAA Debtors become subject to a material environmental liability;

15. Any Plan is sanctioned or any Restructuring Option is consummated by any of the Debtors that is not consistent with or contravenes any provision of this Agreement or the other DIP Credit Documentation in a manner that is adverse to the interests of the Lender or would reasonably be expected to adversely affect unless the Lender has consented thereto in writing or unless it provides for repayment in full of all DIP Obligations to the Lenders under this Agreement;

16. The sale, assignment, transfer, lease, farm-out or other form of disposition of all or any part of a CCAA Debtor's property, assets or undertaking, without the prior written consent of the Lender, excluding transfers, leases and dispositions (a) in the ordinary course of business and (b) in accordance with the Sale and Investment Solicitation Process described in the ARIO;

17. The making of any payments or distributions of any kind by any CCAA Debtor, including payments of principal or interest in respect of existing (pre-filing) debts or obligations, other than as may be permitted by an order of the CCAA Court and that does not result

in an Event of Default and is provided for in the Agreed Weekly Budget;

18. The creation of or permitting to exist indebtedness (including guarantees thereof or indemnities or other financial assistance in respect thereof) by any CCAA Debtor other than (i) Pre-Filing Debt, (ii) debt contemplated by this Term Sheet; and (iii) post-filing trade payables or other post-filing unsecured obligations incurred in the ordinary course of business in accordance with the Agreed Weekly Budget and any Court Order;

19. The making of or giving any additional financial assurances by any CCAA Debtor, in the form of bonds, letters of credit, guarantees or otherwise, to any person (including, without limitation, any governmental authority); and

20. The commencement, continuation or seeking CCAA Court approval of a transaction by any CCAA Debtor in respect of the sale of all or any portion of any CCAA Debtor's assets that will not repay the Lender in full, without the prior written consent of the Lender, in its sole discretion.

**Remedies:** Upon the occurrence of an Event of Default, the Lender, in its sole discretion, may, subject to the Third DIP Order and applicable law:

1. Cease to make any further advances of the DIP Facility;

2. Terminate the DIP Facility and declare all amounts outstanding under the DIP Facility as immediately due and payable;

3. Apply to the Court for the appointment of a receiver, an interim receiver or a receiver and manger over the Collateral, or for the appointment of a trustee in bankruptcy of the CCAA Debtors;

4. Apply to the Court for an order, on terms satisfactory to the Monitor and the Lender, providing the Monitor with the power, in the name of and on behalf of any or all of the CCAA Debtors, to take all necessary steps in the CCAA Proceeding to realize on the Collateral;

5. Exercise the powers and rights of a secured party under the applicable federal, provincial or state legislation governing personal property security and the rights of secured creditors, including, for greater certainty, the *Personal Property Security Act* (British Columbia) or any legislation of similar effect; and

6. Exercise all such other rights and remedies available to the Lender under the DIP Credit Documentation, the Court Orders and applicable law or equity.

**Lender Approvals:** All consents of the Lender hereunder shall be in writing. Any consent, approval, instruction or other expression of the Lender to be

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| | delivered in writing may be delivered by any written instrument, including by way of electronic mail. |
| **Taxes:** | All payments by the CCAA Debtors under this Agreement and the other DIP Credit Documentation, including any payments required to be from and after the exercise of any remedies available to the Lender upon an Event of Default, shall be made free and clear of, without reduction for or on account of, any present or future taxes, levies, imposts, duties, charges, fees, deductions or withholdings of any kind or nature whatsoever or any interest or penalties payable with respect thereto now or in the future imposed, levied, collected, withheld or assessed by any country or any political subdivision of any country (collectively, "**Taxes**"); provided, however, that if any Taxes are required by applicable law to be withheld ("**Withholding Taxes**") from any amount payable to the Lender under this Agreement or under any DIP Credit Documentation, the amounts so payable to the Lender shall be increased to the extent necessary to yield to the Lender on a net basis after payment of all Withholding Taxes, the amount payable under such DIP Credit Documentation at the rate or in the amount specified in such DIP Credit Documentation and the CCAA Debtors shall provide evidence satisfactory to the Lender that the Taxes have been so withheld and remitted. |
| **Further Assurances:** | The CCAA Debtors shall, at their own expense, from time to time do, execute and deliver, or will cause to be done, executed and delivered, all such further acts, documents (including, without limitation, certificates, declarations, affidavits, reports and opinions) and things as the Lender may reasonably request for the purpose of giving effect to this Term Sheet. |
| **Entire Agreement:** | This Term Sheet and the DIP Credit Documentation, constitutes the entire agreement between the parties related to the subject matter hereof. To the extent there is any inconsistency between this Term Sheet and any of the other DIP Credit Documentation, this Term Sheet shall prevail. |
| **Credit Bid:** | The Lender or any affiliate to whom it has assigned the loan and security hereunder shall have the right at all times to credit bid all or any portion of the DIP Facility in connection with any sale of shares, assets or property of the Debtors. The DIP Credit Documentation and the CCAA Order will contain provisions recognizing and confirming the ability of the Lender (or its affiliate assignee) to credit bid for the full face value of all amounts outstanding under the DIP Facility without discount or set-off in any sales process, auction or other disposition of the property, assets and undertaking of the CCAA Debtors in the CCAA Proceedings. |
| **Business Day:** | If any payment is due on a day which is not a business day in Vancouver and New York City, such payment shall be due on the next following business day. |
| **No Waiver or Delay:** | No waiver or delay on the part of the Lender in exercising any right or privilege hereunder or under any other DIP Credit Documentation |

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| | will operate as a waiver hereof or thereof unless made in writing and delivered in accordance with the terms of this Agreement. |
| **Assignability:** | The Lender may assign this Term Sheet and its rights and obligations hereunder, in whole or in part, or grant a participation in its rights and obligations hereunder to any party acceptable to the Lender in its sole and absolute discretion (subject to providing the Borrower and the Monitor with reasonable evidence that such assignee has the financial capacity to fulfill the obligations of the Lender hereunder). Neither this Agreement nor any right and obligation hereunder may be assigned by the Borrower or any of the other CCAA Debtors. |
| **Severability:** | Any provision in this Agreement or in any DIP Credit Documentation which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof or effecting the validity of enforceability of such provision in any other jurisdiction. |
| **No Third Party Beneficiary:** | No person, other than the CCAA Debtors and the Lender, is entitled to rely upon this Agreement and the parties expressly agree that this Agreement does not confer rights upon any party not a signatory hereto. |
| **Press Releases:** | The CCAA Debtors shall not issue any press releases naming the Lender without its prior approval, acting reasonably, unless the CCAA Debtors are required to do so by applicable securities laws or other applicable law. |
| **Counter Parts and Facsimile Signatures:** | This Agreement may be executed in any number of counterparts and delivered by e-mail, including in PDF format, each of which when executed and delivered shall be deemed to be an original, and all of which when taken together shall constitute one and the same instrument. Any party may execute this Agreement by signing any counterpart of it. |
| **Notices:** | Any notice, request or other communication hereunder to any of the parties shall be in writing and be well and sufficiently given if delivered personally or sent by electronic mail to the attention of the person as set forth below:<br><br>**In the case of the Lender:**<br><br>Antarctica Infrastructure Partners, LLC<br>630 Fifth Avenue,<br>20th Floor<br>New York, NY 10111<br><br>Attention: Chandra Patel<br>Email: crpatel@antarcticacapital.com<br><br>**With a copy to:** |

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
66 Wellington Street West
Toronto, ON M5K 1E6

Attention: Jonathan See
Email: jsee@mccarthy.ca

**In the case of the CCAA parties:**

UrtheCast Corp.
1055 Canada Place, PI#33
Vancouver, British Columbia
V6C 0C3

Attention: Sai Chu
Email: schu@urthecast.com

**With a copy to:**

Bennett Jones LLP
666 Burrard Street, Suite 2500
V6C 2X8

Attention: Christian P. Gauthier
Email: gauthierc@bennettjones.com

**In either case, with a copy to the Monitor:**

EY Inc.
700 West Georgia Street
PO Box 10101
Vancouver, British Columbia
V7Y 1C7

Attention: Mike Bell
Email: mike.bell@ca.ey.com

Any such notice shall be deemed to be given and received, when received, unless received after 5:00 PM local time or on a day other than a business day, in which case the notice shall be deemed to be received the next business day.

**English Language:** The parties hereto confirm that this Agreement and all related documents have been drawn up in the English language at their request. *Les parties aux présentes confirment que le présent acte et tous les documents y relatifs furent rédigés en anglais à leur demande.*

**Governing Law :** This Agreement shall be governed by, and construed in accordance with the laws of the Province of British Columbia and the federal laws of Canada applicable therein.

*[Signature pages follow]*

# TAB 29

**CITATION:** U.S. Steel Canada Inc. (Re), 2016 ONSC 7899
**COURT FILE NO.:** CV-14-10695-00CL
**DATE:** 20161222

2016 ONSC 7899 (CanLII)

**SUPERIOR COURT OF JUSTICE - ONTARIO**

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

**AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.**

**BEFORE:** Mr. Justice H. Wilton-Siegel

**COUNSEL:** *Paul Steep, Steve Fulton* and *Jamey Gage,* for the Applicant, U.S. Steel Canada Inc.

*Robert Staley* and *Kevin J. Zych*, for the Monitor, Ernst & Young Inc.

*Alan Mark, Gale Rubenstein* and *Logan Willis* for the Province of Ontario

*Ken Rosenberg,* for the United Steelworkers International Union and the United Steelworkers International Union, Local 8782

*Andrew Hatnay,* Representative Counsel for the non-unionized active employees and retirees

*Robert Thornton, Michael Barrack* and *Mitch Grossell,* for United States Steel Corporation

*Sharon White,* for the United Steelworkers International Union, Local 1005

*Michael Kovacevic* and *Justyna Hidalgo,* for the City of Hamilton

*Lou Brzezinski,* for Robert and Sharon Milbourne

*Waleed Malik,* for Brookfield Capital Partners Ltd.

*Mario Forte,* for Bedrock Industries Canada LLC and Bedrock Industries L.P.

*Bryan Finlay* and *Marie-Andrée Vermette,* for the Board of Directors of U.S. Steel Canada Inc.

**HEARD:** December 15, 2016

**ENDORSEMENT**

[1] The applicant, U.S. Steel Canada Inc. (the "applicant" or "USSC"), seeks an order declaring that Bedrock Industries Canada LLC (the "Purchaser" or "Bedrock") is the Successful Bidder as that term is defined in paragraph 27 of the sales and investment solicitation process order of the Court dated January 21, 2016 (the "SISP Order"). In addition, it seeks authorization to enter into an agreement with Bedrock and Bedrock Industries L.P. dated as of December 9, 2016 referred to as the "CCAA Acquisition and Plan Sponsor Agreement" (the "PSA"). The applicant also seeks related ancillary relief as described below. At the conclusion of the hearing, the Court advised the parties that it was prepared to grant the requested relief for written reasons to follow. This Endorsement sets out the written reasons of the Court for its determination.

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**Background**

[2] On September 16, 2014, the applicant obtained an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") (as amended and restated from time to time, the "Initial Order").

[3] Over the course of more than 18 months, the applicant conducted extensive sales and marketing efforts within these CCAA proceedings. The initial marketing exercise was conducted pursuant to an order of the Court dated April 2, 2015, which authorized the applicant to commence a sale and restructuring/recapitalizing process (the "SARP"). The applicant did not receive any viable offers for a transaction or series of transactions under the SARP. By order of the Court dated October 9, 2015, the applicant was authorized to discontinue the SARP.

[4] Pursuant to the SISP Order, the applicant was authorized to commence a new sales and investment solicitation process (the "SISP"). The course of the SISP is set out in the various reports of the Monitor, Ernst & Young Inc. (the "Monitor"), including its most recent report, the thirty-third report dated December 13, 2016 (the "Monitor's Report"), and the affidavit sworn by the chief restructuring officer of the applicant, William Aziz (the "CRO") on December 13, 2016.

[5] In summary, as with the SARP, more than 100 strategic and financial parties were contacted to solicit potential interest. The first phase of the SISP ended on February 29, 2016. After that date, the applicant, the financial advisor to the applicant, and the CRO assessed the bids received and selected a number of bidders as "Phase 2 Qualified Bidders" after obtaining input from key stakeholders and with the concurrence of the Monitor. The deadline for Phase 2 Qualified Bidders to submit a binding offer was May 13, 2016. After that date, the applicant, together with its financial advisor, the CRO and the Monitor, evaluated the offers received, discussed the offers with the key stakeholders, and facilitated numerous meetings and negotiations between the bidders and various key stakeholders.

[6] At the end of July 2016, as a result of this review and the various meetings and negotiations, the applicant, with the assistance of the financial advisor and the support of the Monitor, concluded that the proposal of Bedrock was the most promising bid and designated the proposal as a "Qualified Bid" for the purposes of the SISP Order.

[7] Since that time, Bedrock has held discussions and negotiations with the principal stakeholders of the applicant, being the United Steelworkers International Union ("USW"), the USW Locals 8782 and 1005, the Province of Ontario (the "Province"), United States Steel Corporation ("USS") and Representative Counsel on behalf of the non-unionized salaried employees and retirees ("Representative Counsel").

[8] On September 21, 2016, the Province announced that it had entered into a memorandum of understanding with Bedrock (the "Province/Bedrock MOU"). On November 1, 2016, USS announced that it had agreed to proposed terms regarding the sale and transition of ownership of USSC to Bedrock, which are reflected in a term sheet (the "USS/Bedrock Term Sheet"). On November 22, 2016, USW Locals 8782 and 8782(b) (collectively, "Local 8782") delivered a letter to Bedrock confirming that the executive of these locals had approved a form of collective bargaining agreement to be entered into upon completion of Bedrock's purchase of USSC (the "Local 8782 Letter of Support"). The letter indicated that the executive was prepared to recommend the agreement to their respective memberships, conditional on satisfaction of certain arrangements relating to the funding of other post-employment benefits ("OPEBs") and the legacy and future pension plans of USSC.

[9] In addition, as a result of direct discussions between Bedrock and USSC during this period, the parties reached agreement on the principal terms of a proposed transaction by which Bedrock would acquire the business and operations of USSC (the "Proposed Transaction"). These terms of the Proposed Transaction are set out in the PSA. The PSA is largely consistent with the terms of the Province/Bedrock MOU, the USS/Bedrock Term Sheet and the understanding between Bedrock and USW Local 8782. The PSA provides that it is not binding on USSC until USSC obtains an order of this Court authorizing it to enter into the PSA and to pursue the Proposed Transaction in accordance with the PSA (the "Authorization Order").

[10] In connection with the PSA, USSC and Bedrock also requested the Province to enter into an agreement with USSC in respect of the Proposed Transaction. To this end, the Province and USSC have entered into an agreement dated December 9, 2016 (the "Province Support Agreement"). The Province Support Agreement also provides that it does not become effective unless and until the Authorization Order is granted.

**The Proposed Transaction**

[11] The basic structure of the Proposed Transaction is summarized in the Monitor's Report as follows:

> (a) the Purchaser will acquire substantially all of USSC's operating assets and business on a going concern basis and the outstanding shares of USSC through a CCAA plan of arrangement. Substantially all of the existing operations at both the Hamilton Works and the Lake Erie Works will continue;

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(b) the Purchaser will not acquire USSC's real property in Hamilton (the "HW Lands") and at Lake Erie (the "Lake Erie Lands") but will cause USSC to lease the part of the real property needed to continue steel operations. USSC's real property will be contributed to a Land Vehicle (as defined below) to be sold, leased or developed for the benefit of USSC's five main registered pension plans (the "Stelco Plans") and OPEBs. There is an expectation that these lands will have value when redeveloped. The Land Vehicle will initially be funded by a $10 million secured revolving loan from the Province, and an amount to be agreed upon from USSC. Any proceeds generated from these lands would be available to:

(i) fund the operations of the Land Vehicle in an agreed amount;

(ii) provide reimbursement to the Ontario Ministry of the Environment and Climate Change ("MOECC") for costs, if actually incurred, to test, monitor and investigate environmental conditions on the land; and

(iii) provide additional funding to be distributed equally towards the benefit of the Stelco Plans and OPEBs;

(c) the Purchaser will provide an equity contribution to implement the Transaction and will arrange new debt financing in an amount with borrowing availability not less than $125,000,000 after satisfying all exit costs and the payment of other amounts associated with USSC's emergence from protection under the CCAA;

(d) a new administrator will be appointed for the Stelco Plans and USSC's ongoing obligations with respect to the legacy liabilities under the Stelco Plans will be fixed as described below. The Stelco Plans will continue to be covered by the Pension Benefits Guarantee Fund. In addition to any funding received by the Stelco Plans from the Land Vehicle, USSC will make various lump sum and ongoing contributions into these pension plans including:

(i) a $30 million upfront payment upon the closing of the Proposed Transaction;

(ii) a $20 million payment prior to any dividend distribution by USSC to Bedrock; and

(iii) 10% of USSC's Free Cash Flow (as defined in the PSA), subject to a minimum of $10 million per year for the first five years, and a minimum of $15 million for the next 15 years. Bedrock will guarantee $160 million of these total annual contributions required from USSC;

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(e) one or more entities (the "OPEB Entity") satisfactory to USSC, the USW and the Province will be established for the purpose of receiving, holding and distributing funds on account of OPEBs. In addition to any funding received by the OPEB Entity from the Land Vehicle as referred to above, USSC will make various lump sum and ongoing contributions to the OPEB Entity, including:

(i) $15 million annual fixed payments (the "OPEB Fixed Contribution");

(ii) 6.5% of USSC's Free Cash Flow, subject to a maximum of $11 million per year; and

(iii) $30 million (the "Advance OPEB Payment") on the earlier of the date on which USSC first pays a dividend, redeems any capital stock, or makes any distribution to Bedrock or its affiliates, investors or funds, or the date that is three years after the closing of the Proposed Transaction. The Advance OPEB Payment is to be amortized in the fourth through ninth years following the closing date and applied against the OPEB Fixed Contribution described above for those years in accordance with a formula as set out in the OPEB Term Sheet (as defined below);

(f) USS will receive full payment for its secured claims and will assign its unsecured claims to the Purchaser;

(g) the Province will receive US$61 million and the MOECC will provide releases of certain legacy environmental liabilities associated with USSC's real property. The US$61 million would be used:

(i) to reimburse the professional fees of the Province related to USSC's restructuring;

(ii) as financial assurance, held by the MOECC, to cover any costs that may be incurred by the MOECC in connection with environmental conditions on USSC's real property; and

(iii) for any portion of the amount held as financial assurance that is not required by the MOECC, to be equally distributed towards the benefit of USSC's OPEBs and the Stelco Plans;

(h) USSC will be required to continue to comply with all environmental laws and regulations going forward and to enter into an environmental management plan with the MOECC going forward. USSC will fund the costs of any environmental baseline testing and monitoring;

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(i) all other secured claims, as determined in accordance with the claims process order of the Court made November 13, 2014 (the "Claims Process Order"), will be paid in full or as otherwise agreed by the Purchaser and USSC; and

(j) the remaining unsecured claims will receive a distribution pursuant to the CCAA plan from a distribution pool in an amount to be determined.

[12] The Monitor believes that, if the Proposed Transaction is completed, USSC will emerge as a stand-alone steel manufacturer with a restructured balance sheet and sufficient liquidity such that it will have stability and be able to compete in challenging steel market conditions. A successful completion of the Proposed Transaction is expected to result in the preservation of jobs, ongoing business for suppliers, and ancillary economic benefits for the communities in which USSC operates its business.

**The Plan Sponsor Agreement**

[13] The following summarizes the significant terms of the PSA and is based on the description thereof in the Monitor's Report.

[14] The principal commitments of USSC and Bedrock are set out in sections 2.01(1) and (2) of the PSA which read as follows:

2.01 Transaction

(1) The Corporation and the Purchaser will each use commercially reasonable efforts to give effect to a restructuring of the Corporation by way of a plan of arrangement under the CCAA (the "CCAA Plan") and the Stakeholder Agreements prior to the Outside Date, on the terms set out in and consistent in all material respects with the Term Sheets and this Agreement (the "Transaction").

(2) The Corporation and the Purchaser agree to cooperate with each other in good faith and use commercially reasonable efforts to complete the following steps in accordance with the following timeline in support of the Transaction:

(a) obtain the Authorization Order by December 31, 2016;

(b) obtain the Meeting Order [being an order of the court for the convening of a meeting or meetings of the creditors to consider and vote on the CCAA Plan] by January 31, 2017 ;

(c) obtain the Sanction Order [being an order of the court for the approval of the CCAA Plan] by March 10, 2017; and

(d) implement the CCAA Plan and close the Proposed Transaction by the Outside Date [being March 31, 2017 or such later date as USSC and the Purchaser may designate by mutual agreement].

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[15] The PSA attaches term sheets setting out the principal terms of the Proposed Transaction agreed to between USSC and Bedrock regarding the following matters (collectively, the "Term Sheets"):

1. the CCAA Plan contemplated to implement the Proposed Transaction;

2. the arrangements pertaining to the environmental conditions at the Hamilton Works and the Lake Erie Works;

3. the arrangements pertaining to the ownership of the HW Lands and the Lake Erie Lands after completion of the Proposed Transaction by a newly established entity (the "Land Vehicle");

4. the lease arrangements pertaining to the lands to be owned by the Land Vehicle that USSC will require for its operations at the Hamilton Works and the Lake Erie Works;

5. proposed terms for OPEBs, including the funding thereof (the "OPEB Term Sheet");

6. proposed terms regarding the Stelco Plans including the funding thereof (the "Pension Term Sheet"); and

7. arrangements concerning the tax aspects of the Proposed Transaction.

[16] The Proposed Transaction is subject to a number of important conditions, which are for the benefit of the Purchaser and USSC and must be complied with at or prior to the closing of the Proposed Transaction. Such conditions include, among others:

(a) *Competition Act* compliance and *Investment Canada Act* approval will have been obtained;

(b) the Sanction Order of the court will have been obtained;

(c) amendments to the collective agreements with USW Local 1005, USW Local 8782 and USW Local 8782(b) shall have been executed and ratified;

(d) the closing conditions to implement the arrangements described in the Term Sheets will have been satisfied on terms and conditions acceptable to the Purchaser and USSC;

(e) implementation of arrangements satisfactory to the Purchaser and USSC regarding the following:

(i) the payment in full to USS of its secured claim;

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(ii) the assignment to the Purchaser of the USS unsecured claims and the issued and outstanding shares in the capital of USSC;

(iii) the execution of a transitional services agreement between USS and USSC;

(iv) the execution of an agreement with respect to intellectual property and trade secrets between USS and USSC; and

(v) the execution of an ore supply agreement between USS and USSC;

(f) the execution and delivery of a new loan agreement, security and related documentation with not less than $125,000,000 of credit available, after satisfying all exit costs and other amounts associated with USSC's emergence from protection under the CCAA, to the Purchaser and USSC by the lenders and to be available at or prior to closing of the Proposed Transaction;

(g) the execution and delivery of all other agreements contemplated by the Term Sheets, or required to satisfy the closing conditions described above, that are required to be executed prior to the time of closing between Bedrock or USSC or both, as applicable, with one or more stakeholders as applicable;

(h) the execution and delivery of all releases among each of the key stakeholders and USSC; and

(i) the satisfaction or waiver of the conditions to the implementation of the CCAA Plan giving effect to the Proposed Transaction as described in the PSA.

**Preliminary Matter**

[17] The relief sought in this proceeding is opposed by three parties: USW Local 1005 ("Local 1005"), the City of Hamilton ("Hamilton"), and Robert J. Milbourne and Sharon P. Milbourne (collectively, the "Milbournes"). These parties (collectively, the "Objecting Parties") each raise a common issue, the short service of the motion materials, which I will address first.

[18] The notice of motion and motion record in this matter were served on the service list on Friday, December 9, 2010 after the close of business. The Objecting Parties say that this effectively gave them three business days' notice of the motion. In paragraph 55, the Initial Order contemplates eight business days' notice of a motion, subject to further order of the Court in respect of urgent motions. To the extent necessary, the applicant seeks leave of the Court to bring this motion on short service on the grounds that it is an urgent motion.

[19] The Objecting Parties seek dismissal of the motion or, in the alternative, an adjournment of this motion for five business days. Counsel for Local 1005 and for Hamilton say that a delay would permit their clients to better understand the terms of the Proposed Transaction. In

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addition, Hamilton and the Milbournes suggest that such an adjournment might permit resolution of their respective issues.

[20] It would have been preferable for the applicant to have provided the full notice contemplated by the Initial Order for motions in the ordinary course. However, I am prepared to grant leave to shorten the service to that actually provided in this case for the following reasons.

[21] First, there is real urgency to this motion in several respects. After almost two years of marketing USSC, the Proposed Transaction is not only the only viable proposal but also the best offer for USSC's stakeholders generally. However, Bedrock is not currently legally obligated to proceed with any transaction. Moreover, the economic circumstances generally, and the economics of the steel industry in particular, are subject to great uncertainty. In addition, there are no currently operating timelines for the resolution of the outstanding issues necessary to finalize the Proposed Transaction. Time does not normally improve the prospects for a successful restructuring. It is therefore imperative that Bedrock be committed to using commercially reasonable efforts to complete the Proposed Transaction at the present time.

[22] Second, there is no evidence whatsoever of any prejudice to the Objecting Parties that would result from granting the requested relief. As discussed below, none of their rights are affected by the Authorization Order. Further, there is no indication that any of them has been unable to understand the PSA in the time available or to represent their clients properly in this hearing. Indeed, they have very ably presented the principal issues of their clients. I would observe as well that Local 1005 has had knowledge of the principal terms of the Proposed Transaction in respect of pensions and OPEBs since early September through its participation in discussions regarding the Proposed Transaction.

[23] Lastly, there is no reasonable likelihood that a delay of five business days will result in the resolution of any of the claims of the Objecting Parties that require negotiation. As all of the parties acknowledge, this is a highly complex restructuring with a number of inter-related issues. I would also note that, to the extent that the position of the Milbournes under the Proposed Transaction is a matter of clarification rather than negotiation, there is no need for any delay in hearing this motion.

**Declaration of Bedrock as the Successful Bidder**

[24] As mentioned, the applicant seeks a declaration that Bedrock is the Successful Bidder as defined in paragraph 27 of the SISP Order with the result, among other things, that all other bids and proposals made by any other person are deemed to be rejected.

[25] Paragraph 27 of the SISP Order reads as follows:

> USSC and the Financial Advisor, in consultation with and with the approval of the Monitor, (a) will review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated among USSC, in consultation with the Financial Advisor and the Monitor, and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations, and (b) identify the highest or otherwise best bid (the

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> "Successful Bid", and the Phase 2 Qualified Bidder making such Successful Bid, the "Successful Bidder") for any particular Property or the Business in whole or part. The determination of any Successful Bid by USSC, with the assistance of the Financial Advisor, and the Monitor shall be subject to approval by the Court.

[26] The applicant, with the assistance of its financial advisor and the Monitor, has determined that Bedrock is the Successful Bidder and that the Proposed Transaction is the Successful Bid. Such determination is therefore now subject to the approval of the Court.

[27] The applicant says that such determination is, in effect, governed by the business judgment rule. On this basis, the determination of the applicant's board of directors should be respected absent evidence of negligence, fraud or patent unreasonableness. There is no such evidence filed in opposition to the motion, notwithstanding the objections discussed below.

[28] I am inclined to agree with the standard proposed by the applicant. In any event, however, there are the following additional considerations which weigh in favour of the granting of the Court's approval if, instead, the Court is required to address the reasonableness of the applicant's determination.

[29] First, the Proposed Transaction is the outcome of an extended search for a buyer or investor pursuant to which USSC has been very extensively marketed. There is no other viable bid or proposal before the Court which would provide as much value to the stakeholders generally. The Monitor is of the view that the Proposed Transaction is the best option for USSC and its stakeholders in the present circumstances.

[30] Second, on the evidence before the Court in the earlier reports of the Monitor, and in the opinion of the Monitor as expressed in the Monitor's Report, the SISP process which resulted in the Proposed Transaction was transparent, robust, fair and reasonable and considered all available alternatives.

[31] Third, despite the fact that the Proposed Transaction does not meet the objectives of all parties, it creates a number of benefits for stakeholders. These include the maintenance of USSC as a going concern with the attendant preservation of employment and related social benefits. In addition, the Proposed Transaction would provide significant funding for USSC's pensions and OPEBs, including through the Land Vehicle created to hold the lands not required for the operations of the Hamilton Works. It also provides for a distribution to the applicant's unsecured creditors as well as repayment of its secured creditors.

[32] Fourth, as a related matter, there is considerable support for the PSA from principal stakeholders of USSC. While Local 1005 argues that support for the Proposed Transaction has not reached "the tipping point", because of the opposition to the PSA of the Objecting Parties addressed below, the reality is the opposite. The Authorization Order is supported by the applicant's board of directors, the Province and USW Local 8782. While USS, the USW and Representative Counsel take no position on the motion, they are not raising any objections. In particular, USS is not opposed to the terms of the Proposed Transaction as set out in the PSA but is withholding its consent until the remaining issues are resolved to its satisfaction. In addition, Representative Counsel stated on behalf of his clients that his clients take reassurance from the

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fact that the Authorization Order does not purport to affect the legal rights of the parties and that negotiations will continue regarding the matters of significance to his clients. Further, the board of directors of USSC is supportive of the PSA, notwithstanding the fact that an important issue to them personally remains an unresolved issue, being the operation of existing indemnities in their favour from USS. Lastly, the CRO of the applicant also recommends that Bedrock be approved as the Successful Bidder.

[33] Fifth, the Objecting Parties submit that particular provisions are intrinsically unfair and, on this basis, urge the Court to reject the Proposed Transaction, or to withhold its approval of Bedrock as the Successful Bidder. In so doing, they are implicitly urging the Court to apply its own view of fairness. I do not think that the Court's view of the fairness of the Proposed Transaction is the appropriate standard at this stage of the proceedings for the following reasons.

[34] First, the Proposed Transaction is not yet finalized. It would therefore be premature to reach any conclusion regarding the terms of the Proposed Transaction. In addition, while the Objecting Parties raise legitimate concerns regarding particular issues of importance to them or their members and retirees, such issues cannot be examined in a vacuum. They must be measured for present purposes against the alternative. In this case, as mentioned, there is no alternative transaction against which to assess these provisions of the Proposed Transaction. The only alternative would appear to be a liquidation scenario.

[35] Further, to the extent that the Court must address the fairness of a transaction, it must do so having regard to the entirety of the transaction, including the pre-existing rights of the stakeholders and the manner in which the interests of the parties are resolved given the need for concessions on the part of the stakeholders to achieve a successful restructuring. In this context, a significant consideration in assessing the fairness of any transaction is whether or not it has received the approval of the affected stakeholders. In other words, the fairness of the issues raised by Local 1005, which are important issues, are more properly addressed by the members and retirees of Local 1005 themselves in the creditors' meeting or otherwise after the Proposed Transaction and CCAA Plan are finalized.

[36] Sixth, as discussed below, the Monitor has provided a strong recommendation in favour of the Court granting approval of the Authorization Order. The Monitor is of the view that the Proposed Transaction represents the best available option for USSC and its stakeholders in the present circumstances.

[37] Accordingly, I am satisfied that the Court should approve the Proposed Transaction as the Successful Bid for the purposes of the SISP Order.

**Authorization to Enter into the PSA and the Province Support Agreement**

[38] The applicant also seeks the authorization of the Court to enter into the PSA and the Province Support Agreement. I will address this matter by dealing first with the authority of the Court to grant such authorization, then with the reasons for the Court's determination to authorize the applicant to sign these agreements, next with two particular terms of the PSA for which the applicant has sought specific authorization, and finally with the objections of the Objecting Parties.

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**Authority of the Court to Authorize the Execution of the PSA and the Province Support Agreement by the Applicant**

[39] Section 11 of the CCAA provides the Court with broad powers to "make any order that it considers appropriate in the circumstances" and section 11.02(2) provides specific authority to vary a stay of proceedings. The Court therefore has the authority to authorize a debtor company in CCAA proceedings to enter into an agreement to facilitate a prospective restructuring.

[40] The issue of the authority of a court was addressed in *Re Stelco* (2005), 78 O.R. (3d) 254 (C.A.). In that case, the Court of Appeal upheld an order of the motion judge authorizing the debtor company to enter into three agreements with the provincial government, the USW and a proposed financing party. The three agreements were said to be "intrinsic to the success" of the proposed plan of arrangement. The debtor company had negotiated those agreements "in an attempt to successfully emerge from CCAA protection." They established the framework for the proposed transaction which would in turn form the basis of the proposed plan of arrangement. It appears that these agreements served a similar purpose in that case as the Province/Bedrock MOU, the USS/Bedrock Term Sheet and the Local 8782 Letter of Support in the present proceeding.

[41] In reaching its decision, the Court of Appeal expressed the following test at paras. 18 and 19, which I think is equally applicable in the present context:

> In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the CCAA provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, s.11(4) [the predecessor of section 11.02] includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the status quo. The point of the CCAA process is not simply to preserve the status quo but to facilitate restructuring so that the company can successfully emerge from the process. This point was made by Gibbs J.A. in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at para. 10:
>
> [Excerpt omitted.]
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

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**Authorization of the PSA and the Province Support Agreement**

[42] I will address the authorization of the applicant's execution of the PSA first and will then briefly address authorization of the Province Support Agreement.

***Authorization of the Plan Sponsor Agreement***

[43] The following sets out the four principal reasons of the Court for its determination to authorize the applicant to enter into the PSA.

[44] First, the Authorization Order does not alter or otherwise affect any legal rights of any of the creditors. As it is not a plan sanction order, it does not alter the right of creditors to approve or reject a plan of arrangement, based on a finalized Proposed Transaction, when it is presented to the creditors. Nor does it constitute approval of a plan of arrangement. For that, the applicant requires a finalized Proposed Transaction upon which to base such a plan. It does not even constitute approval of a final Proposed Transaction. It constitutes no more than authorization to USSC to enter into the PSA and thereby commit to use commercially reasonable efforts to pursue finalization of a transaction based on the framework of the Proposed Transaction described therein, as well as an authorization to enter into the Province Support Agreement.

[45] In order to finalize a binding agreement for the Proposed Transaction that is capable of being completed, the applicant will have to negotiate the final terms of the agreement and take the necessary actions to be in a position to satisfy the conditions of closing contemplated in the PSA. The former requires resolution of a number of outstanding issues among the stakeholders who have already been involved as well as consultation and negotiation with other stakeholders who have not been involved to date, including Hamilton and the Milbournes, among others, regarding the treatment of their claims and interests. The latter requires negotiation of a number of agreements giving effect to the arrangements contemplated by the Term Sheets as well as new collective agreements with each of Local 1005 and Local 8782. There is nothing in the Authorization Order that prohibits USSC from continuing negotiations with its creditors on these matters. Rather, the PSA expressly contemplates that such discussions and negotiations are necessary to finalize all of the terms of the Proposed Transaction and of the proposed plan of arrangement.

[46] Second, while the Objecting Parties' concern that granting the Authorization Order will limit or constrain their bargaining power in such negotiations is understandable, the fact is that the Order itself does not affect the bargaining power or "leverage" of any of the creditors. Nor is it correct to say that future negotiations will take place in a "take it or leave it" atmosphere.

[47] On the one hand, there is scope for negotiations between the stakeholders and USSC and Bedrock. As mentioned, the PSA itself expressly contemplates serious negotiations on a large number of issues that are important to various stakeholders and that ultimately require their approval or consent. It does not predetermine or foreclose the outcome of these negotiations, which are integral to the proposed restructuring of USSC. Further, as mentioned above, the extent to which particular creditors are able to achieve their priorities or objectives in such negotiations will continue to depend, among other factors, on the overall economics of the

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Proposed Transaction and the willingness of other parties to make concessions or tradeoffs to complete a transaction, rather than on the existence of the Authorization Order.

[48] On the other hand, and more significantly, while the terms of the Authorization Order grant exclusivity to Bedrock while the necessary consultations and negotiations are proceeding, this merely reflects the reality of the current situation even without the Order. To the extent that any of the creditors believe themselves to be constrained in some manner in future negotiations, that is a reflection of the circumstances in which the parties find themselves quite apart from the Order. The Court's authorization of the applicant's request to enter into the PSA does not alter the environment in which future negotiations will take place if there is to be a successful restructuring of USSC. While that could be the case if the effect of the Authorization Order were to prevent stakeholders from negotiating simultaneously with two or more potential purchasers, this is no longer a realistic possibility. The SISP has run its course and the stakeholders must now address its outcome. The Proposed Transaction is not only the option that provides the most value to the stakeholders of USSC, it is the only viable option. There is no competing offer for the business and operations of USSC on a going concern basis. The only alternative to proceeding to finalize the Proposed Transaction is a liquidation of USSC on a controlled or an uncontrolled basis.

[49] Third, there are real benefits that will flow from execution of the PSA. In general terms, the commitments of the applicant and Bedrock in the PSA will increase the likelihood of a successful restructuring to the benefit of all of the stakeholders. In this regard, the present circumstances are very similar to those in *Re Stelco*. The PSA is a necessary step in the progression toward finalization of a plan of arrangement for submission to the creditors. The PSA establishes the framework for the Proposed Transaction which would, in turn, form the basis of a proposed plan of arrangement. As in *Re Stelco*, the PSA is therefore intrinsic to the success of the prospective plan of arrangement and it is doubtful that the proposed plan could proceed if the Authorization Order were not granted.

[50] More particularly, the execution of the PSA provides a binding commitment of Bedrock to use commercially reasonable efforts to finalize a restructuring of USSC based on the terms of the Proposed Transaction. As Bedrock is not otherwise obligated in respect of the Proposed Transaction, this commitment, even with the qualifications in the PSA, is important to maintain the confidence of the applicant's employees, suppliers and customers in the continued progress of the restructuring. As mentioned, it provides a framework for future negotiations among stakeholders as well as transparency regarding the interests of the other stakeholders, which will facilitate such negotiations. In addition, it provides some momentum to the process of finalizing the Proposed Transaction by bringing the creditors who have not been involved to date into the consultations and negotiations on an informed basis. Lastly, the PSA sets timelines for completion of a finalized Proposed Transaction and a plan of arrangement based on such Proposed Transaction, which are critical if there is to be successful restructuring.

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[51] Fourth, an important consideration for the Court is the strong recommendation of the Monitor that the Court grant the Authorization Order. The Monitor's recommendation is based on the following:

- the integrity of the SISP process used to arrive at the Proposed Transaction;
- the Monitor's judgment that the Proposed Transaction set out in the PSA is the best available option for USSC and its stakeholders in the circumstances and has only been possible to achieve after two marketing processes that took more than 18 months;
- the Monitor's view that the Proposed Transaction provides a foundation upon which a successful restructuring of USSC can be built; and
- the Monitor's belief that approval of the PSA should assist in focusing the efforts of the key stakeholders towards completing the negotiations of the definitive agreements and arrangements contemplated by the PSA.

***Authorization of the Province Support Agreement***

[52] At the hearing of this motion, the focus of the arguments of all parties was on approval of the PSA, with little attention paid to the related issue of the request for the Court's authorization for the applicant to enter into the Province Support Agreement. I have proceeded on the basis that the opposition of the Objecting Parties also extended to opposition to authorization of the Province Support Agreement, given that it was also necessary in order to progress the Proposed Transaction.

[53] In any event, to the extent that there is any opposition to this relief, the Court is satisfied that the applicant should be authorized to enter into the Province Support Agreement for the same reasons as it authorized the applicant to enter into the PSA.

**Non-Solicitation and Expense Reimbursement Provisions of the PSA**

[54] The applicant also seeks approval of the Court of the non-solicitation provision in section 5.06 of the PSA and the expense reimbursement provision in section 7.02(2) of the PSA.

[55] The non-solicitation provision runs in favour of Bedrock until such time as the PSA is terminated. Given the Court's approval of the applicant's determination of Bedrock as the Successful Bidder and the Court's authorization of the PSA, this is a commercially reasonable provision. It would be unreasonable to expect that Bedrock would commit the time and resources necessary to finalize and implement the Proposed Transaction, and a plan of arrangement giving effect to the Proposed Transaction, without the assurance that it could not be displaced by a subsequent offer. In addition, the significant level of stakeholder support in favour of the Authorization Order described above also weighs in favour of authorization of this covenant.

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[56] The expense reimbursement provision contemplates reimbursement of Bedrock's transaction-related expenses up to a maximum of $4 million in the event Bedrock terminates the PSA under section 7.01(a) thereof. However, this provision relates only to termination in the event of a material breach of any representation, warranty, covenant, obligation or other provisions of the PSA by the other party — i.e. by the applicant. Accordingly, Bedrock is only entitled to reimbursement of its expenses in the event of a material breach of the PSA by the applicant.

[57] In my view, given the complexity and attendant cost of the Proposed Transaction, including the remaining actions required to complete a successful transaction, this is an eminently reasonable provision from a commercial perspective.

[58] Based on the foregoing, the Court is satisfied that both provisions should be approved as commercially reasonable, given the context in which the PSA has been negotiated and executed. In addition, each of these provisions enhances the prospects for a successful restructuring of USSC and, as such, are consistent with the purposes of the CCAA.

## **The Objections**

[59] In reaching the Court's determination to authorize the applicant to enter into the PSA, the Court considered the following substantive objections to the Authorization Order and rejected them for the reasons expressed below.

### ***The City of Hamilton***

[60] Hamilton objects to the declaration of Bedrock as the Successful Bidder and to the authorization of USSC to enter into the PSA. Hamilton says it has been excluded from meaningful consultation and negotiation regarding the Proposed Transaction. It says such consultation was due given its status as a creditor of the applicant and its role as the approval authority for land use and development on the HW Lands.

[61] In its Notice of Objection dated December 13, 2016, Hamilton says it has three main areas of concern: (1) pension and benefits for retirees of USSC; (2) payment of past (accrued and unpaid) and future property taxes; and (3) the future of the HW Lands.

[62] Of these matters, its principal objection pertains to the uncertainty regarding the treatment of the accrued and unpaid past property taxes on the HW Lands as well as the payment of future property taxes. It asks the Court to order, as a condition of the authorization of the PSA, that the PSA confirm that USSC will pay its accrued past taxes and all future property taxes on the HW Lands.

[63] It is not entirely clear that the City has been excluded from negotiations with Bedrock, as counsel for the City suggests. However, the more important point is that on each of the two issues that are of direct concern to the City — payment of its accrued and future taxes and the regime pertaining to the HW Lands — the effect of the relief granted is to permit consultations and negotiations to take place among Bedrock, Hamilton and the other parties involved in these issues. It is inappropriate for the Court to order that Hamilton's rights be enshrined in the

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provisions of the PSA pending the outcome of such discussions and negotiations. Moreover, the Authorization Order does not impair or otherwise affect its rights in any manner whatsoever. Among other things, Hamilton retains the right to oppose the prospective CCAA Plan, both at the creditors' meeting and in the sanction hearing, if it believes that the Proposed Transaction is not fair to it given its legal rights.

***The Milbournes***

[64] The Milbournes have filed an objection dated December 14, 2016. The Milbournes say that they object to the Authorization Order because the PSA "fails to provide for treatment of the pension benefits and OPEBs for individuals in uniquely situated positions", including, in particular, themselves. They say the resulting uncertainty is prejudicial to their interests, given that these benefits stand to be compromised under the proposed plan of arrangement.

[65] In addition to registered pension benefits, the Milbournes receive non-registered pension benefits under a retirement compensation agreement. They submit that, if the Authorization Order is granted, the Court should require that the PSA confirm their continued entitlement to these benefits.

[66] The circumstances of the Milbournes, and any other parties who currently receive similar benefits, are not before the Court, although the Court understands that there may be a trust established to fund some or all of these benefits. In any event, it would be premature to address the treatment of these benefits at the present time.

[67] As with the issues raised by Hamilton, the intended treatment of these benefits under the Proposed Transaction will be the subject of discussion and negotiation, depending, among other things, upon the extent to which such benefits are currently entitled to the benefit of a trust. Further, the Milbournes' rights are not affected in any way by the Authorization Order. They retain the right to oppose the fairness of any plan of arrangement in the sanction hearing to the extent they consider that their rights have been unfairly affected by such plan.

***Local 1005***

[68] I have addressed above the principal objections of Local 1005 to approval of Bedrock as the Successful Bidder for purposes of the SISP Order. Local 1005 also opposes authorizing the applicant to enter into the PSA. It says that, if the PSA is authorized, significant issues outstanding among the parties will essentially be presented to stakeholders on a "take it or leave it basis". I do not agree with this characterization of the situation for the reasons set out above.

[69] The Proposed Transaction is a multiparty transaction. The principal stakeholders have reached agreement on governing principles regarding a number of critical issues. However, Local 1005 is not bound by those arrangements as a legal matter. They are free to negotiate based on their own priorities. As mentioned, the extent to which they are able to achieve those priorities or objectives will depend, among other factors, on the overall economics of the Proposed Transaction and the willingness of other parties to make concessions or tradeoffs in order to complete a transaction. However, in the present circumstances, it will not be affected by the execution of the PSA and the exclusivity that the SISP Order and the PSA grant Bedrock.

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[70] Local 1005 also refers to the fact that the PSA and the CCAA Term Sheet stipulate that changes to Local 1005's collective agreement must be agreed to, as well as changes to the pension and OPEB arrangements. It says that, if the PSA is authorized, these conditions will have a significant impact on collective bargaining and contractual rights. The CCAA Term Sheet does contemplate amendments to existing arrangements affecting employees and retirees of USSC. I do not agree, however, that the authorization of the PSA has a significant impact by itself on the negotiation process.

[71] After a lengthy search process, this is the transaction that is on the table. It reflects what Bedrock is prepared to offer and, in a larger sense, what the market assesses as the value of USSC. There remains considerable scope for negotiations between the parties. However, the scope of such negotiation is defined by the financial limitations imposed by the broad terms of the Bedrock offer and, in a larger sense, by the market. Any sense of constraint in this negotiating process is a reflection of these economic realities, not the authorization of the PSA. Moreover, the consequences of not approving the PSA would establish constraints of a more immediate and draconian nature.

[72] Lastly, Local 1005 objects that certain provisions are, in its opinion, unfair to its members and retirees. This includes their treatment in respect of OPEBs relative to the treatment of members and retirees of Local 8782. Local 1005 also says the arrangements regarding the pension plans and OPEBs are unfair in that they do not provide retirees and beneficiaries, as well as future retirees and future beneficiaries, with any security regarding their pensions and benefits.

[73] It is premature to address these issues at this time. They remain the subject of further negotiations among the stakeholders. They will also be addressed in the context of negotiations regarding satisfaction of the conditions to implementation of the Proposed Transaction. Concerns of this nature are also more properly addressed, as mentioned, by the creditors in the creditors' meeting or in the sanction hearing before the Court if a plan of arrangement is approved.

## Sealing Order

[74] The applicant also requests a sealing order regarding the un-redacted versions of the PSA and the Province Support Agreement. These versions differ from the redacted versions in only one respect: disclosure of the minimum equity contribution of Bedrock.

[75] It is my understanding that none of the parties oppose this relief. In any event, I am satisfied that the requirements for sealing the un-redacted versions of the PSA and the Province Support Agreement contemplated by the test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, 211 D.L.R. (4th) 193, at para. 53, have been met at this stage of the CCAA proceedings. The minimum equity figure is commercially sensitive information, disclosure of which could be prejudicial to Bedrock and/or USSC and, ultimately, to the prospects for a successful restructuring. The benefits of protecting this information in furthering the restructuring far outweigh any negative impact from its redaction. More generally, there is no obvious reason why the other stakeholders should know the position taken by their counterparty, Bedrock, in its negotiations with the applicant. Accordingly, the ability of stakeholders to

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negotiate the remaining outstanding issues is not reasonably affected in any manner by the non-disclosure of this information.

Wilton-Siegel, J.

**Date:** December 22, 2016

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# TAB 30

**CITATION:** *Validus Power Corp. et al. and Macquarie Equipment Finance Limited*, 2023 ONSC 6367
**COURT FILE NO.:** CV-23-0070521500CL and CV-2300703754-00CL
**DATE:** 20231102

2023 ONSC 6367 (CanLII)

**ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**RE:** Macquarie Equipment Finance Limited, Applicant

**AND:**

Validus Power Corp., Iroquois Falls Power Corp., Bay Power Corp., KAP Power Corp., Validus Hosting Inc., Kingston Cogen Limited Partnership and Kingston Cogen GP Inc., Respondents

CV-23-00705215-00CL

**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 VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY THEIR COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.**

**BEFORE:** Peter J. Osborne J.

**COUNSEL:** *Jennifer Stam*, for the Monitor, Moving Party

*Catherine Francis*, for Validus Power Corp., Iroquois Falls Power Corp., Bay Power Corp., KAP Power Corp., Validus Hosting Inc., Kingston Cogen Limited Partnership and Kingston Cogen GP Inc., Respondents

*Scott Bomhof, Jeremy Opolsky and Mike Noel*, for Macquarrie Equipment Finance Limited, Respondent

*Edward Park*, for Attorney General of Canada

*Jesse Mighton*, for Hut 8 Mining Corp. / Far North Power Corp.

**HEARD:** November 1, 2023

## ENDORSEMENT

### The Motions

[1] KSV Restructuring Inc. brings motions in each of these two companion proceedings. I heard both of these motions yesterday, and this Endorsement applies to both motions in both proceedings.

[2] KSV, as Court-appointed Monitor of the Validus Entities in the CCAA Proceeding, seeks an order:

a. approving a SISP for the Validus Entities;

b. authorizing the Monitor to implement the SISP;

c. approving the Transaction Agreement between the Validus Entities by KSV as Monitor, and Kingston LP, and Macquarie Equipment Finance Ltd. ("Macquarie") and Far North Power Corp. ("Far North") as Assignee (Macquarie and Far North together referred to as the "Stalking Horse Bidder"), solely for the purpose of constituting the Stalking Horse Bid in the SISP;

d. authorizing the Monitor to enter into the Break Fee Agreement and approving the Break Fee and the Expense Reimbursement;

e. granting the Bid Protections Charge on the Property in favour of Macquarie as security for the Break Fee and the Expense Reimbursement;

f. approving the Unknown Contract Bar Process;

g. approving the Pre-Filing report of the Monitor dated August 23, 2023, the First Report dated September 1, 2023, and the Second Report dated October 19, 2023; and

h. extending the Stay Period to December 31, 2023.

[3] KSV, as court-appointed Receiver of the Validus Entities in the Receivership Proceeding, seeks an order amending paragraph 23 of the Receivership Order to increase the Receiver's borrowing limit under the Receiver's Borrowing Charge by $500,000 from $1 million to $1.5 million.

[4] Defined terms in this Endorsement have the meaning given to them in the motion materials, the Reports of the Monitor/Receiver or earlier Endorsements made in these proceedings, unless otherwise stated.

[5] All of the relief sought in both proceedings is unopposed by any party, except for the Validus Entities, who do not oppose approval of a SISP but oppose certain terms of this proposed SISP, and who oppose approval of the Stalking Horse Offer. The relief sought by the

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Monitor/Receiver is strongly supported by Macquarie, the largest secured creditor of the Validus Entities, and Hut 8 Mining Corp., now known as Far North Power Corp.

[6] The Validus Entities do not agree with the calculation of the quantum of the obligations owing to Macquarie. Since the proposed Stalking Horse Offer is essentially a credit bid by Macquarie based on the amounts owing to it, the Validus Entities oppose approval of that Stalking Horse Offer.

[7] In the alternative, and if the calculation is correct, the Validus Entities submit that the amount owing to Macquarie is unconscionable and violates the anti-deprivation rule.

[8] Finally, the Validus entities oppose, although the points were not pressed vigourously in argument, other terms of the SISP including the quantum of the break fee and the tight timing for the receipt of bids.

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**BACKGROUND, the MACQUARIE AGREEMENTS and the DEFAULTS**

[9] A more detailed background to, and context for, these motions is set out in earlier Endorsements.

[10] The Validus Entities are a group of privately held companies that own and operate power generation plants located in North Bay, Kapuskasing, Iroquois Falls and Kingston, Ontario. They sell capacity and power to the Independent Electricity System Operator ("IESO") as a participant in the IESO's capacity auction market.

[11] Macquarie is the senior secured lender of the Validus Entities. In April 2022, Iroquois Falls Power Corp. ("IFPC"), one of the Validus Entities, entered into a sale-leaseback transaction with Macquarie pursuant to several transaction agreements which work together and are all part of the relationship between Macquarie and the Validus Entities.

[12] Those transaction agreements include an Amended and Restated Lease Agreement (the "Lease Agreement"), an Amended and Restated Participation Agreement (the "Participation Agreement") and certain guarantees and security provided by the Validus Entities (collectively the "Lease Transaction Documents").

[13] In summary, and as part of that transaction, IFPC sold certain Leased Property to Macquarie pursuant to the Participation Agreement, and that Leased Property was then leased back to IFPC pursuant to a Lease Agreement. Macquarie was granted security for the amounts owing to it.

[14] The first ranking security held by Macquarie includes a pledge of the interests of the Validus Parent in certain of the power generation plants, general security and mortgages on substantially all real and personal property of the Validus Entities in respect of the four power plants except for turbines, plant and equipment that is owned by Macquarie and leased to IFPC under the Lease Agreement, and a pledge of various material agreements.

[15] As is further explained below, it is important to understand that the Macquarie transaction was a sale lease-back transaction, and not simply a loan.

[16] Macquarie calculates its claim as at September 22, 2023 to be $57,218,822, to which amount it adds costs and overdue interest accruing after that date.

**THE PROPOSED SISP, STALKING HORSE AGREEMENT and RELATED RELIEF**

[17] A SISP was contemplated from virtually the outset of the CCAA Proceeding. The particulars and full terms of the proposed SISP are set out in the Second Report and I have not summarized all of them here unless they are contested or centrally relevant to the disposition of the motions.

[18] In summary, the SISP contemplates a relatively tight timeframe for the commencement of a marketing process by the Monitor, the receipt and evaluation of Bids and Qualified Bids, the conduct of an Auction (if any), followed by a motion for approval of the transaction reflected in the Successful Bid (whatever Bid that may be), which approval will likely include a reverse vesting order structure.

[19] A reverse vesting order structure is contemplated since the Validus Entities hold numerous permits and licences that allow them to operate in a highly regulated industry. The Stalking Horse Bidder requires such a structure to minimize uncertainty related to the transferability of those licences and permits in any commercially reasonable time frame. The Monitor anticipates that other bidders would require the same terms.

[20] It is also important to note that approval of any transaction, including but not limited to the transaction reflected in the Stalking Horse Offer, and approval of any reverse vesting order structure, is not being sought today (and to be very clear, nor is it being granted). Rather, and as discussed below, approval of the Stalking Horse Offer is sought as just that: a stalking horse bid as a term of the proposed SISP to provide a "floor" or minimum initial bid only.

[21] The proposed SISP include some significant flexibility to give the Monitor the latitude and discretion to conduct the process in a manner that is likely to maximize recovery for stakeholders, but to do so pursuant to a process that is transparent, fair and efficient.

[22] For example, interested parties may submit Bids for individual assets or plants, and multiple Bids may be aggregated to form together a Qualified Bid, including in conjunction with the Stalking Horse Offer to form an Alternative Bid.

[23] In order to be considered a "Qualified Bid" under the SISP, a Bid must meet the criteria clearly set out in the SISP. Those criteria include a minimum aggregate consideration of $60,228,822. That figure represents the sum of:

a. the Macquarie Claim Amount referred to above of $57,218,822 (as of September 22, 2023);

b. the Priority Payments Closing amount of $1.5 million;

c. the Bid Protections of $2.26 million; and

d. a $750,000 minimum overbid.

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[24] In addition, Qualified Bids must also provide for the purchase of the interest of Macquarie in the Receiver's Certificates which are projected to be approximately $1.3 million - $1.5 million plus fees and interest: see the Second Report of the Monitor, Cash Flow Forecast Appendix.

[25] The Stalking Horse Offer has been structured to be what is referred to colloquially as a "sign and close" transaction with the intention that Macquarie and Far North are not deemed to control IFPC for income tax purposes prior to the time that the applicable Stalking Horse Bidder actually acquires control at closing (if in fact that occurs).

[26] Macquarie and Far North have advised the Monitor that there is a risk that such deeming for income tax purposes would occur if the bid provided for a closing date that did not occur contemporaneously with the execution by the parties of the Transaction Agreement.

[27] Importantly, however, the Stalking Horse Offer is irrevocable subject to its Terms and Conditions. It contemplates a transaction pursuant to which Macquarie and Far North would acquire (in summary):

a. the shares/units of Validus Parent held in the Validus Entities except for IFPC;

b. newly issued shares of IFPC; and

c. certain assets of Validus Parent that are not subject to the Macquarie Security, as fully described in the motion materials and the Second Report.

[28] The Stalking Horse Offer is effectively a credit bid. The consideration payable would be comprised of:

a. payment by the Assignee of $1.5 million in respect of certain estimated "priority payments" owing by Validus Parent in respect of unremitted employee source deductions (and an indemnity with a corresponding charge to secure those priority amounts);

b. payment by the Assignee of an amount to be determined by the Monitor prior to closing in respect of administrative expenses;

c. Macquarie releasing the Validus Entities from all outstanding obligations under the Lease Transaction Documents and security; and

d. Macquarie transferring to IFPC the Leased Property (pursuant to a contemplated reverse vesting order structure).

[29] The Stalking Horse Offer also contemplates the opportunity for ongoing employment opportunities for employees of the Validus Entities as well as the assumption of all pre-and post-filing liabilities relating to Continuing Contracts and liabilities for municipal taxes.

[30] It contemplates an Outside Date of December 29, 2023. If it is Terminated (i.e., not selected as the Successful Bid or not approved by the Court, among other things), a break fee would be payable. Pursuant to the proposed Break Fee Agreement, the Monitor has agreed to a Break Fee

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of $1.25 million plus an expense reimbursement of up to $1 million (collectively, the (Bid Protections") together with a Bid Protections Charge on the Property as security for the payment of the Bid Protections, which would be payable only out of the proceeds of sale on the closing of another Qualified Bid.

[31] As observed above, no party opposes the approval of a SISP. I am satisfied that the particular SISP proposed here should be approved.

[32] Courts have recognized that the broad, remedial nature of the CCAA, and the discretion in s.11 in particular, conferred the power to approve a SISP in respect of CCAA debtors and their property: *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169, 2009 CanLII 39492 (ONSC) ("*Nortel*") at para. 36.

[33] This Court has held that when considering a sales solicitation process, including the use of a stalking horse bid, the Court should assess the following factors (See: *CCM Master Qualified Fund v. Bluetip Power Technologies*, 2012 ONSC 1750 at para. 6):

a. the fairness, transparency and integrity of the proposed process;
b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; 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.

[34] The British Columbia Supreme Court recently surveyed the Canadian authorities relevant to consideration of stalking horse bids, including those referred to above, and expressed the relevant factors as follows (See: *Re Freshlocal Solutions Inc.*, 2022 BCSC 1616 at paras. 24-32):

a. how did the stalking horse agreement arise?
b. what are the stability benefits?
c. does the timing support approval?
d. who supports or objects to the stalking horse agreement?
e. what is the true cost of the stalking horse agreement? and
f. is there an alternative?

[35] In my view, these authorities are entirely consistent with one another and, while articulating the factors in a slightly different manner, each approaches the analysis in the same way and with the same objectives. The slightly more detailed list of factors set out by Justice Fitzpatrick in *Freshlocal* are in my view all subsumed, or they should be, in the three factors set out by Justice Brown in *CCM*.

[36] Moreover, both of those authorities are also consistent with the approach of the Québec Superior Court which set out a list of non-exhaustive factors relevant to the approval of stalking horse bids in *Boutique Euphoria Inc. (Re)*, 2007 QCCS 7129 at para. 37 (as well as with the approach taken in *DCL Corporation, (Re)*, 2023 ONSC 3686 (CanLII), at para. 19).

[37] These analyses distill, essentially, to this question: taking into account the support for and opposition to the terms of the proposed SISP and stalking horse agreement, while recognizing whether and how those parties supporting or opposing it are economically affected by the outcome,

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will the proposed process (including its stalking horse bid component and all other material terms), if approved and approved at this time, likely result in the best recovery on the assets being sold pursuant to a fair and transparent process?

[38] 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. (See *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
b. the interests of all parties;
c. the efficacy and integrity of the process by which the party obtained offers; and
d. whether the working out of the process was unfair.

[39] In *Nortel*, Morawetz, J. (now Chief Justice Morawetz) described several factors to be considered in a determination of whether to approve a proposed sales process, including:

a. is a sale transaction warranted at this time?
b. will it benefit the whole economic community?
c. do any of the debtor's creditors have a *bona fide* reason to object to a sale? and
d. is there a better viable alternative?

[40] Subsequent to that decision, the *CCAA* was amended in 2009 to clarify the jurisdiction of this Court to authorize a sale of assets of the debtor outside a plan of arrangement according to the non-exhaustive list of factors set out in s. 36 of the *CCAA*. The s. 36 factors apply to approval of a sale rather than a sale process, but Chief Justice Morawetz' *Nortel* factors continue to apply post-2009 amendments: *Brainhunter Inc*., 2009 62 CBR ($5^{th}$) 41.

[41] Notwithstanding that the s. 36 factors are not directly applicable to the relief sought on this motion, in my view they should be kept in mind since they will be considered when this Court is asked to approve a sale resulting from the very process now under consideration.

[42] The use of stalking horse bids to set a baseline for a sales process can be a reasonable and useful approach. As observed by Justice Penny of this Court, they can maximize value of a business for the benefit of stakeholders and enhance the fairness of the sales process as they establish a baseline price and transactional structure for any superior bids. (See *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20).

[43] The challenge in this particular proceeding, as is often the case, is one of stability and time: the former is required, and the latter is lacking.

[44] If recovery here is to be maximized, the business must be stabilized, and stabilized in a manner that is apparent to those inside such as employees, and to those outside the business such as potential bidders, future debt lenders or equity investors, and regulators.

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[45] This means, among other things, that the preservation of value in the Validus Entities depends in large part on the ability of those entities or their successors to participate in the upcoming IESO capacity auction. The bid deadline for participating in the IESO capacity auction is November 29, 2023 (just over two weeks from now) and there are corresponding milestones to be met in advance of that bid deadline towards the achievement of which the Monitor, on behalf of the Validus Entities, is already working.

[46] It is therefore critical for the SISP (any SISP) to start as soon as possible to permit participation in the IESO's capacity auction and also continue the work streams that require the development of a comprehensive business plan for the Validus Entities more broadly. It follows that the timing is necessarily extremely limited.

[47] The SISP has been developed and will be conducted by the Court-appointed Monitor. To state the obvious, that Court Officer has, and I am certain will fulfil, the obligation to conduct that process in a fair and transparent manner.

[48] The proposed SISP contemplates and facilitates possible transactions with greater value than the Stalking Horse Offer if one is identified. The Monitor is of the view that the 35-day bid period is sufficient in the circumstances to allow interested parties to perform due diligence (there will be a virtual data room).

[49] I observe that the Monitor has been mindful of the sales process conducted by Ernst & Young Corporate Finance earlier this year (discussed in the Monitor's Reports and my earlier Endorsements in this proceeding), which did not yield any material unconditional offer for IFPC, and it is considered to be one of the two most valuable powerplants. In addition, the Validus Entities attempted without success to arrange alternative financing transactions at or about the time the Receivership Order was made (which they had opposed).

[50] Moreover, I am satisfied that the opportunity presented by the SISP is unlikely to take the market of potential bidders, (which is limited and highly sophisticated, given the nature of the business of the Validus Entities), by surprise. Hut 8 issued a press release on August 11, 2023, announcing the execution of the Transaction Support Agreement which effectively telegraphed to the market the very process for which approval is now being sought.

[51] I also note that the consideration contemplated by the Stalking Horse Offer exceeds materially the aggregate value that Validus Power Corp. paid when it acquired plants in 2021/2022, of approximately $45 million.

[52] I am also satisfied that the inclusion in the SISP of the Stalking Horse Offer is appropriate in the particular circumstances of this proceeding. The Monitor considered one of the obvious questions; namely, whether a stalking horse bid was required at all or whether the process might be just as effective if those parties simply participated in the sales process by submitting whatever offer they might consider appropriate.

[53] I accept and agree with the recommendation of the Monitor that the Stalking Horse Offer provides an important degree of certainty to the employees of the Validus Entities and other stakeholders who may take some comfort that there is a possible going-concern solution for the business.

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[54] As reflected in the Second Report, employees of the Validus Entities have communicated to the Monitor that they are encouraged by the steps taken to date in these proceedings and were further encouraged to learn that a stalking horse bid was being prepared and would likely be submitted by a prospective purchaser who is substantive and reputable. The Pre-Filing Report referenced the risk of significant employee resignations, and the consequent effect on the continued operation of the Validus Entities and the preservation of their value. That risk is further mitigated by the Stalking Horse Offer.

[55] This is contrasted with the risks of conducting a SISP without a stalking horse, which risks include the absence of support from Macquarie as the senior secured creditor, the possible resignation of the employees and consequent shutdown of all plants, and the virtual certain detrimental, yet material, impact on value.

[56] As stated at the beginning of this Endorsement, the Validus Entities oppose certain terms of the Stalking Horse Offer.

[57] Leaving aside the issue raised by Macquarie as to what interests the Validus Entities are in fact advancing and for whose benefit, given that those Entities are currently being operated by the Receiver, I have considered the objections they have raised.

[58] First, as stated above and as was confirmed repeatedly in both written and oral submissions by the Receiver, the Monitor and the Stalking Horse Bidders (Macquarie and Far North), this Court is not being asked to approve today, and nor is it approving, the Stalking Horse Offer other than for the limited and exclusive purpose of having it serve as a stalking horse in the SISP.

[59] If, and only if, the Stalking Horse Offer is the Successful Bid in the SISP, further approval of the Court will be sought and required for the approval of such Successful Bid and the transaction contemplated thereby. This includes approval of its terms, the proposed reverse vesting order structure and the proposed tax treatment, including HST issues, and the inclusion or exclusion of assets.

[60] This Court has previously held that it is not in all cases necessary for the full terms of the stalking horse bid to be considered at the time of approval of a SISP: *Kingsett Mortgage Corporation et al. v. Stateview Homes (Minu Towns) Inc., et al.*, July 19, 2023, Ontario Superior Court of Justice (Commercial List) at paras. 7, 12 and 17; and *Fire & Flower Holdings Corp. et al.*, 2023 ONSC 4048 (CanLII) at para. 23.

[61] I agree with that approach. That is not to say, however, that the terms of a stalking horse bid, including its overall economic value or the consideration payable if the transaction is approved, are irrelevant at the time of approval of a SISP. They are not. In my view, there is no purpose served by approving a stalking horse bid even if for the limited purpose of acting as such in a sales process, if it is clear from the outset that it would not be approved at the conclusion of the sales process even if no other bid, or no superior bid, were made. That sets up the process for failure and would likely result in a waste of time and financial resources all to the detriment of stakeholders and to the ultimate outcome achieved.

[62] To be clear, the value of the consideration to be paid in a stalking horse bid is a relevant consideration at the time of SISP approval. It is by no means determinative and is not the exclusive

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factor, but it is a relevant factor. This is particularly so, where, as here, the Stalking Horse Offer is a credit bid. That in turn means that the value of that credit (or really, debt) that is being bid, is a relevant consideration at the SISP approval stage.

[63] What all of this means is that the economically affected stakeholders, including in this case Macquarie who is the senior secured creditor and also the Stalking Horse Offer sponsor (with Far North), and also including the Court-appointed Officers (being the Receiver and the Monitor in making their recommendations to this Court), must go into the SISP process fully armed with the knowledge that even if the Stalking Horse Offer turns out to be the Successful Bid, there is a risk that it may not be approved by the Court. That determination is for another day, but the parties need to understand and recognize now the risk that a SISP with the Stalking Horse Offer has the possibility of not succeeding just as does a SISP without any stalking horse bid.

[64] I am satisfied that all parties understand this here; indeed, it is expressly recognized by the Receiver, the Monitor and the Stalking Horse Bidders as stated above. Appropriate parties will have the opportunity to oppose approval of the transaction contemplated by the Stalking Horse Offer, including the reverse vesting order structure, on the approval motion if it is the Successful Bid.

[65] Having considered all of the factors, I am satisfied that in the circumstances of this case, the SISP with the Stalking Horse Offer is the far preferable alternative to a SISP without a stalking horse.

**The Objections Raised**

[66] I have not set out in this Endorsement every particular of the objections raised by the Validus Entities, nor every particular of the points raised in answer to the objections by the Monitor and by Macquarie.

[67] In summary, the principal objections of the Validus Entities to approval of the Stalking Horse Offer, even for the limited purposes of the SISP as stated above, are three-fold:

a. it overstates the quantum of the amounts owing to Macquarie which forms the basis of the credit bid, with the result that the consideration that must be offered by any alternative bidder to be deemed to be a Superior Bid is artificially inflated;

b. in the alternative, if it does not overstate the quantum owing pursuant to the Lease Transaction Documents, that quantum is unconscionable and violates the anti-deprivation rule, with the result that the effect on the SISP and alternative bids is the same as above; and

c. it contemplates a structure which should never be approved even if it is the Superior Bid since it would mean that the Validus Entities, through the Monitor, pay to Macquarie material amounts in respect of HST for remittance to the CRA, but the input tax credits generated by the HST payments are unavailable to offset outstanding HST liabilities to the CRA, all of which is to the detriment of the CRA and all other creditors of the Validus Entities.

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[68] I am satisfied that the Stalking Horse Offer should be approved notwithstanding these objections, whether considered separately or in the aggregate.

**The Quantum Owing to Macquarie**

[69] First, I am satisfied that the amount owing to Macquarie is correct for the purposes of this motion and accords with the Lease Transaction Documents and the calculation of that amount in the event of a default, as has occurred here.

[70] I draw significant comfort from the very strong support of the Court-appointed Monitor, having conducted its own extensive analysis and calculations, that the quantum is correct.

[71] In my view, much of the disagreement results from the issue foreshadowed at the outset of this Endorsement: the Lease Transaction Documents set out the terms not of a simple loan from Macquarie secured by equipment, but rather of a much more nuanced sale and lease-back transaction.

[72] The Validus Entities argue that the quantum that Macquarie says is outstanding and on which the credit bid is based materially exceeds the aggregate of all amounts advanced by Macquarie, net of repayments, as a result of double-counting of certain components of that quantum.

[73] I am satisfied for the purposes of this motion that it does not do so. Without question, the quantum sought by Macquarie is greater than the net amount advanced plus accrued interest. But that is not the end of the analysis given the conceptual structure of the transaction in the first place and the application of the specific provisions of the Lease Transaction Agreements in particular.

[74] Counsel to the Monitor has provided an opinion that, subject to the standard assumptions and qualifications, the security granted by each of the Validus Entities to Macquarie is valid and enforceable.

[75] Pursuant to the terms of the Participation Agreement, the purchase price for the Leased Property was $45 million plus $5.85 million in HST. Of that $45 million purchase price, the amount of $9 million was agreed by the parties to be paid to IFPC upon it and other Validus Entities meeting a certain condition, failing which such amount was to be used to prepay rent under the Lease Agreement.

[76] Ultimately, the condition was not met, with the result that as contemplated by the parties and provided for in the Participation Agreement, that $9 million was applied to pre-pay rent under the Lease Agreement.

[77] Pursuant to the Lease Agreement, IFPC agreed to make monthly rent payments to Macquarie in the amount of $1.25 million (the “Base Rent”) plus HST during the 36-month base term of the Lease. IFPC also agreed to pay all other amounts and obligations it was required to pay under the Lease Transaction Documents.

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[78] In the event of default, Macquarie had various contractual remedies provided, including the right to demand from IFPC liquidated damages in an amount equal to the sum of three components:

a. any unpaid Base Rent in arrears;

b. the Stipulated Loss Value ("SLV") for the Leased Property; and

c. interest on both of those amounts.

[79] The SLV is not a fixed value but rather, according to the terms of the Lease Transaction Documents, is determined as provided for in Schedule 3 to the Lease Agreement. Initially, the SLV was $54 million, but was reduced with each rent payment made by IFPC. As provided for in the Lease Transaction Documents, however, the relationship between the quantum of each rent payment, and the reduction in the-then amount of the SLV, is not linear (i.e., the two amounts do not reduce on a dollar-for-dollar basis at the same time).

[80] The amount of the SLV payable by IFPC in the event of a default was the SLV as of the date of written notice that Macquarie was exercising its remedies. Upon payment of these amounts, pursuant to s. 13.1(f) of the Lease Agreement, IFPC would become the owner of the Leased Property.

[81] IFPC failed to make required payments under the Lease Agreement as due on each of May 31, 2023, June 7, 2023 and July 7, 2023. Pursuant to amendments made to the Lease Agreement on February 24, 2023, Macquarie provided IFPC a four-month "rent holiday" by amending the rent payment schedule (Schedule 3).

[82] As a result, IFPC was relieved of the obligation to pay rent from February through April, but was instead required to make a single, larger, rent payment in May (the "balloon payment"), followed by regular monthly payments in June and beyond. The total rent payable during that period was increased by $1 million as is clear from a plain reading of the terms of the Lease Agreement.

[83] In other words, the parties agreed that a premium was to be paid for the rent holiday. In my view, therefore, it is not a fair characterization of the operation of the provisions of the relevant agreements to say that the aggregate rent payments due and owing exceed the sum of the original rent payments due monthly that were forgiven in exchange for the four-month rent holiday and the balloon payment thereafter. There has been no overstatement of rent arrears.

[84] Similarly, I am satisfied that there has not been a double-counting, as alleged by the Validus Entities, of $8.5 million in the calculation of the SLV.

[85] The Lease Agreement specifies that the quantum of the SLV is determined upon reference to the "number of Base Rents paid … at the relevant time". The basis for the SLV is described above. I recognize that the operation of the Lease Transaction Documents results, given the default, in a contractual entitlement of Macquarie to collect both the rental arrears and an SLV that is not calculated in a manner that accounts for those rental payments. The Monitor is satisfied, however, that it is calculated exactly in accordance with the language of s. 13.1(f) of the Lease Agreement.

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[86] Finally, I am also satisfied that there has been no failure to credit the $9 million in prepaid rent. Pursuant to the Lease Agreement, the Pre-Paid Rent is to be applied to the last payments of the Base Term. Macquarie submits, and the Monitor agrees, that the quantum sought gives credit for these payments when determining the quantum of the SLV.

[87] Macquarie gave notice that it was exercising its right to terminate the Lease Agreement on July 24, 2023. It demanded payment pursuant to s. 13.1(f) of the Lease Agreement of $55,598,575, comprised of:

a. $8.5 million of unpaid Base Rent;

b. $40.5 million in respect of the SLV;

c. $6,370,000 in respect of HST payable on the above amounts; and

d. $228,575 in respect of interest on the Base Rent.

[88] That quantum has increased, and continues to increase, as interest accrues (see paragraph 16 above).

[89] For all of these reasons, I am satisfied that the amount claimed is appropriate for the purposes of this motion and flows from the operation of the bargain made by the parties as reflected in the Lease Transaction Documents.

**The Anti-Deprivation Rule**

[90] Even if I am right in accepting the recommendation of the Monitor that the calculation is correct, the Validus Entities submit that such a calculation violates the anti-deprivation rule and would result in the unjust enrichment of Macquarie, to the detriment of other creditors and the Validus Entities.

[91] The anti-deprivation rule has its origins in the common law. It is intended to prohibit contracts that frustrate statutory insolvency schemes and was originally directed against fraudulent conduct.

[92] The Supreme Court of Canada considered the anti-deprivation rule in *Chandos Construction Ltd. v. Deloitte Restructuring Inc*., [2020] 3 S.C.R. 3, 2020 SCC 25 ("*Chandos*"), and shifted the focus from the nature of the conduct to the nature of the result and rejected an intention-based test in favour of a result-based test.

[93] The Validus Entities argue that Macquarie invoked the SLV provision after issuing demands for repayment and serving a Notice pursuant to s. 244 of the *BIA*, with the result that the anti-deprivation rule is engaged and should operate here to prohibit the operation of that contractual provision.

[94] The Supreme Court stated in *Chandos* that the rule renders void any provision in an agreement which provides that upon an insolvency (or bankruptcy), value is removed from the

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reach of the insolvent person's creditors which would otherwise have been available to them, and places that value in the hands of others.

[95] In *Chandos*, that is exactly what happened. A general construction contractor entered into a construction subcontract which provided, in relevant part, that the subcontractor would pay the general contractor 10% of the subcontract price as a fee for the inconvenience or for monitoring the work in the event of a bankruptcy of the subcontractor.

[96] The fee was triggered and indeed was expressly conditional upon the event of bankruptcy. It was not payable otherwise in the event of a default or indeed in any circumstance absent a bankruptcy. It was a clear example of a provision that was triggered by an event of insolvency or bankruptcy. In fact, it could not have been clearer, as it stated that: "in the event that [subcontractor] commits any act of bankruptcy, [subcontractor] shall forfeit 10% of the subcontract price".

[97] The present case is distinguishable. In my view, the anti-deprivation rule is not engaged in the circumstances of this case so as to prevent operation of the agreements according to their terms. The entitlements pursuant to the SLV provision (and the related provisions discussed above) did not arise as a result of the insolvency of the Validus Entities (and there has been no bankruptcy). They arose, as intended by the parties in making their bargain, on the default by the Validus Entities of their contractual obligation to make the rent payments when due.

[98] It is irrelevant whether those entities were insolvent, at the time of the defaults, or now when the amounts calculated by operation of the contractual provisions are being claimed. Those amounts did not arise, and were not triggered, by the insolvency. Macquarie would have been no less entitled to the amounts it is now claiming if the Validus Entities were not insolvent at all (then or now) but rather had simply breached the Lease Transaction Agreements in the absence of an insolvency.

[99] Moreover, Macquarie will not have been unjustly enriched if it is found to be entitled to the amounts it is claiming. The Validus Entities cannot meet the requirement of demonstrating that there was no juristic reason for the benefit and the loss, in circumstances where the Lease Transaction Documents, representing the bargain freely made by highly sophisticated parties engaged in an extremely complex transaction and represented by counsel throughout, specifically and expressly contemplated exactly this result.

[100] As observed by the Supreme Court, the anti-deprivation rule is based on the common law public policy against agreements entered into for the unlawful purpose of defrauding or otherwise injuring third parties. The Supreme Court concluded that Parliament intended to prohibit a debtor from contracting with creditors for a different distribution of the debtor's assets in bankruptcy than that provided in the *BIA*. That is not what is happening here. In my view, it was neither the intent of the parties, nor the effect of the agreements, to circumvent the statutory regime that provides that all claims proved in a bankruptcy shall be paid ratably.

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**Unfairness Regarding HST Treatment**

[101] With respect to the payment of HST, I am also satisfied that if an issue exists at all, it is an issue properly argued on the motion for approval of the transaction resulting from the Successful Bid, whether or not that is the Stalking Horse Offer.

[102] The Validus Entities submit, and in fairness to them submitted earlier on the motion to appoint a receiver, that they had concerns about the treatment of certain post-filing input tax credits ("ITCs") which may otherwise serve to reduce the Purchase Price HST.

[103] First, counsel for the Canada Revenue Agency ("CRA") was present in Court on these motions and took no position on the issue. The CRA agrees that the issue is properly addressed at the time of the transaction approval motion, and moreover, the CRA is still in the process of completing its HST audit, with the result that it was not in a position at the hearing to make any submissions with respect to what amounts were owing, what ITCs may be available, or to any other particulars of the HST issue.

[104] The Monitor/Receiver and Macquarie also submit that this issue is properly addressed on a transaction approval motion, since any Successful Bidder will be responsible for HST obligations arising on the transaction and can and should take its own advice as to whether, and the extent to which, ITCs may be available to it, to subsequently set off HST remittance obligations otherwise owing.

[105] Moreover, the Monitor has considered the proposed tax treatment under the Stalking Horse Offer and is unaware as to whether any ITC applications were previously filed by the Validus Entities (largely due to the poor state of the books and records of the business, which has presented a continuing challenge for both the Receiver and the Monitor).

[106] Nonetheless, it is of the view that to the extent that IFPC is entitled to any ITCs in respect of HST on pre-filing base rent payments that were actually made by IFPC to Macquarie pursuant to the Lease Agreement, any such entitlements are Excluded Assets pursuant to the Transaction Agreement which would be vested, if the transaction is approved, in ResidualCo.

[107] In addition, the Monitor has concluded that any HST paid by IFPC in respect of the transaction contemplated by the Stalking Horse Offer is considered to be a post-filing payment of HST, and correspondingly, any ITCs generated as a result of such payment of HST cannot be set off against the prefiling Purchase Price HST obligation in any event. Finally, any ITCs generated from the payment of HST on obligations of Validus Power Corp. during the receivership or CCAA period will continue to be assets of that entity or of ResidualCo, but also cannot be set off against the prefiling Purchase Price HST.

[108] For all of those reasons, the Monitor is of the view that the treatment of any entitlements to ITCs under the transaction and within the course of these proceedings, is appropriately allocated. Even if it is not, the issue can be argued and determined as part of a sale approval motion.

[109] For all of these reasons, I am satisfied that the HST issues have been appropriately allocated to the extent they can be at present, and will in any event be the subject of the sale approval motion

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such that they need not be finally determined today. As stated above, and given the position of the CRA, they could not be determined today in any event.

**Bid Protections**

[110] The Break Fee Agreement includes a Break Fee of $1.26 million and an Expense Reimbursement of up to $1 million for reasonable out-of-pocket third-party expenses incurred by Macquarie.

[111] The Monitor has considered the range of acceptable bid protections in the context of stalking horse bids (see: Comparative Summary of Break Fees, Appendix 'J" to the Second Report). This Court has previously noted that bid protections within the range of 1.8% - 5% may be reasonable: *CCM*, at para. 13. Here, the maximum amount of the Bid Protections represents approximately 3.85% of the proposed consideration.

[112] The Monitor is of the view that the Bid Protections properly recognize the benefit being conveyed to the estate by the Stalking Horse Offer setting the floor for a sales process, as well as the time, effort and resources spent by the stalking horse buyer who may ultimately be outbid in the SISP.

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

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

[115] In the circumstances here, and as I have concluded that the Bid Protections should be approved, I am also satisfied that the Bid Protections Charge, which I note is a condition of the Stalking Horse Offer, should be approved as this Court has done in other cases: see, for example, *In the Matter of LoyaltyOne Co*., (March 20, 2023), Toronto, Superior Court of Justice (Commercial List), CV-23-0069601700CL.

[116] Although the Bid Protections Charge encumbers the Property, the Bid Protections themselves are payable only out of closing proceeds from a different successful transaction. The Monitor believes that such a charge is reasonable in the circumstances.

**Unknown Contract Bar Process**

[117] I am also satisfied that the Unknown Contract Bar Process should be approved. It is perhaps somewhat atypical, but I am satisfied that it is appropriate here. Part of the challenge faced by the

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Receiver and by the Monitor has been the fact that the books and records of the Validus Entities are incomplete and in disarray. The Monitor in particular has struggled to identify even material contracts to which the Validus Entities are parties, and therefore in some cases the counterparties are unknown.

[118] In other cases, the existence of a contractual arrangement and the identity of a counterparty may be known, but the material terms of the contractual arrangement are unknown or unclear. The Monitor has retained the services of a former senior officer of the Validus Entities to assist with its efforts in this regard.

[119] Courts have expressed concern in other cases, and properly so, regarding the notice to contractual counterparties as to the potential effects of a proposed reverse vesting order on the treatment of their contracts with the debtors: see, for example, *Re PaySlate Inc.* 2023 BCSC 608 at paras. 64, 71 and 75, where Justice Walker of the British Columbia Supreme Court declined to approve a proposed reverse vesting order transaction on the basis that, among other things, the debtor had not provided notice of the hearing for approval of the proposed transaction to counterparties in contracts that were proposed to be retained.

[120] In that case, the reverse vesting order transaction was subsequently approved, but only after notice had been given to those counterparties (2023 BCSC 977).

[121] The proposed Unknown Contract Bar Process here will provide for publication of the notice in both national and local publications. In addition, the Monitor is making best efforts to ensure that those known counterparties or possible counterparties are also advised. The Process contemplates that the Monitor will post on its website a list of known contracts, with the exception of employee agreements. Counterparties on that Known Contract List will receive notice of the anticipated reverse vesting order transaction, including notice as to how their contracts will be treated in the context of the Successful Bid.

[122] To identify whether there are any unknown excluded contracts or liabilities that would be affected by a reverse vesting order, the Monitor will post the notices as described above and require any contract counterparty to contact the Monitor by the Unknown Contract Bar Date to advise of the contract and provide an executed copy.

[123] The proposed Process does not bar any party from ultimately submitting unsecured claims, although those claims will be made in ResidualCo, if the anticipated reverse vesting order transaction (or any other reverse vesting order transaction) is approved, with the result that in my view it is very appropriate now that those contractual counterparties be given notice of what is afoot. The Monitor believes that the Proposed Unknown Contract Bar Process provides a fair and reasonable process to identify any unknown contract counterparties.

**Activities of the Monitor**

[124] The activities of the Monitor are set out in detail in the three reports: the Pre-Filing Report, the First Report and the Second Report. Approval of those activities is not opposed by any party, and I am satisfied that the activities are both appropriate and consistent with the exercise of the mandate given to the Monitor pursuant to the Initial Order.

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**Stay Extension**

[125] The stay of proceedings currently in effect expires on December 1, 2023. An extension is clearly appropriate to afford the Monitor sufficient time to conduct the proposed SISP. It makes good practical sense to seek that extension now, albeit approximately three weeks before the current stay expires, to avoid the expense incurred with bringing a separate motion for a stay extension in the very near future.

[126] I am satisfied that the Receiver and Monitor, respectively on behalf of the Validus Entities, have acted and continue to act in good faith and with due diligence.

**Receiver's Borrowing Charge**

[127] Concurrent with the stay extension, the Receiver seeks in the Receivership Proceeding the approval of an increase in the borrowing amount available pursuant to the Receiver's Borrowing Charge of $500,000, from $1 million to $1.5 million. This, too, is unopposed.

[128] The revised cash flow forecast reflects that, provided that the increase in the Borrowing Charge is granted, the Validus Entities are projected to have sufficient liquidity to fund operations through the proposed stay extension period.

[129] The increase is approved.

**Disposition**

[130] For all of these reasons, the motions are granted. I have signed two orders, the first approving the increase in the Receiver's Borrowing Limit in the Receivership Proceeding, and the second approving the SISP, including the Stalking Horse Offer, approving the reports of the Monitor and the activities described therein, and extending the stay, all in the CCAA Proceeding.

[131] Both orders have immediate effect without the necessity of issuing and entering.

Osborne J.

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# TAB 31

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107

Date: 20160126
Docket: S1510120
Registry: Vancouver

2016 BCSC 107 (CanLII)

**In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 as Amended**

**And**

**In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, as Amended**

**And**

**In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"**

Before: The Honourable Madam Justice Fitzpatrick

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioners: | Marc Wasserman<br>Mary I.A. Buttery<br>Tijana Gavric<br>Joshua Hurwitz |
| Counsel for United Mine Workers of America 1974 Pension Plan and Trust: | John Sandrelli<br>Tevia Jeffries |
| Counsel for Steering Committee of First Lien Creditors of Walter Energy, Inc.: | Matthew Nied |
| Counsel for Her Majesty the Queen in Right of the Province of British Columbia: | Aaron Welch |
| Counsel for Morgan Stanley Senior Funding, Inc.: | Kathryn Esaw |

| | |
|---|---|
| Counsel for KPMG Inc., Monitor: | Peter Reardon<br>Wael Rostom<br>Caitlin Fell |
| Counsel for Canada Revenue Agency: | Neva Beckie |
| Counsel for the United States Steel Workers, Local 1-424: | Stephanie Drake |
| Place and Date of Hearing and Ruling given to Parties with Written Reasons to Follow: | Vancouver, B.C.<br>January 5, 2016 |
| Place and Date of Written Reasons: | Vancouver, B.C.<br>January 26, 2016 |

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**Introduction and Background**

[1] On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*").

[2] The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

[3] The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay provisions relating to the partnerships: *Lehndorff General Partner Ltd. (Re)* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.); *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 21.

[4] The timing of the Canadian acquisition could not have been worse. Since 2011, the market for metallurgical coal has fallen dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014. The mines remain in this state today, at an estimated annual cost in excess of $16 million. Similarly, the U.K. mines were idled in 2015. In July 2015, the U.S. companies in the Walter Group filed and sought creditor protection by filing a proceeding under Chapter 11 of the U.S. *Bankruptcy Code*. It is my understanding that the U.S. entities have coal mining operations in Alabama and West Virginia.

[5] From the time of the granting of the initial order, it was apparent that the outcome of the U.S. proceedings would have a substantial impact on the Walter

Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will discuss below.

[6] The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately $22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of $11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

[7] This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

[8] As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

[9] The petitioners now seek relief that will set them on a path to a potential restructuring; essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation

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process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

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[10] For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

[11] The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

[12] Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

[13] The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC § 101, as amended, which is commonly referred to as "*ERISA*".

[14] The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

[15] It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

[16] Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

[17] At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

**The Sale and Investment Solicitation Process ("SISP")**

[18] The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

[19] It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

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[20] Approvals of SISPs are a common feature in *CCAA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750. At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[21] Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a *CCAA* proceeding: see *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 at paras. 17-19.

[22] In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable, particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

[23] The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

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[24] No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

**Appointment of Financial Advisor and CRO**

[25] The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

[26] The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

[27] In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

[28] A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

[29] The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

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[30] Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

[31] In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

[32] The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

[33] In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *Mobilicity Group (Re)*, 2013 ONSC 6167 at para. 17). No question arises as to his extensive qualifications to fulfil this role.

[34] The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his

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involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

[35] The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the *CCAA*: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*., 2007 SKQB 121 at para. 19.

[36] The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

[37] PJT is to receive a monthly work fee of US$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

[38] At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US$75,000. In

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addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to $1 million upon the happening of a "triggering event" (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

[39] To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of $10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

[40] The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*:

> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[41] In *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

[42] In *Canwest Publishing Inc*., 2010 ONSC 222 at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining

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whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

[43] I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

[44] The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

[45] Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept

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the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

[46] The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

[47] Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

[48] In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of $10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

**Key Employee Retention Plan ("KERP")**

[49] The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

[50] The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

[51] I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at

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para. 53; *Sahlin v. The Nature Trust of British Columbia*, 2010 BCCA 516 at para. 6. A sealing order was granted on January 5, 2016.

[52] The proposed KERP must be considered in the context of earlier events. This individual was to receive a retention bonus from the U.S. entities; however, this amount is now not likely to be paid. In addition, just prior to the commencement of these proceedings, this person was given a salary increase to reflect his additional responsibilities, including those arising from the loss of support and the shared services from the U.S. entities. This new salary level has not been disclosed to the court or the stakeholders.

[53] The Walter Canada Group has proposed that this employee be paid a retention bonus on the occurrence of a "triggering event", provided he remains an active employee providing management and other services. The defined triggering events are such that the retention bonus is likely to be paid whatever the outcome might be. In addition, to secure the payment of the KERP to this employee, Walter Energy Canada seeks a charge up to the maximum amount of the retention bonus.

[54] The amount of the retention bonus is large. It has been disclosed in the sealed affidavit but has not been disclosed to certain stakeholders, including the 1974 Pension Plan. The Monitor states in its report:

> The combination of the salary increase and proposed retention bonus … were designed to replace the retention bonus previously promised to the KERP Participant by Walter Energy U.S.

[55] I did not understand the submissions of the 1974 Pension Plan to be that the granting of a KERP for this employee was inappropriate. Rather, the concern related to the amount of the retention bonus, which is to be considered in the context of the earlier salary raise. At the end of the day, the 1974 Pension Plan was content to leave a consideration of the level of compensation to the Court, given the sealing of the affidavit.

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[56] The authority to approve a KERP is found in the courts' general statutory jurisdiction under s. 11 of the *CCAA* to grant relief if "appropriate": see *U.S. Steel Canada* at para. 27.

[57] As noted by the court in *Timminco Ltd. (Re)*, 2012 ONSC 506 at para. 72, KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

[58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

[59] I will discuss those factors and the relevant evidence on this application, as follows:

a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;

b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;

c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume

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that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a "potential" loss of this person's employment is a factor to be considered;

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee's salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and

e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding "yes". As to the amount, the Monitor notes that the amount of the retention bonus is at the "high end" of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person's supervision and the critical nature of his involvement in the restructuring. As this Court's officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

[60] In summary, the petitioners' counsel described the involvement of this individual in the *CCAA* restructuring process as "essential" or "critical". These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor's report states that this individual's ongoing employment will be "highly beneficial" to the Walter Canada Group's restructuring efforts, and that this employee is "critical" to the care and maintenance operations at

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the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the SISP.

[61] What I take from these submissions is that a loss of this person's expertise either now or during the course of the *CCAA* process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the *CCAA*. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

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**Cash Collateralization / Intercompany Charge**

[62] Pursuant to the initial order, the Walter Canada Group was authorized and directed to cash collateralize all letters of credit secured by the 2011 credit agreement within 15 days of any demand to do so from the administrative agent, Morgan Stanley Senior Funding Inc. ("Morgan Stanley"). This order was made on the basis of representations by the Monitor's counsel that it had obtained a legal opinion that the security held by Morgan Stanley was valid and enforceable against the Walter Canada Group.

[63] On December 9, 2015, Morgan Stanley demanded the cash collateralization of approximately $22.6 million of undrawn letters of credit. On December 21, 2015, Morgan Stanley requested that the Walter Canada Group enter into a cash collateral agreement (the "Cash Collateral Agreement") to formalize these arrangements.

[64] The Walter Canada Group seeks the approval of the Cash Collateral Agreement, which provides for the establishment of a bank account containing the cash collateral and confirms Morgan Stanley's pre-filing first-ranking security interest in the cash in the bank account. The cash collateralization is intended to relate to letters of credit issued on behalf of Brule Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership. However, only the Brule Coal Partnership has sufficient cash to collateralize all these letters of credit.

[65] Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other member of the Walter Canada Group in respect of obligations under the letters of credit. The intercompany charge is proposed to rank behind all of the other court-ordered charges granted in these proceedings, including the charges for PJT and the CRO and the KERP.

[66] No objection is raised in respect of this relief. The Monitor is of the view that the intercompany charge is appropriate.

[67] In my view, this relief is simply a formalization of the earlier authorization regarding the trusting up of these contingent obligations. On that basis, I approve the Cash Collateral Agreement. I also approve the intercompany charge in favour of the Brule Coal Partnership, on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of this Partnership's funds. Such a charge will, as stated by the Monitor, protect the interests of creditors as against the individual entities within the Walter Canada Group.

**Stay Extension**

[68] In order to implement the SISP, and further its restructuring efforts in general, the Walter Canada Group is seeking an extension of the stay and other relief granted in the initial order until April 5, 2016.

[69] Section 11.02(2) and (3) of the *CCAA* authorizes the court to make an order extending a stay of proceedings granted in the initial application. In this case, the evidence, together with the conclusions of the Monitor, support that an extension is appropriate and that the petitioners are acting in good faith and with due diligence. No stakeholder has suggested otherwise.

[70] As noted above, it is anticipated that the Walter Canada Group will have sufficient liquidity to continue operating throughout the requested stay period.

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[71] Further, as the Phase 1 deadline in the SISP is March 18 2016, an extension of the stay until April 5, 2016 will provide sufficient time for PJT to solicit, and the CRO (in consultation with the Monitor and PJT) to consider, any letters of intent. At that time, the process may continue to Phase 2 of the SISP, if the CRO, in consultation with the Monitor and PJT, deems it advisable. In any event, at the time of the next court date, there will be a formal update to the court and the stakeholders on the progress under the SISP.

[72] The only issue relating to the extension of the stay arises from the submissions of the Union, who represents the employees at the Wolverine mine owned and operated by the Wolverine Coal Partnership ("Wolverine LP"). The Union wishes to continue with certain outstanding legal proceedings outstanding against Wolverine LP, as follows:

a) In June 2015, the B.C. Labour Relations Board (the "Board") found that Wolverine LP was in breach of s. 54 of the *Labour Relations Code,* R.S.B.C. 1996, c. 224 (the "*Code*"). The Board ordered Wolverine LP to pay $771,378.70 into trust by way of remedy. This was estimated to be the amount of damages owed by Wolverine LP, but the Union took the position that further amounts are owed. In any event, this amount was paid and is currently held in trust;

b) In November 2015, Wolverine LP filed a proceeding in this court seeking a judicial review of the Board's decision on the s. 54 issue. As a result, the final determination of the damages arising from the *Code* breach has not yet occurred and may never occur if Wolverine LP succeeds in its judicial review; and

c) Following layoffs in April 2014, the Union claimed that a "northern allowance" was payable by Wolverine LP to the employees, including those on layoff. This claim was rejected at arbitration, and upheld on review at the Board. In February 2015, the Union filed a proceeding in this court seeking a judicial review of the Board's decision.

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[73] The Union's counsel has referred me to my earlier decision in *Yukon Zinc Corporation (Re)*, 2015 BCSC 1961. There, I summarized the principles that govern applications by a creditor to lift the stay of proceedings to litigate claims:

> [26] There is also no controversy concerning the principles which govern applications by creditors under the *CCAA* to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:
>
> a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;
>
> b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) (Ont. S.C.J.) ("*Canwest* (2009)"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and *505396 B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;
>
> c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest* (2009) at para. 33;
>
> d) relevant factors will include the status of the *CCAA* proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest* (2009) at para. 32;
>
> e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the *CCAA* is to promote a streamlined process to determine claims that reduces expense and delay; and
>
> f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest* (2009); *Azure Dynamics* at para. 28.

[74] I concluded that the Union had not met the "heavy onus" on it to justify the lifting of the stay to allow these various proceedings to continue. My specific reasons are:

a) The Union argues that the materials are essentially already assembled and that these judicial reviews can be scheduled for short chambers matters. As such, the Union argues that there is "minimal prejudice" to Wolverine LP. While this may be so, proceeding with these matters will

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inevitably detract both managerial and legal focus from the primary task at hand, namely to implement the SISP, and as such, potentially interfere with the restructuring efforts;

b) The Union argues that any purchaser of Wolverine LP's mine will inherit outstanding employee obligations pursuant to the *Code*. Accordingly, the Union argues that it will be more attractive to a buyer for the mine to have all outstanding employee claims resolved. Again, while this may come to pass, such an argument presupposes an outcome that is anything less than clear at this time. Such a rationale is clearly premature;

c) The Union argues that it is unable to distribute the $771,378.70 to its members until Wolverine LP's judicial review is addressed. Frankly, I see this delay as the only real prejudice to the Union members. However, on the other hand, one might argue that the Union members are in a favourable position with these monies being held in trust as opposed to being unsecured creditors of Wolverine. In any event, the Union's claim to these monies has not yet been determined and arises from a dispute that dates back to April 2014. Therefore, there is no settled liability that would allow such payment to be made; and

d) The Union claims that these matters must be determined "in any event" and that they should be determined "sooner rather than later". However, the outcome of the SISP may significantly affect what recovery any creditor may hope to achieve in this restructuring. In the happy circumstance where there will be monies to distribute, I expect that a claims process will be implemented to determine valid claims, not only in respect of the Union's claims, but all creditors.

[75] In summary, there is nothing to elevate the Union's claims such that it is imperative that they be determined now. There is nothing to justify the distraction and expense of proceeding with these actions to the detriment of the restructuring

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efforts. If it should come to pass that monies will be distributed to creditors, such as the Union, then I expect that the usual claims process will be implemented to decide the validity of those claims.

[76] In the meantime, if it becomes necessary to determine the validity of these claims quickly (such as to clarify potential successor claims for a purchaser), the Union will be at liberty to renew its application to lift the stay for that purpose.

[77] Accordingly, I grant an extension of the stay of proceedings and other ancillary relief until April 5, 2016.

"Fitzpatrick J."

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# TAB 1

| | |
|---|---|
| COURT FILE NUMBER | 2201-02699 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | NATIONAL BANK OF CANADA |
| DEFENDANTS | BALANCED ENERGY OILFIELD SERVICES INC., BALANCED ENERGY OILFIELD SERVICES (USA) INC., BALANCED ENERGY HOLDINGS INC., MICHELLE THOMAS, NEIL SCHMEICHEL, DARREN MILLER, and CODY BELLAMY |
| DOCUMENT | **ORDER**<br><br>**(Approval of Sales Solicitation Process, Stalking Horse Term Sheet and Receiver's Conduct and Activities)** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **OSLER, HOSKIN & HARCOURT LLP**<br>Barristers & Solicitors<br>Brookfield Place, Suite 2700<br>225 6 Ave SW<br>Calgary, AB T2P 1N2<br><br>Solicitors: Randal Van de Mosselaer / Emily Paplawski<br>Telephone: (403) 260-7060 / (403) 260-7071<br>Facsimile: (403) 260-7024<br>Email: RVandemosselaer@osler.com / EPaplawski@osler.com<br>File Number: 1230496 |

Clerk's Stamp
JUDICIAL CENTRE OF CALGARY
FILED
Apr 14, 2022
by Email
CLERK OF THE COURT

**DATE ON WHICH ORDER WAS PRONOUNCED:** March 30, 2022

**NAME OF JUDGE WHO MADE THIS ORDER:** The Honourable Justice J.T. Neilson

**LOCATION OF HEARING:** Edmonton, Alberta (by WebEx)

**UPON** the application of FTI Consulting Canada Inc. in its capacity as receiver and manager (the "**Receiver**") of all the current and future assets, undertakings, properties whatsoever and wherever situate of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc., and Balanced Energy Holdings Inc. (the "**Debtors**") for an order, among other things, approving the binding term sheet (as amended, the "**Stalking Horse Term Sheet**") between XDI Energy Solutions Inc. (the "**Stalking Horse Bidder**") and the Receiver, dated March 21, 2022, as attached as Appendix "B" to the First Report of the Receiver, dated March 21, 2022 (the "**First Report**"), and approving the proposed sales solicitation process ("**SSP**") attached as Appendix "A" to the First Report and as Schedule "A" hereto; **AND UPON** having reviewed the

Receivership Order granted by the Honourable Madam Justice Grosse on March 7, 2022 (the "**Receivership Order**"), the First Report, including the Confidential Supplement thereto, and the Affidavit of Service of Elena Pratt, sworn March 22, 2022; **AND UPON** hearing from counsel for the Receiver and any other interested party; **IT IS HEREBY ORDERED AND DECLARED THAT:**

**SERVICE**

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this Application and time for service of this Application is abridged to that actually given.

**APPROVAL OF STALKING HORSE TERM SHEET AND SSP**

2. The Stalking Horse Term Sheet is hereby approved and the execution of the Stalking Horse Term Sheet by the Receiver is hereby authorized and approved, and the Receiver is authorized and directed to take such additional steps and execute such additional documents and make such minor amendments to the Stalking Horse Term Sheet as may be necessary or desirable for the completion of the terms of the Stalking Horse Term Sheet, in all cases subject to the terms of this Order.

3. The Break Fee as defined in the SSP is hereby approved and the Receiver is authorized and directed to pay the Break Fee in the manner and circumstances described therein.

4. The SSP attached hereto as **Schedule "A"**, is hereby approved. The Receiver is hereby authorized and directed to implement the SSP and do all things as are reasonably necessary to conduct and give full effect to the SSP and carry out its obligations thereunder.

5. In connection with the SSP and pursuant to section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the Receiver is authorized and permitted to disclose personal information of identifiable individuals to prospective purchasers or offerors and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more transactions (each, a "**Transaction**"). Each prospective purchaser or offeror to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its

evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Receiver; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver or ensure that other personal information is destroyed.

6. In the event no Superior Offers are received in the SSP or if the Stalking Horse Bidder is the Successful Bidder in the SSP, the Receiver is authorized and directed to file the Receiver's Certificate substantially in the form attached hereto as **Schedule "B"** (the "**Receiver's SSP Certificate**") certifying that no Superior Offers were received in the SSP or, in the alternative, that the Stalking Horse Bidder is the Successful Bidder in the SSP and that, as a result, the Receiver is proceedings to close the transactions detailed in the Stalking Horse Term Sheet, and serve the Receiver's SSP Certificate on the Service List established in these proceedings and on all Qualified Bidders (as defined in the SSP) which participated in the SSP.

7. Following the filing and service of the Receiver's SSP Certificate in accordance with paragraph 6 above, the Receiver is hereby authorized and empowered to close the transactions detailed in the Stalking Horse Term Sheet including, but not limited to, filing the Receiver's Certificates appended at Schedules A to the Approval and Vesting Order and Approval and Reverse Vesting Order granted by this Honourable Court concurrent with this Order.

8. In the event a Superior Bid is received in the SSP, the Receiver shall be at liberty to apply for an Order vesting title to the purchased assets in the name of the Successful Bidder in accordance with, and as defined in, the SSP.

**APPROVAL OF CONDUCT AND ACTIVITIES**

9. The actions, conduct and activities of the Receiver, as reported in the First Report are hereby approved.

**MISCELLANEOUS**

10. Paragraph 21 of the Receivership Order is hereby amended to increase the Receiver's Borrowings Charge from $1,000,000 to $1,750,000.

11. The Receiver shall serve by courier, fax transmission, email transmission or ordinary post, a copy of this Order on all parties present at this Application and on all parties who are presently on the service list established in these proceedings and such service shall be deemed good and sufficient for all purposes.

James T. Neilson

Justice of the Court of Queen's Bench of Alberta

# SCHEDULE "A"

## Sales Solicitation Process

## Sales Solicitation Process

1. On March 7, 2022, the Alberta Court of Queen's Bench (the "**Alberta Court**") made an order (the "**Receivership Order**") appointing FTI Consulting Canada Inc. ("**FTI**") as receiver and manager (the "**Receiver**") of the property, assets and undertakings of Balanced Energy Oilfield Services Inc. ("**BCAN**"), Balanced Energy Oilfield Services (USA) Inc. ("**BUSA**") and Balanced Energy Holdings Inc. ("**BEH**", and collectively with BCAN and BUSA, "**Balanced Energy**").

2. The Receiver is requesting the Alberta Court's approval of the sale solicitation process (the "**Sales Process**") set forth herein at a court application scheduled on March 30, 2022 (the "**SSP Approval Order**").

3. Set forth below are the procedures (the "**Sales Process Procedure**") to be followed with respect to the Sale Process to be undertaken to seek a Successful Bid, and if there is a Successful Bid, to complete the transactions contemplated by the Successful Bid.

4. All dollar amounts set out in this Sale Process shall be deemed to be in Canadian dollars unless otherwise noted.

## Defined Terms

5. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Receivership Order or the Stalking Horse Term Sheet. In addition, in these Sale Process Procedures:

**"Break Fee"** means the sum of $250,000, which shall be paid to the Stalking Horse Bidder in the circumstances described herein;

"**Business Day"** means a day, other than a Saturday or Sunday, on which banks are open for business in the City of Calgary;

"**Court**" means the Alberta Court of Queen's Bench;

"**Damaged Unit Repair Costs**" means all costs incurred prior to closing of the Successful Bid or the transactions detailed in the Stalking Horse Term Sheet, as applicable, in connection with repairs to be made to that damaged coiled tubing unit of BCAN having serial No. 27124977-0435A-1013 and included in the Purchase Price, as specified in the Stalking Horse Term Sheet;

"**Laurentian**" means Laurentian Bank, a secured lender to BUSA holding first lien security over certain equipment held by BUSA;

"**Laurentian Debt**" means all secured debt of BUSA to Laurentian, currently estimated at $900,000;

"**Minimum Incremental Overbid**" means cash (or a non-cash equivalent) value of at least $250,000;

"**NBC**" means National Bank of Canada, the primary secured creditor of Balanced Energy;

**"Pre-Closing Expense Amount"** has the meaning given in the Stalking Horse Term Sheet and is included in the Purchase Price as specified in the Stalking Horse Term Sheet;

"**Pre-Closing Coiled Tubing Inventory Amount**" has the meaning given in the Stalking Horse Term Sheet and is included in the Purchase Price as specified in the Stalking Horse Term Sheet;

"**Property**" means all, substantially all, or certain of the assets, property, and undertakings of BCAN, BUSA, BEH, or any one of them;

"**Purchase Price**" has the meaning given in the Stalking Horse Term Sheet and in paragraph 21 below;

"**Purchased Assets**" means the assets of BUSA defined and enumerated in the Stalking Horse Term Sheet;

"**Purchased Shares**" means all of the issued and outstanding common shares in the capital of BCAN;

"**Receivership Obligations**" means the indebtedness, liabilities and obligations secured by the Receiver's Charge and Receiver's Borrowing Charge (as defined in the Receivership Order) granted in favour of the Receiver pursuant to the Receivership Order;

"**Retained Assets**" means all of the assets of BCAN proposed to be retained BCAN in accordance with the Stalking Horse Term Sheet, as further defined and enumerated in the Stalking Horse Term Sheet;

"**Retained Liabilities**" means all of the liabilities of BCAN proposed to be retained in BCAN in accordance with the Stalking Horse Term Sheet, as further defined and enumerated in the Stalking Horse Term Sheet;

"**Stalking Horse Bidder**" means XDI Energy Solutions Inc.;

"**Stalking Horse Term Sheet**" means the Binding Term Sheet between the Stalking Horse Bidder, the Receiver, and NBC dated March 21, 2022 and attached as Schedule "A" hereto;

"**Superior Offer**" means a credible, reasonably certain and financially viable third party offer for the acquisition of some or all of the Property, the terms of which offer are, in the determination of the Receiver, in its sole discretion acting reasonably, no less favourable and no more burdensome or conditional than the terms contained in the Stalking Horse Term Sheet, and which at a minimum includes a payment in cash of the Purchase Price under

Stalking Horse Term Sheet plus the Break Fee plus one Minimum Incremental Overbid as at the closing of such transaction;

"**Transferred Assets**" means all of the assets of BCAN proposed to be transferred to BEH in accordance with the Stalking Horse Term Sheet, as further defined and enumerated in the Stalking Horse Term Sheet;

**"Transferred Liabilities"** means all of the liabilities of BCAN proposed to be transferred to BEH in accordance with the Stalking Horse Term Sheet, as further defined and enumerated in the Stalking Horse Term Sheet;

## Stalking Horse Term Sheet

6. The Receiver has entered into the Stalking Horse Term Sheet with the Stalking Horse Bidder and with NBC, pursuant to which, if there is no Successful Bid (as defined below) from a party other than the Stalking Horse Bidder, the Stalking Horse Bidder will, by virtue of the transactions set out in the Stalking Horse Term Sheet, acquire (directly or indirectly) the Purchased Assets, Purchased Shares, Retained Assets, and Retained Liabilities, but specifically excluding the Transferred Assets and Transferred Liabilities which will remain with BEH and be subject to the terms of the Receivership Order.

7. The Stalking Horse Term Sheet is attached hereto as **Schedule "A".**

## Sales Process Procedure

8. The Sales Process Procedure set forth herein describes, among other things, the Property available for sale, the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Property, the manner in which bidders and bids become Qualified Bidders and Qualified Bids (each as defined below), respectively, the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder (as defined below) and the Courts' approval and recognition thereof. The Receiver shall administer the Sales Process Procedure. In the event that there is disagreement as to the interpretation or application of this Sales Process Procedure, the Court will have jurisdiction to hear and resolve such dispute.

9. The Receiver will use reasonable efforts to complete the Sales Process Procedure in accordance with the timelines as set out herein. The Receiver shall be permitted to make such adjustments to the timeline that it determines are reasonably necessary.

## Purchase Opportunity

10. A non-confidential teaser letter prepared by the Receiver (the **"Teaser"**) describing the

opportunity to acquire the Property be made available by the Receiver to prospective purchasers and will be posted on the Receiver's website as soon as practicable following the execution of the Stalking Horse Term Sheet.

11. The Receiver will also populate an electronic data room with detailed information regarding the Purchased Assets including, but not limited to, listings, photographs, financial information, technical specifications and other information required for prospective purchasers to perform due diligence on the Property.

**"As Is, Where Is"**

12. The sale of the Property will be on an "as is, where is" basis and without surviving representations, warranties, covenants or indemnities of any kind, nature, or description by the Receiver or any of its agents, except to the extent set forth in the relevant final sale agreement with a Successful Bidder. The representations, warranties, covenants or indemnities shall not be materially more favourable than those set out in the Stalking Horse Term Sheet except to the extent additional tangible monetary value of an equivalent amount is provided by a Successful Bidder other than the Stalking Horse Bidder for such representations, warranties, covenants or indemnities.

**Free of Any and All Claims and Interests**

13. In the event of a sale pursuant to this Sales Process, all of the rights, title and interests of Balanced Energy in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests thereon and there against (collectively the **"Claims and Encumbrances**"), such Claims and Encumbrances to attach to the net proceeds of the sale of such Property (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), pursuant to an approval and vesting order made by the Court, upon the application of the Receiver, except to the extent otherwise set forth in the relevant sale agreement with a Successful Bidder. The vesting out of Claims and Encumbrances by a Successful Bidder other than the Stalking Horse Bidder shall not be materially more favourable to the Successful Bidder than those set out in the Stalking Horse Term Sheet except to the extent additional tangible monetary value of an equivalent amount is provided for the vesting out of such Claims and Encumbrances.

**Publication of Notice and Teaser**

14. As soon as reasonably practicable after the execution of the Stalking Horse Term Sheet the Receiver will cause a notice of the Sales Process contemplated by these Sale Process Procedures, and such other relevant information which the Receiver considers appropriate, to be published in *The Daily Oil Bulletin* and *Insolvency Insider.* At the same time, the Receiver will

invite, pursuant to the Teaser, and by whichever means the Receiver deems appropriate, bids from interested parties.

## Participation Requirements

15. In order to participate in the Sales Process, each person interested in bidding on the Property (a **"Potential Bidder")** must deliver to the Receiver at the address specified in **Schedule "B"** hereto (the **"Notice Schedule")** (including by email transmission), and prior to the distribution of any confidential information by the Receiver to a Potential Bidder, an executed non-disclosure agreement substantially in the form attached at **Schedule "C"** hereto, which shall inure to the benefit of any purchaser of the Property.

16. A Potential Bidder that has executed a non-disclosure agreement, as described above, and who the Receiver in its sole discretion determines has a reasonable prospect of completing a transaction contemplated herein, will be deemed a "**Qualified Bidder**" and will be promptly notified of such classification by the Receiver.

## Due Diligence

17. The Receiver shall provide any person deemed to be a Qualified Bidder with access to the electronic data room and the Receiver shall provide to Qualified Bidders further access to such reasonably required due diligence materials and information relating to the Property as the Receiver deems appropriate. The Receiver makes no representation or warranty as to the information to be provided through the due diligence process or otherwise, regardless of whether such information is provided in written, oral or any other form, except to the extent otherwise contemplated under any definitive sale agreement with a Successful Bidder executed and delivered by the Receiver and approved by the Court.

## Seeking Qualified Bids from Qualified Bidders

18. A Qualified Bidder that desires to make a bid for the Property must deliver either:

(a) a written final, binding proposal (the **"Final Bid")** in the form of a fully executed purchase and sale agreement substantially in the form attached hereto as **Schedule "D"** (the "**Template Sale Agreement**"); or

(b) a signed letter confirming that the Qualified Bidder wishes to assume and perform the obligations of the Stalking Horse Bidder under the Stalking Horse Term Sheet, subject to the necessary adjustment to the Purchase Price to include the Minimum Incremental Overbid and the Break Fee, and detailing

any adjustments, revisions or other terms that the Qualified Bidder proposes be included in the Stalking Horse Term Sheet (a "**Confirmation of Term Sheet Assumption**"),

in each case to Receiver at the address specified in the Notice Schedule (including by email transmission) so as to be received by it not later than 4:00 p.m. Calgary time on April 27, 2022 (the **"Final Bid Deadline")**.

**Qualified Bids**

19. A Final Bid will be considered a Qualified Bid only if it is submitted by a Qualified Bidder and the Final Bid complies with, among other things, the following conditions (a **"Qualified Bid"):**

(a) it contains

(i) a duly executed purchase and sale agreement substantially in the form of the Template Sale Agreement and a blackline of the executed purchase and sale agreement to the Template Sale Agreement; or

(ii) a Confirmation of Term Sheet Assumption compliant with the requirements in paragraph 18(b) above;

(b) it includes a letter stating that the Final Bid is irrevocable until there is a Selected Superior Offer (as defined below), provided that if such Qualified Bidder is selected as the Successful Bidder, its Final Bid shall remain an irrevocable offer until the earlier of (i) the completion of the sale to the Successful Bidder and (ii) the outside date stipulated in the Successful Bid;

(c) it provides written evidence of a firm, irrevocable financial commitment for all required funding or financing;

(d) it provides a written confirmation that the Qualified Bidder has not engaged in any collusion with any other bidder;

(e) it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;

(f) it is accompanied by a refundable deposit (the **"Deposit"**) in the form of a wire transfer (to a bank account specified by the Receiver), or such other form of payment acceptable to the Receiver, payable to the order of the Receiver, in trust, in an amount equal to 10% of the total consideration in the Qualified Bid to be held and dealt with in accordance with these Sale Process Procedures;

(g) the aggregate consideration, as calculated and determined by the Receiver in its sole discretion, to be paid in cash by the Qualified Bidder under the Qualified Bid exceeds the aggregate of the Purchase Price under the Stalking Horse Term Sheet, plus the Break Fee and plus one Minimum Incremental Overbid, upon completion of the transaction contemplated by the Stalking Horse Term Sheet;

(h) it is not conditional upon:

(i) the outcome of unperformed due diligence by the Qualified Bidder, and/or

(ii) obtaining financing;

(i) it contains evidence of authorization and approval from the Qualified Bidder's board of directors (or comparable governing body); and

(j) it is received by the Final Bid Deadline.

**Stalking Horse Term Sheet**

20. No deposit is required in connection with the Stalking Horse Term Sheet.

21. The purchase price for the Purchased Assets, Purchased Shares, and Retained Assets identified in the Stalking Horse Term Sheet includes the sum of:

(a) $11,250,000 in cash;

(b) such amount as shall be required to pay out and satisfy, in full, the Laurentian Debt (estimated to be approximately $900,000);

(c) such amount equal to the Damaged Unit Repair Costs;

(d) such amount equal to the Pre-Closing Coiled Tubing Inventory Amount; and

(e) such amount equal to the Pre-Closing Expense Amount;

(collectively, the "**Purchase Price**").

**No Qualified Bids**

22. If none of the Qualified Bids received by the Receiver constitutes a Superior Offer, the Receiver shall promptly file the Receiver's Certificate substantially in the form attached

as Schedule "A" to the SSP Order (the "**Receiver's SSP Certificate**") and shall proceed immediately to close the transactions enumerated in the Stalking Horse Term Sheet.

**If a Superior Offer is Received**

23. If the Receiver determines in its reasonable discretion that one or more of the Qualified Bids constitutes a Superior Offer, the Receiver shall provide the parties making Superior Offers and the Stalking Horse Bidder the opportunity to make further bids through the auction process set out below (the **"Auction").**

**Auction**

24. If an Auction is to be held, the Receiver will conduct the Auction commencing at 10:00 a.m. (Calgary time) on May 4, 2022 at the offices of the Receiver's legal counsel, Osler Hoskin & Harcourt LLP, Suite 2700 Brookfield Place, 225 6 Ave SW, Calgary Alberta, or such other location as shall be timely communicated to all entities entitled to attend at the Auction, which Auction may be adjourned by the Receiver. The Auction shall run in accordance with the following procedures:

(a) prior to 4:00 p.m. Calgary time on May 2, 2022, the Receiver will provide unredacted copies of the Qualified Bid(s) which the Receiver believes is/are (individually or in the aggregate) the highest or otherwise best Qualified Bid(s) (the "**Starting Bid**") to the Stalking Horse Bidder and to all Qualified Bidders that have made a Superior Offer;

(b) prior to 4:00 p.m. Calgary time on May 3, 2022, each Qualified Bidder that has made a Superior Offer and the Stalking Horse Bidder, must inform the Receiver whether it intends to participate in the Auction (the parties who so inform the Receiver that they intend to participate are hereinafter referred to as the "**Auction Bidders**");

(c) prior to the Auction, the Receiver shall develop a financial comparison model (the "**Comparison Model**") which will be used to compare the Starting Bid and all Subsequent Bids (as defined below) submitted during the Auction, if applicable;

(d) during the morning of May 4, 2022, the Receiver shall make itself available to meet with each of the Auction Bidders to review the procedures for the Auction, the mechanics of the Comparison Model, and the manner by which Subsequent Bids shall be evaluated during the Auction, and the Auction shall be held immediately thereafter;

(e) only representatives of the Auction Bidders, the Receiver, and such other persons as permitted by the Receiver (and the advisors to each of the foregoing entities) are entitled to attend the Auction in person (and the Receiver shall have the discretion to allow such persons to attend by teleconference);

(f) the Receiver shall arrange to have a court reporter attend at the Auction;

(g) at the commencement of the Auction, each Auction Bidder shall be required to confirm that it has not engaged in any collusion with any other Auction Bidder with respect to the bidding or any sale;

(h) only the Auction Bidders will be entitled to make a Subsequent Bid (as defined below) at the Auction; provided, however, that in the event that any Qualified Bidder elects not to attend and/or participate in the Auction, such Qualified Bidder's Qualified Bid, shall nevertheless remain fully enforceable against such Qualified Bidder if it is selected as the Winning Bid (as defined below);

(i) all Subsequent Bids presented during the Auction shall be made and received in one room on an open basis. All Auction Bidders will be entitled to be present for all Subsequent Bids at the Auction with the understanding that the true identify of each Auction Bidder at the Auction will be fully disclosed to all other Auction Bidders at the Auction and that all material terms of each Subsequent Bid will be fully disclosed to all other Auction Bidders throughout the entire Auction;

(j) all Auction Bidders must have at least one individual representative with authority to bind such Auction Bidder present in person at the Auction;

(k) the Receiver may employ and announce at the Auction additional procedural rules that are reasonable under the circumstances (e.g., the amount of time allotted to make a Subsequent Bid, requirements to bid in each round, and the ability of multiple Auction Bidders to combine to present a single bid) for conducting the Auction, provided that such rules are (i) not inconsistent with these Sale Process Procedures, general practice in insolvency proceedings, or the Receivership Order and (ii) disclosed to each Auction Bidder at the Auction;

(l) bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by an Auction Bidder (a "**Subsequent Bid**") that the Receiver, utilizing the Comparison Model, determines is (i) for the first round, a higher or otherwise better offer than the Starting Bid, and (ii) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (as defined below), in

each case by at least the Minimum Incremental Overbid. After the first round of bidding and between each subsequent round of bidding, the Receiver shall announce the bid (including the value and material terms thereof) that it believes to be the highest or otherwise best offer (the "**Leading Bid**"). A round of bidding will conclude after each Auction Bidder has had the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid;

(m) to the extent not previously provided (which shall be determined by the Receiver), an Auction Bidder submitting a Subsequent Bid must submit, at the Receiver's discretion, as part of its Subsequent Bid, written evidence (in the form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Receiver), demonstrating such Auction Bidder's ability to close the transaction proposed by the Subsequent Bid;

(n) the Receiver reserves the right, in its reasonable business judgment, to make one or more adjournments in the Auction of not more than 24 hours each, to among other things (i) facilitate discussions between the Receiver and the Auction Bidders; (ii) allow the individual Auction Bidders to consider how they wish to proceed; (iii) consider and determine the current highest and best offer at any given time in the Auction; and (iv) give Auction Bidders the opportunity to provide the Receiver with such additional evidence as the Receiver, in its reasonable business judgment, may require that that Auction Bidder (including, as may be applicable, the Stalking Horse Bidder) has sufficient internal resources, or has received sufficient non-contingent debt and/or equity funding commitments, to consummate the proposed transaction at the prevailing overbid amount;

(o) the Stalking Horse Bidder shall be permitted, in its sole discretion, to submit Subsequent Bids, provided, however, that such Subsequent Bids are made in accordance with these Sale Process Procedures;

(p) if, in any round of bidding, no new Subsequent Bid is made, the Auction shall be closed;

(q) the Auction shall be closed within 5 Business Days of the start of the Auction unless extended by the Receiver; and

(r) no bids (from Qualified Bidders or otherwise) shall be considered after the conclusion of the Auction.

25. At the end of the Auction, the Receiver shall select the winning bid (the "**Winning Bid**"). Once a definitive agreement has been negotiated and settled in respect of the Winning Bid as selected by the Receiver (the "**Selected Superior Offer**") in accordance with the provisions hereof, the Selected Superior Offer shall be the "Successful Bid" hereunder and the person(s) who made the Selected Superior Offer shall be the "Successful Bidder" hereunder. If the Successful Bidder is a bidder other than the Stalking Horse Bidder, the Stalking Horse Bidder shall be entitled to receive, and the Receiver shall pay to it, the Break Fee, immediately after closing, from the Successful Bidder's payment of cash at closing.

## Alberta Court Approval Motion

26. Unless the Successful Bid is the Stalking Horse Term Sheet (in which case the provisions of the SSP Order shall govern and the transaction detailed in the Stalking Horse Term Sheet shall be closed in accordance with the requirements thereof), the Receiver shall apply to the Court (the **"Approval Motion")** for an order (the **"Sale Approval and Vesting Order")** approving the Successful Bid and authorizing the Receiver to enter into any and all necessary agreements with respect to the Successful Bidder, as well as an order vesting title to the Property in the name of the Successful Bidder.

27. The Approval Motion will be held on May 13, 2022 at 2:00 p.m., or such further and other date as may be agreed by the Receiver and the Successful Bidder.

28. All Qualified Bids and Subsequent Bids (other than the Successful Bid) shall be deemed rejected on and as of the date and of approval of the Successful Bid by the Court, but not before, and shall remain open for acceptance until that time.

## Deposits

29. All Deposits shall be retained by the Receiver in a bank account specified by the Receiver. If there is a Successful Bid, the Deposit (plus accrued interest, if any) paid by the Successful Bidder whose bid is approved at the Approval Motion shall be applied to the purchase price to be paid by the Successful Bidder upon closing of the approved transaction and will be non-refundable. The Deposits (plus applicable interest, if any) of Qualified Bidders not selected as the Successful Bidder shall be returned to such bidders within five (5) Business Days of the date on which the Sale Approval and Vesting Order is granted by the Court or, if the Successful Bid is the Stalking Horse Term Sheet, the date on which the Receiver files the Receiver's SSP Certificate. If there is no Successful Bid, all Deposits shall be returned to the bidders within five (5) Business Days of the date upon which the Sale Process is terminated in accordance with these procedures.

## Approvals

30. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the applicable law in order to implement a Successful Bid.

## No Amendment

31. Subject to paragraph 9 above, there shall be no amendments to these Sale Process Procedures without the consent of the Receiver.

## Further Orders

32. At any time during the Sales Process, the Receiver may apply to the Court for advice and directions with respect to the discharge of its powers and duties hereunder.

**Schedule "A" to Sales Solicitation Process**

**BINDING TERM SHEET**

**RVO TRANSACTION**

*(All amounts expressed herein are in Canadian Dollars)*

This Term Sheet sets forth the agreement of the parties hereto (the "**Parties**") with respect to the proposed transaction which is described herein (the "**Proposed Transaction**"). In the Proposed Transaction, the Purchaser will: (i) purchase the Purchased Shares of Balanced Canada; and (ii) purchase the Purchased Assets of Balanced USA. Pursuant to the AVO and RVO, those purchases shall be approved and: (i) the Purchased Shares will be transferred from Balanced Holdings to the Purchaser; (ii) the Transferred Assets will be transferred from Balanced Canada to Balanced Holdings, in consideration for Balanced Holdings assuming from Balanced Canada the Transferred Liabilities; and (iii) the Purchased Assets will be transferred to the Purchaser, free and clear of all claims of the creditors of the Debtors.

The Parties acknowledge that this Term Sheet is being provided as part of a SH SSP (as that term is defined below) being administered by the Receiver (as defined below).

Upon execution of this Term Sheet by the Parties, this Term Sheet shall create a binding legal obligation on the part of the Parties, subject only to the terms and conditions hereof and of the RVO and approval of the Court of Queen's Bench of Alberta. The terms and conditions set forth in this Term Sheet, together with the RVO, are intended to be comprehensive and are not subject to any further due diligence by any Party or to any further definitive documentation, except as expressly permitted or contemplated hereunder.

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| **Purchaser:** | The Purchaser will be XDI Energy Solutions Inc. (the "**Purchaser**"). |
| **Seller:** | FTI Consulting Canada Inc., in its capacity as the Receiver (the "**Receiver**") of Balanced Energy Holdings Ltd. ("**Balanced Holdings**"), Balanced Energy Oilfield Services Inc. ("**Balanced Canada**") and Balanced Energy Oilfield Services (USA) Inc. ("**Balanced USA**") (collectively, the "**Debtors**"), and not in its personal or corporate capacity. |
| **Secured Creditor:** | National Bank of Canada, the primary secured creditor of the Debtors ("**NBC**"). |
| **Closing Date:** | Closing of the Proposed Transaction (the "**Closing**") shall occur on or about three business days after the closing conditions have been satisfied or waived, or such earlier or later date as agreed by the Parties (the "**Closing Date**"). |
| **Proposed Definitive Documents:** | NBC has commenced proceedings in the Court of Queen's Bench of Alberta (the "**Court**") and on March 7, 2022, the Court appointed the Receiver over all the business, assets and undertaking of the Debtors (the "**Receivership Order**") in Action No. 2201-02699. On March 30, 2022 (the "**Sale Approval Date**"), the Receiver shall apply for a Sale Approval and Vesting Order, substantially in the form attached as Schedule A, approving the purchase and sale of the Purchased Assets (the "**AVO**") and a Reverse Vesting Order, in substantially the form attached as Schedule B, approving the Proposed Transaction regarding Balanced Canada (the "**RVO**"), the effectiveness of the AVO and the RVO each being subject to the outcome of the SH SSP. |
| **Balanced Canada Purchased Shares:** | Concurrent with Closing, all of the issued and outstanding common shares in the capital of Balanced Canada (the "**Purchased Shares**") shall be transferred to the Purchaser, pursuant to the RVO. |
| **Balanced Canada Preferred Shares:** | Concurrent with, and only in the event of, Closing, each of Balanced Holdings, Neil Schmeichel, Michelle Thomas, Codie Bellamy and Darren Miller hereby consent and agree to the cancellation, for no consideration other than the consideration contained in |

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| | this Term Sheet, of: (i) all preferred shares (the "**Preferred Shares**") in the capital of Balanced Canada which are issued and outstanding thereto; and (ii) all rights and entitlements in connection with the Preferred Shares and, for clarity, upon Closing all claims which the foregoing individuals may have against the Debtors in connection with the Preferred Shares shall be released. |
| **Balanced Canada Transferred Assets:** | Pursuant to the RVO, the following assets of Balanced Canada shall be transferred to Balanced Holdings (collectively, the "**Transferred Assets**"):<br><br>(a) all of the Debtors' cash and cash equivalents, including all cash collateral and deposits posted by or for the benefit of the Debtors as security for any obligation;<br><br>(b) all accounts receivable, notes receivable and negotiable instruments of the Debtors;<br><br>(c) all rights to receive any refund, rebate, credit, abatement or recovery of or with respect to taxes;<br><br>(d) all of the right, title and interest of Balanced Canada in and to the intercompany loan agreement between Balanced Canada and Balanced USA which was entered into by the parties to facilitate the transfer of certain equipment from Balanced Canada to Balanced USA (the "**Intercompany Loan**"); and<br><br>(e) subject to the prior written consent of the Receiver, any other assets of Balanced Canada designated by the Purchaser as Transferred Assets, prior to the Closing Date. |
| **Balanced Canada Transferred Liabilities:** | Pursuant to the RVO, the following liabilities of Balanced Canada shall be assumed by Balanced Holdings on or prior to Closing (collectively, the "**Transferred Liabilities**"), in consideration for the transfer to Balanced Holdings of the Transferred Assets:<br><br>(a) all unpaid funded indebtedness, including all claims of NBC, BDC and EDC;<br><br>(b) all unsecured claims;<br><br>(c) all liabilities associated with the employees that are not retained, which employees shall be identified by the Purchaser prior to Closing (the "**Excluded Employees**");<br><br>(d) all of the right, title and interest of Balanced Canada in and to the Calgary office lease (the "**Calgary Lease**") and all liabilities associated with the Calgary Lease;<br><br>(e) all of the right, title and interest of Balanced Canada in and to the Brooks facility lease (the "**Brooks Lease**") and all liabilities associated with the Brooks Lease; and<br><br>(f) subject to the prior written consent of the Receiver, any other liabilities designated by the Purchaser as Transferred Liabilities, prior to the Closing Date. |
| **Balanced Canada Retained Assets:** | The following assets of Balanced Canada shall not be transferred to Balanced Holdings and shall be retained by Balanced Canada (collectively, the "**Retained Assets**"):<br><br>(a) all prepaid charges and expenses, including all prepaid rent;<br><br>(b) all inventory;<br><br>(c) all equipment and other tangible assets, including all vehicles, tools, parts and supplies, fuel, machinery, furniture, furnishing, appliances, fixtures, office equipment |

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| | and supplies, owned and licensed computer hardware and related documentation, stored data, communication equipment, trade fixtures and leasehold improvements, in each case, with any transferable warranty and service rights of any Seller related thereto;<br><br>(d) all contracts (except for accounts receivable payable to the Debtors under such contracts);<br><br>(e) all licenses and permits used by Balanced Canada in connection with the operation of its business;<br><br>(f) all employees of Balanced Canada which the Purchaser decides to retain, acting in its sole discretion (the "**Retained Employees**");<br><br>(g) all intellectual property;<br><br>(h) all goodwill and intangibles;<br><br>(i) all books and records;<br><br>(j) all rights under insurance contracts and policies;<br><br>(k) all telephone numbers, fax numbers and email addresses;<br><br>(l) all prepaid taxes and tax credits;<br><br>(m) all bank accounts;<br><br>(n) all non-disclosure agreements entered into by the Receiver on behalf of the Debtors in connection with the Stalking Horse SSP process;<br><br>(o) all proceeds of insurance paid following Closing in connection with that damaged coiled tubing unit of Balanced Canada having serial No. 27124977-0435A-1013 (the "**Damaged Unit**");<br><br>(p) NBC shall assign to the Purchaser all life insurance policies outstanding in respect of Mr. Neil Schmeichel and Ms. Michelle Thomas; and<br><br>(q) all other or additional assets, properties, privileges, rights and interests relating to the business of Balanced Canada (the "**Canadian Business**"), the Retained Liabilities or the assets of Balanced Canada (other than any Transferred Assets) of every kind and description and wherever located, whether known or unknown, fixed or unfixed, accrued, absolute, contingent or otherwise, and whether or not specifically referred to in this Term Sheet.<br><br>The Purchased Shares and the Canadian Business shall be acquired on an “as is where is” basis without any representation or warranty as to fitness or condition. |
| **Balanced Canada Retained Liabilities:** | The following liabilities of Balanced Canada shall remain with Balanced Canada and shall not be assumed by Balanced Holdings (collectively, the "**Retained Liabilities**"):<br><br>(a) all liabilities and obligations arising from the possession, ownership and/or use of the Purchased Shares and the Retained Assets following Closing; |

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| | (b) all liabilities associated with contracts included in Retained Assets;<br><br>(c) all outstanding property taxes or obligations;<br><br>(d) all liabilities of Balanced Canada with respect to the following shareholder loans made to Balanced Canada: (i) loan from 1821109 Alberta Ltd. in the approximate amount of $181,931.71; and (ii) loan from Michelle Thomas in the approximate amount of $508,286.15;<br><br>(e) all liabilities associated with the Retained Employees; and<br><br>(f) any other liabilities of Balanced Canada designated by the Purchaser as Retained Liabilities, prior to the Closing Date. |
| **Balanced USA Purchased Assets:** | Pursuant to the AVO, the Purchaser shall purchase the following assets of Balanced USA (collectively, the "**Purchased Assets**"):<br><br>(a) all prepaid charges and expenses, including all prepaid rent;<br><br>(b) all inventory;<br><br>(c) all equipment and other tangible assets, including all vehicles, tools, parts and supplies, fuel, machinery, furniture, furnishing, appliances, fixtures, office equipment and supplies, owned and licensed computer hardware and related documentation, stored data, communication equipment, trade fixtures and leasehold improvements, in each case, with any transferable warranty and service rights of any Seller related thereto;<br><br>(d) all intellectual property;<br><br>(e) all goodwill and intangibles;<br><br>(f) all books and records;<br><br>(g) all rights under insurance contracts and policies;<br><br>(h) all telephone numbers, fax numbers and email addresses;<br><br>(i) all prepaid taxes and tax credits;<br><br>(j) all bank accounts; and<br><br>(k) all other or additional assets, properties, privileges, rights and interests relating to the business of Balanced USA (the "**US Business**"), excluding the US Excluded Assets.<br><br>The Purchased Assets shall be acquired free and clear of all claims of the creditors of Balanced USA, and on an “as is where is” basis without any representation or warranty as to fitness or condition. The Parties acknowledge that the following Balanced USA Purchased Assets are currently under seizure in North Dakota or are otherwise unable to be transferred into Canada in advance of Closing (the "**Detained Assets**"):<br><br>(a) Unit HCRT 2 (Trailer only, no tractor) (“**Unit HCRT 2**”); |

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| | (b) Unit 804 (KW tractor only, no cryogenic trailer) ("**Unit 804**"); and<br><br>(c) Unit 211 (200Ton Todano Crane) ("**Unit 211**").<br><br>The Parties shall work together to secure physical possession of the Detained Assets so that they may be transferred to the Purchaser in accordance with this Term Sheet. |
| **Balanced USA Excluded Assets:** | Pursuant to the AVO, the following assets of Balanced USA shall remain with Balanced USA and shall not be transferred to the Purchaser on Closing (the "**US Excluded Assets**"):<br><br>(a) all of Balanced USA's cash and cash equivalents, including all cash collateral and deposits posted by or for the benefit of Balanced USA as security for any obligation;<br><br>(b) all accounts receivable, notes receivable and negotiable instruments of Balanced USA;<br><br>(c) all contracts of Balanced USA; and<br><br>(d) such additional assets as may be identified by the Purchaser on or prior to Closing. |
| **Balanced USA Liabilities:** | Pursuant to the AVO, no liabilities or obligations of Balanced USA shall be assumed by the Purchaser on Closing including, without limitation, any of the following:<br><br>(a) all liabilities associated with the employees Balanced USA;<br><br>(b) all liabilities associated with the contracts of Balanced USA; and<br><br>(c) all of Balanced USA's liabilities and obligations in respect of the Intercompany Loan. |
| **Damaged Unit:** | NBC, Balanced Canada, the Receiver and the Purchaser agree that Balanced Canada and the Receiver may proceed with procuring the repairs to the Damaged Unit prior to Closing and in advance of confirmation of whether the costs of completing such repairs will be covered by insurance. NBC agrees to fund the cost of making such repairs, whether incurred before or after the appointment of the Receiver (the "**Damaged Unit Repair Costs**"), subject to reimbursement of all such costs by the Purchaser on Closing. Following Closing, the Purchaser, provided it has reimbursed NBC for the Damaged Unit Repair Costs, shall be entitled make an insurance claim in respect of the Damaged Unit Repair Costs and shall be entitled to retain all proceeds of insurance paid in connection therewith. |
| **Pre-Closing Inventory:** | NBC, Balanced Canada and the Purchaser acknowledge that Balanced Canada was required to purchase approximately $300,000 of coiled tubing inventory in connection with ongoing business operations prior to Closing ("**Pre-Closing Coiled-Tubing Inventory**"). NBC agreed to and did fund the cost of procuring the Pre-Closing Coiled-Tubing Inventory. Two business days prior to the Closing Date, Balanced Canada shall deliver a report which details the remaining useful life, described as a percentage, of all Pre-Closing Coiled-Tubing Inventory which was funded by NBC. On Closing, the Purchaser shall reimburse NBC for the value of the remaining useful life of the Pre-Closing Coiled-Tubing Inventory, which amount shall be calculated by multiplying the purchase price of the Pre-Closing Coiled-Tubing Inventory by the percentage of useful life remaining in respect of the Pre-Closing Coiled-Tubing Inventory (the "**Pre-Closing Coiled-Tubing Inventory Amount**"). |

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| **Pre-Closing Certification and Repairs:** | NBC, Balanced Canada, the Receiver and the Purchaser agree that, between the Sale Approval Date and the Closing Date, Balanced Canada will incur certain expenses in respect of annual maintenance, repairs, inspection and re-certification of its equipment (the "**Pre-Closing Work**"). NBC agrees that the cost of the Pre-Closing Work shall be paid by Balanced Canada from cash on hand, accounts receivable which are collected by Balanced Canada or by NBC by extending additional funding to the Receiver through additional advances under the Receiver's Borrowing Charge established by the Receivership Order. On the date that is two business days prior to Closing, Balanced Canada shall deliver a report (the "**Pre-Closing Expense Report**") which details all costs incurred in connection with the Pre-Closing Work, together with a report of which items of Pre-Closing Work could reasonably be attributed to either: (i) routine annual maintenance, repairs, inspection and re-certification of equipment for future use by the Purchaser (collectively, "**Annual Maintenance Expenses**"); or (ii) generating additional revenue and accounts receivable during the period prior to Closing (collectively, "**Revenue Generating Expenses**"). The Pre-Closing Expense Report shall calculate the difference between the Annual Maintenance Expenses minus the Revenue Generating Expenses and, if such difference is positive, the Purchase Price shall be adjusted upward by the amount of such positive amount and, if such difference is negative, the Purchase Price shall be adjusted downward by such negative amount (the "**Pre-Closing Expense Amount**"). The Receiver and the Purchaser currently estimate that the Pre-Closing Expense Amount will result in an upward adjustment to the Purchase Price of approximately $650,000. |
| **Closing Sequence:** | Closing shall be sequenced such that: (i) the Preferred Shares shall be cancelled by Balanced Canada; (ii) the Purchased Shares shall be transferred to the Purchaser; and (iii) immediately following the cancellation of the Preferred Shares and the transfer of the Purchased Shares, the Purchased Assets shall be transferred to Balanced Canada upon it becoming a wholly-owned subsidiary of the Purchaser. |
| **Purchase Price:** | The total aggregate purchase price for the Purchased Shares and Purchased Assets shall be:<br><br>(a) CA$11,250,000 in cash;<br><br>(b) such amount as shall be required to pay out and satisfy, in full, the first charge held by Laurentian Bank over certain equipment held by Balanced USA (currently estimated at approximately CA$900,000);<br><br>(c) increased, dollar for dollar, by an amount equal to the Damaged Unit Repair Costs;<br><br>(d) increased, dollar for dollar, by an amount equal to the Pre-Closing Coiled-Tubing Inventory Amount; and<br><br>(e) increased or decreased (as the case may be), dollar for dollar, by an amount equal to the Pre-Closing Expense Amount;<br><br>(the "**Purchase Price**").<br><br>The Purchase Price shall not be subject to any additional increase or decrease. |
| **Detained Assets:** | Notwithstanding the foregoing, in the event that the Detained Assets have not been transferred into Canada on or prior to the Closing Date, Closing shall still occur, but the |

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| | amount of the Purchase Price paid on Closing shall be reduced by the following amount, per unit, set forth below:<br><br>(a) Unit HCRT 2 – $CA551,000;<br><br>(b) Unit 804 – $CA68,000; and<br><br>(c) Unit 211 – $CA763,000.<br><br>Following Closing, upon each Detained Asset being transferred into Canada, but in any event not later than two business days following completion of such transfer, the Purchaser shall pay the Receiver the applicable portion of the Purchase Price which corresponds to the individual Detained Asset which has been so transferred into Canada. |
| **Stalking Horse SSP Process:** | The Purchaser hereby agrees to allow for disclosure of this Term Sheet to the Court and all other parties by the Receiver as part of a stalking horse sales solicitation process (the "**SH SSP**") to be commenced by the Receiver as soon as practicable following execution of this Term Sheet. Additionally, upon issuance of the AVO and the RVO, and subject to receiving approval of the Court to proceed with the SH SSP, the Receiver shall continue carrying out the SH SSP in accordance with the provisions set forth in Schedule C. |
| **Transfer Taxes:** | The Purchase Price is exclusive of all transfer taxes, including GST, and the Purchaser shall pay, or shall otherwise be responsible for, all transfer taxes and GST which may become payable in connection with the purchase of the Proposed Transaction.<br><br>The Parties shall, acting reasonably, mutually agree upon an allocation of the Purchase Price among the Purchased Shares and the Purchased Assets in such a manner as will reduce transfer taxes payable by the Purchaser to the greatest extent possible. |
| **Distribution to Creditors:** | After Closing, the Receiver shall obtain one or more distribution orders from the Court in order to cause the assets in Balanced Holdings to be distributed to the creditors of the Debtors, in accordance with the priority of their claims against the Debtors. |
| **Representations and Warranties:** | The purchase and sale shall be on an "as is, where is" basis, with only such representations and warranties as are customary in receivership transactions. |
| **Conditions to Closing:** | The Purchaser's and the Receiver's obligation to close the Proposed Transaction will be subject to the following conditions precedent:<br><br>(a) the granting of the AVO and the RVO, all in a form satisfactory to Purchaser, the Receiver and NBC, acting reasonably;<br><br>(b) the release by NBC of all personal guarantees (the "**Personal Guarantees**") granted to NBC by shareholders, directors, officers or employees of the Debtors ("**Key Debtor Personnel**");<br><br>(c) resolving all potential liability of the Key Debtor Personnel to Business Development Bank of Canada and Export Development Canada to the sole satisfaction of the Key Debtor Personnel;<br><br>(d) this Term Sheet being the successful bid under the SH SSP or there is no Superior Offer under the SH SSP; and |

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| | (e) the RVO and AVO becoming final orders, not subject to any stay or filed appeal, no later than May 15, 2022. |
| **Post-Closing Covenants:** | The parties acknowledge that the Receiver is commencing ancillary proceedings pursuant to Chapter 15 of the US *Bankruptcy Code* (the "**US Bankruptcy Proceedings**") to seek, among other things, recognition of the Receivership Order, AVO and RVO. If the Detained Assets are not transferred into Canada on or prior to the Closing Date, the Receiver shall continue its efforts in the US Bankruptcy Proceedings (or otherwise) to recover the Detained Assets and the Purchaser, the Receiver and NBC agree that, upon the transfer of the Detained Assets into Canada, a second closing will occur with respect to such assets for the purchase price per unit specified in the section titled "*Detained Assets*", above.<br><br>All fixtures and leasehold improvements retained by Balanced Canada will be subject to all claims by the landlord under the Calgary Lease and Brooks Lease, as applicable, and Balanced Canada shall indemnify and hold Balanced Holdings harmless in respect of any claims made by either such landlord that relate to the fixtures or leasehold improvements retained by Balanced Canada. |
| **Covenants that continue whether or not Purchaser is not the Successful Bidder under the SSP** | The Purchaser shall provide reasonable assistance to the Receiver in connection with the collection of all accounts receivable owing to the Debtors including, without limitation, accounts receivable owing to Balanced USA by the United States Federal Government (approximately USD$500,000) whether it is the successful bidder under the SH SSP or not.<br><br>NBC agrees that in the event that the Successful Bidder chosen under the SH SSP is a party other than the Purchaser, the Key Debtor Personnel shall be released of all their obligations under the Personal Guarantees provided that the Key Debtor Personnel provide assistance to the Receiver in connection with the collection of the accounts receivable outlined above. |
| **No Post-Closing Adjustments:** | The Purchaser is not entitled to any claim, adjustment or abatement arising from any claim, as to the conditions, existence of or effective assignment or transfer of the Purchased Shares or the Purchased Assets, provided, however, that if following Closing:<br><br>(a) any Transferred Asset or Transferred Liability is found to have been retained or received by Balanced Canada, Balanced Canada shall transfer such Transferred Asset or Transferred Liability to Balanced Holdings, including, for greater certainty, any amounts that may have been received by Balanced Canada in respect of any: (A) cash collateral and deposits posted by or for the benefit of the Debtors as security for any obligations, (B) accounts receivable, notes receivable, and negotiable instruments, and (C) refund, rebate, credit, abatement or recovery of or with respect to taxes, in each case which form part of the Transferred Assets;<br><br>(b) any Retained Asset or Retained Liability is found to have been transferred to Balanced Holdings, Balanced Holdings shall transfer such Retained Asset or Retained Liability to Balanced Canada;<br><br>(c) any Purchased Asset is found to have been retained or received by Balanced USA, Balanced USA shall transfer such Purchased Asset to Balanced Canada; and<br><br>(d) any US Excluded Asset is found to have been transferred to or received by Purchaser, Purchaser shall transfer such US Excluded Asset to Balanced USA, including, for |

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| | greater certainty, any amounts that may have been received by Purchaser in respect of any: (A) cash collateral and deposits posted by or for the benefit of the Debtors as security for any obligations, and (B) accounts receivable, notes receivable, and negotiable instruments, in each case which form part of the US Excluded Assets. |
| **Expenses:** | Each Party shall pay its own expenses in connection with the Proposed Transaction, whether or not the Proposed Transaction is completed, unless otherwise mutually agreed by the Parties. |
| **Governing Law:** | This Term Sheet will be governed by and construed in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable therein. |
| **Counterparts:** | This Term Sheet may be executed and delivered electronically in two or more counterparts, any one of which need not contain the signature of more than one Party, but all such counterparts taken together shall constitute one and the same instrument. |
| **Assignment:** | This Term Sheet may not be assigned without the prior written consent of the other Parties hereto. |
| **Further Assurances** | Each of the Parties hereto shall at the request and expense of the other Party hereto so requesting execute and deliver such further or additional documents and instruments as may reasonably be considered necessary or desirable to properly reflect and carry out the true intent and meaning of this Term Sheet. |
| **Prior Term Sheet:** | All of the Parties hereby agree and acknowledge that this Term Sheet represents the final and binding agreement of the Parties with respect to the subject matter provided for herein and the Parties further agree that the prior term sheet dated as of the 28th day of February, 2022, and executed by all Parties except the Receiver, shall be replaced in its entirety by this Term Sheet and shall of no further force or effect. |

***[Signature page follows]***

Dated effective as of the ____ day of March, 2022

**XDI ENERGY SOLUTIONS INC.**

Per: _____
Name: Michelle Thomas
Title: Director

Agreed and accepted as of the 21st day of March, 2022, by:

**FTI CONSULTING CANADA INC.**, in its capacity as Receiver of the Debtors, and not in its personal or corporate capacity

Per: _____
Name: Dustin Olver
Title: Senior Managing Director

Agreed and accepted as of the ____ day of March, 2022, by:

**NATIONAL BANK OF CANADA**

Per: Dana Ades-Landy
Digitally signed by Dana Ades-Landy
DN: cn=Dana Ades-Landy, o=Banque Nationale, ou=Special Loans/Unite d'Intervention, email=dana.adeslandy@nbc.ca, c=CA
Date: 2022.03.21 17:43:20 -04'00'
Name: Dana Ades-Landy
Title: Senior Manager Special Loans

Chantal Tremblay
2022.03.21 17:45:56 -04'00'

Agreed and accepted as of the ____ day of March, 2022, by:

Name: Chantal Tremblay
Title: Senior Manager Special Loans

**BALANCED ENERGY HOLDINGS INC.**

Per: _____
Name: Neil Schmeichel
Title: Director

Agreed and accepted as of the ____ day of March, 2022, by:

**BALANCED ENERGY OILFIELD SERVICES INC.**

Per: _____
Name: Neil Schmeichel
Title: Director

Dated effective as of the ____ day of March, 2022

**XDI ENERGY SOLUTIONS INC.**

Per: _____
Name: Michelle Thomas
Title: Director

Agreed and accepted as of the 21st day of March, 2022, by:

**FTI CONSULTING CANADA INC.**, in its capacity as Receiver of the Debtors, and not in its personal or corporate capacity

Per: _____
Name: Dustin Olver
Title: Senior Managing Director

Agreed and accepted as of the ____ day of March, 2022, by:

**NATIONAL BANK OF CANADA**

Per: _____
Name:
Title:

Agreed and accepted as of the 21 day of March, 2022, by:

**BALANCED ENERGY HOLDINGS INC.**

Per: _____
Name: Neil Schmeichel
Title: Director

Agreed and accepted as of the 21 day of March, 2022, by:

**BALANCED ENERGY OILFIELD SERVICES INC.**

Per: _____
Name: Neil Schmeichel
Title: Director

Agreed and accepted as of the 21 day of March, 2022, by:

**NEIL SCHMEICHEL**

Agreed and accepted as of the 21 day of March, 2022, by:

**MICHELLE THOMAS**

Agreed and accepted as of the ____ day of March, 2022, by:

**CODIE BELLAMY**

Agreed and accepted as of the ____ day of March, 2022, by:

**DARREN MILLER**

Agreed and accepted as of the ____ day of March, 2022, by:

**NEIL SCHMEICHEL**

Agreed and accepted as of the ____ day of March, 2022, by:

**MICHELLE THOMAS**

Agreed and accepted as of the 31st day of March, 2022, by:

**CODIE BELLAMY**

Agreed and accepted as of the ____ day of March, 2022, by:

**DARREN MILLER**

Agreed and accepted as of the ____ day of March, 2022, by:

**NEIL SCHMEICHEL**

Agreed and accepted as of the ____ day of March, 2022, by:

**MICHELLE THOMAS**

Agreed and accepted as of the ____ day of March, 2022, by:

**CODIE BELLAMY**

Agreed and accepted as of the 21 day of March, 2022, by:

**DARREN MILLER**

## SCHEDULE A

## FORM OF APPROVAL AND VESTING ORDER

**(attached)**

## SCHEDULE B

## FORM OF REVERSE VESTING ORDER

**(attached)**

# SCHEDULE C

# SALE SOLICITATION PROCESS

**(attached)**

**Schedule “B” to Sales Solicitation Process**

To the Receiver at:

**FTI Consulting Canada Inc.**
Suite 1610, 520 – 5th Avenue S.W.
Calgary, AB T2P 3R7

**Attention: Dustin Olver / Brett Wilson**
E-mail: Dustin.Olver@fticonsulting.com / Brett.Wilson@fticonsulting.com

With copy to:

**Osler, Hoskin & Harcourt LLP**
Suite 2700, Brookfield Place
225 – 6th Avenue S.W.
Calgary, AB T2P 1N2

**Attention: Randal Van de Mosselaer / Emily Paplawski**
Email: RVandemosselaer@osler.com / EPaplawski@osler.com

**Schedule “C” to Sales Solicitation Process**

# NON-DISCLOSURE AGREEMENT

_____, 2022

Attention:

Dear Sirs & Mesdames:

On March 7, 2022, FTI Consulting Canada Inc. (the "**Receiver**", "**us**" or "**we**") was appointed receiver and manager of all of the assets, undertakings and properties of every nature and kind whatsoever and wherever situate, including all proceeds thereof of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc., and Balanced Energy Holdings Inc. (collectively, the "**Debtors**"), pursuant to an Order of the Court of Queen's Bench of Alberta (the "**Court**").

On March 30, 2022, the Court issued an order, *inter alia*, approving the Sales Solicitation Process (the "**SSP**"). The purpose of the SSP is for the Receiver to seek sale or investment proposals for the shares and/or assets of the Debtors (collectively, the "**Potential Transactions**") from Qualified Bidders and to subsequently implement one or a combination of such Potential Transactions. Capitalized terms used in this NDA and not otherwise defined herein have the meanings given to them in the SSP.

This SSP describes, among other things, the process by which interested parties and/or prospective bidders may evaluate and participate in Potential Transactions, including: (a) the manner in which such parties may obtain preliminary information, execute non-disclosure agreements and gain access or continue to have access to due diligence materials concerning the Potential Transactions; (b) the manner in which bidders and bids become Qualified Bidders and Qualified Bids, respectively; (c) the process for the evaluation of bids received; (d) the process for the ultimate selection of a Successful Bidder; and (e) the process for obtaining such approvals (including the approval of the Court) as may be necessary or appropriate in respect of a Successful Bid.

In executing this non-disclosure agreement ("**NDA**") you (the "**Potential Bidder**" or "**you**") acknowledge receipt of a copy of the SSP, attached as Schedule 1 hereto, and agree to accept and be bound by the provisions contained therein.

You confirm your interest in participating in the SSP with a view to becoming a Qualified Bidder and subsequently a Successful Bidder in order to close a transaction contemplated by a Successful Bid (the "**Transaction**"). In that regard, you have requested Confidential Information (as defined herein) be furnished to you.

As a condition to us furnishing Confidential Information to you, and in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, you agree on behalf of yourself, your affiliates and Representatives (as

defined herein and to the extent such affiliates and Representatives are in receipt of all or any part of the Confidential Information) as follows:

1. **Confidential Information** – The term "Confidential Information" means: (A) any and all information of whatever nature (including information in the form not only of written information but also information which may be transmitted orally, visually, graphically, electronically or by any other means) relating to the Debtors, their business and property including, without limitation, information concerning any past, present or future customers, suppliers or our technology, and any correspondence, internal business discussions, strategic plans, budgets, financial statements, records, reports, evaluations, notes, analyses, documents, engineering, trade secrets, know-how, data, patents, copyrights, processes, business rules, tools, business processes, techniques, programs, designs, formulae, marketing, advertising, financial, commercial, sales or programming materials, equipment configurations, system access codes and passwords, written materials, compositions, drawings, diagrams, computer programs, studies, works in progress, visual demonstrations, ideas, concepts, or any other documents or information pertaining in any way whatsoever to the Debtors; (B) all information about an identifiable individual or other information that is subject to any federal, provincial or other applicable statute, law or regulation of any governmental or regulatory authority in Canada relating to the collection, use, storage and/or disclosure of information about an identifiable individual, including the *Personal Information and Protection of Electronic Documents Act* (Canada) and equivalent provincial legislation, whether or not any such information is confidential ("**Personal Information**"); and (C) all summaries, notes, analyses, compilations, data, studies or other documents or records prepared by Potential Bidder or its Representatives that contain or otherwise reflect or have been generated, wholly or partly, or derived from, any such information ("**Derivative Information**"). The term "Confidential Information" shall not include such portions of the Confidential Information which: (i) are, or prior to the time of disclosure or utilization become, generally available to the public other than as a result of a disclosure by you or your Representatives; (ii) are received by you from an independent third party who had obtained the Confidential Information lawfully and was under no obligation of secrecy or duty of confidentiality; (iii) you can show were in your lawful possession before you received such Confidential Information from us, or (iv) you can show were independently developed by you or on your behalf by personnel having no access to the Confidential Information at the time of its independent development. In addition, you agree that the Receiver may, in its sole discretion, withhold or provide information requested by you.

2. **Non-Disclosure and Restricted Use** – the Confidential Information will be kept confidential by Potential Bidder and will not, without the prior written consent of the Receiver or as permitted by this NDA, be disclosed by Potential Bidder or any of its Representatives in any manner whatsoever, in whole or in part, and will not be used by Potential Bidder or any of its Representatives, directly or indirectly, for any purpose other than evaluating, negotiating and consummating a Transaction (the "**Permitted Purpose**"). You will not use the Confidential Information so as to obtain any commercial advantage over the Debtors or in any way which is, directly or indirectly, detrimental to the Debtors. Neither you nor any of your affiliates will alter, decompose, disassemble, reverse engineer or otherwise modify any Confidential Information received hereunder that relates to the

research and development, intellectual property, processes, new product developments, product designs, formulae, technical information, patent information, know-how or trade secrets of the Debtors. Potential Bidder agrees to comply with any applicable privacy laws in respect of Confidential Information relating to individuals. Potential Bidder recognizes and acknowledges the competitive value and confidential nature of the Confidential Information and the damage that could result to the Debtors if any information contained therein is disclosed to any person.

3. **Storage and Records** – You shall store the Confidential Information properly and securely and ensure that appropriate physical, technological and organisational measures are in place to protect the Confidential Information against unauthorised or unintended access, use or disclosure. You will only reproduce or take such copies of any of the Confidential Information as is reasonably necessary for the Permitted Purpose. You shall keep a record of the Confidential Information furnished to you, in any medium other than oral, and of the location of such Confidential Information.

4. **Access Limited to Representatives** – Potential Bidder may reveal or permit access to the Confidential Information only to its agents, representatives (including lawyers, accountants and financial advisors), directors, officers and employees (each a "**Representative**") who need to know the Confidential Information for the Permitted Purpose, who are informed by Potential Bidder of the confidential nature of the Confidential Information, who are directed by Potential Bidder to hold the Confidential Information in the strictest confidence and who agree to act in accordance with the terms and conditions of this agreement. Potential Bidder will take all necessary precautions or measures as may be reasonable in the circumstances to prevent improper access to the Confidential Information or use or disclosure of the Confidential Information by Potential Bidder's Representatives and will be responsible for any breach of this agreement by any of its Representatives. You will, in the event of a breach of this agreement or any disclosure of Confidential Information by you or any of your Representatives, other than as permitted by this agreement, through accident, inadvertence or otherwise, notify the Receiver of the nature of the breach promptly upon your discovery of the breach or disclosure.

   You acknowledge that certain of the Debtors' books, records or information representing or containing Confidential Information to which you may be given access are books, records and information to which solicitor-client privilege and/or litigation privilege ("**Privilege**") attaches. You recognize and acknowledge that we have a material interest in the preservation of Privilege in respect of all Privileged material (collectively, the "**Privileged Material**"). You agree (acting on your own behalf and as agent for your Representatives) that: (a) such access is being provided solely for the Permitted Purpose; (b) such access is not intended and should not be interpreted as a waiver of any Privilege in respect of Privileged Material or any right to assert or claim Privilege in respect of Privileged Material. To the extent there is any waiver, it is intended to be a limited waiver in your favour, solely for the Permitted Purpose; (c) you shall keep the Privileged Material in strict confidence, and disclose such material solely to your legal counsel and to your directors, officers and employees and any affiliate and only to the extent required for the Permitted Purpose; (d) at our request, all copies of Privileged Material, and any notes that would disclose the contents of Privileged Material, will be destroyed or returned to the

owner thereof; and (e) at our request, you shall claim or assert, or co-operate to claim or assert, Privilege in respect of our Privileged Material.

5. **No Disclosure of Transaction** – Potential Bidder and its Representatives will not, without the Receiver's prior written consent, disclose to any person the fact that the Confidential Information has been made available, that this agreement has been entered into, that discussions or negotiations are taking place or have taken place concerning a possible Transaction or any of the terms, conditions or other facts with respect to any such possible Transaction.

6. **Contact Persons** – In respect of Confidential Information requests or any other matters concerning the Confidential Information or the Transaction, you agree to communicate only with _____, each from FTI Consulting Canada Inc.; or with such other individual or individuals as they may authorize in writing and on terms acceptable to the Receiver, acting reasonably. Without such prior written consent, neither you nor any of your Representatives will initiate or cause to be initiated or maintain any communication with any officer, director, agent, employee of the Debtors, or any affiliate, creditor, shareholder, customer, supplier or lender of the Debtors concerning their business, operations, prospects or finances, or the Confidential Information or the Transaction.

7. **Proprietary Rights** – You acknowledge that the Confidential Information is a proprietary asset of the Debtors and its affiliates and agree that the Debtors will retain proprietary rights in the Confidential Information and the disclosure of such Confidential Information shall not be deemed to confer upon you any rights whatsoever in respect of any Confidential Information.

8. **Return of Confidential Information –** If you determine not to pursue a Transaction, you will promptly advise the Receiver of that fact. At the time of such notice, or if, at any earlier time, the Receiver so directs (whether or not you determine to pursue a Transaction), you and your Representatives will, at your own expense, promptly return or destroy all copies of the Confidential Information upon our request (and, in any event, within five (5) business days after such request), except for that portion of the Confidential Information which consists of Derivative Information, which will be destroyed, and in the case of information stored in electronic form, it will be permanently erased. If requested by the Receiver, compliance with this Section 8 shall be certified in writing by an authorized officer of the Potential Bidder.

   Notwithstanding the foregoing, (i) you may retain a copy of the Confidential Information to the extent that such retention is required to demonstrate compliance with applicable law, regulation or professional standards, provided that it is kept strictly confidential; and (ii) Confidential Information that is electronically stored may be retained in back-up servers if it is not intentionally made available to any person, and is deleted in accordance with your normal policies with respect to the retention of electronic records. Notwithstanding the return or destruction of the Confidential Information, you and your Representatives shall continue to be bound by the confidentiality and other obligations hereunder.

9. **No Representation** – You acknowledge that neither we nor any of our Representatives makes any express or implied representation or warranty as to the accuracy or completeness of the Confidential Information, and agree that neither we nor our Representatives shall have any liability, direct or indirect, to you or your Representatives relating to or resulting from the Confidential Information or the use thereof, errors therein or omissions therefrom and except in accordance with any specific representations and warranties made in any definitive agreement entered into regarding the Transaction. Neither you nor we have any obligation to the other to negotiate a Transaction.

10. **Definitive Agreement** - You acknowledge and agree that no agreement relating to or providing for the Transaction shall exist unless and until a definitive agreement with respect to Transaction has been executed by you and us. It is agreed that unless and until such a definitive agreement has been executed and delivered pursuant to the terms of the SSP, neither we nor you shall have any legal obligation of any kind whatsoever with respect to the completion of the Transaction by virtue of this agreement. We and you further understand and agree that: (i) we are under no obligation to provide Confidential Information and any data room containing Confidential Information may be closed by us at any time; and (ii) neither we nor you shall have any claim whatsoever against the other (nor any of their respective affiliates or Representatives) arising out of or relating to the completion of the Transaction (other than as expressly set forth in a subsequent definitive written agreement entered into by us and you in connection with the Transaction and pursuant to the terms of the SSP). The process leading up to a Transaction shall be governed by the applicable terms of the SSP. Either party to this NDA may terminate discussions and negotiations with regard to the Transaction at any time for any reason.

11. **Required Disclosure** – In the event that you or any of your Representatives become legally compelled or are required by regulatory authorities having appropriate jurisdiction to disclose any of the Confidential Information, you will promptly provide us with written notice so that we may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this agreement. You will cooperate with us on a reasonable basis to obtain a protective order or other remedy. In the event that such protective order or other remedy is not obtained or we waive compliance with the provisions of this agreement, you will furnish only that portion of the Confidential Information which you are advised by counsel is legally required to be disclosed and will exercise all reasonable efforts to obtain reliable assurance that confidential treatment will be accorded the Confidential Information so furnished.

12. **Non-Solicitation; No-Hire** – Without prior written consent of the Receiver, for a period of eighteen (18) months from the date of this Agreement (the "**Restriction Period**"), Potential Bidder, its Representatives and affiliates will not, either directly or indirectly, solicit for employment, employ or otherwise contract for the services of (or cause or seek to cause to leave the employ of the Debtors or its affiliates) any person who is now employed or engaged (either as an employee or consultant) or becomes employed or engaged during the term of this agreement by the Debtors in their operations, other than persons whose employment or engagement shall have been terminated at least six (6) months prior to the date of such solicitation, employment or other contractual arrangements, providing however that the foregoing provision will not prevent you from

hiring any such person who contacts you on his or her own initiative without any direct or indirect solicitation by or encouragement from you. The prohibition contained in this paragraph does not extend to general solicitations of employment by you not specifically directed towards the employees or consultants of the Debtors.

13. **Standstill** – Potential Bidder agrees that during the Restriction Period, neither you nor any of your affiliates (including any person or entity directly or indirectly through one or more intermediaries controlling you or controlled by or under common control with you) will, without the prior written authorization of the Receiver, directly, indirectly, or jointly or in concert with any other person: (i) purchase, offer or agree to purchase any direct or indirect rights or options to acquire bank indebtedness, trade claims or other liabilities of the Debtors; (ii) enter into, offer or agree to enter into or engage in any discussions or negotiations with respect to any acquisition or other business combination transaction relating to the Debtors or their affiliates, or any acquisition transaction relating to all or part of the assets of the Debtors, any of our affiliates or any of their respective businesses, or propose any of the foregoing; (iii) form, join or in any way participate in any group acting jointly or in concert with respect to the foregoing; (iv) seek any modification to or waiver of your agreements and obligations under this agreement; (v) seek, propose or otherwise act alone or in concert with others, to influence or control the management, board of directors or policies of the Debtors or any of their affiliates; (vi) advise, assist or encourage, act as a financing source for or otherwise invest in any other person in connection with any of the foregoing activities; or (vii) disclose any intention, plan or arrangement, or take any action inconsistent with the foregoing.

14. **Amendment of Agreement** – This agreement may not be amended, modified or waived except by an instrument in writing signed on behalf of each of the parties hereto.

15. **Successors and Assigns; Assignability** – This agreement shall be binding upon, inure to the benefit of, and be enforceable by, the respective successors and permitted assigns of the parties hereto. This agreement may not be assigned by the Potential Bidder without the prior written consent of the Receiver. This agreement may be assigned by the Receiver without the prior written consent of the Potential Bidder. Any assignment or attempted assignment in contravention of this subsection shall be void ab initio and shall not relieve the assigning party of any obligation under this agreement.

16. **Certain Definitions** – In this agreement, the term "**affiliate**" shall mean a person directly or indirectly controlling, or controlled by, or under common control with, the Debtors or you, as the case may be, with "**control**" meaning direct or indirect ownership of more than 50% of the voting securities or similar rights or interests of such person. The term "**person**" shall be interpreted broadly to include, without limitation, any individual, corporation, company, partnership, limited partnership, limited liability company, joint venture, estate, association, trust, firm, unincorporated organization, or other entity of any kind or nature.

17. **Governing Law** – This agreement shall be governed by and construed in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable in the Province of Alberta. You hereby irrevocably (a) submit to the exclusive jurisdiction of the

Court in respect of any actions or proceedings ("**Proceedings**") relating in any way to this agreement and the transactions contemplated hereby (and you agree not to commence any Proceeding relating thereto except in such courts); and (b) waive any objection to the venue of any Proceeding relating to this agreement or the transactions contemplated hereby in the Court, including the objection that any such Proceeding has been brought in an inconvenient forum.

18. **Non-Waiver** – No failure or delay by the Receiver in exercising any right, power or privilege under this agreement will operate as a waiver thereof, nor will any single or partial exercise preclude any other or further exercise of any right, power or privilege under this agreement.

19. **Notice** – Any notice, consent or approval required or permitted to be given in connection with this agreement ("**Notice**") shall be in writing and shall be sufficiently given if delivered (whether in person, by courier service or other personal method of delivery), or if transmitted by facsimile or e-mail:

(a) to the Receiver at:

FTI Consulting Canada Inc.
Suite 1610, 520 Fifth Avenue S.W
Calgary, AB T2P 3R7

Attention: Hailey Liu / Brandi Swift
E-mail: hailey.liu@fticonsulting.com / brandi.swift@fticonsulting.com

With copy to:

Osler, Hoskin & Harcourt LLP
Brookfield Place, Suite 2700
225 6 Ave SW
Calgary, AB T2P 1N2

Attention: Randal Van de Mosselaer / Emily Paplawski
Email: RVandemosselaer@osler.com / EPaplawski@osler.com

(b) Potential Bidder at:

[●]

Any Notice delivered or transmitted as provided above shall be deemed to have been given and received on the day it is delivered or transmitted, provided that it is delivered or transmitted on a business day prior to 5:00 p.m. local time in the place of delivery or receipt. However, if the Notice is delivered or transmitted after 5:00 p.m. local time or if such day is not a business day then the Notice shall be deemed to have been given and

received on the next business day. Both you and we may, from time to time, change our respective addresses by giving Notice to the other in accordance with the provisions of this section.

20. **Indemnity** – Potential Bidder shall indemnify and hold harmless the Receiver and its Representatives from any damages, loss, cost or liability (including reasonable legal fees and the cost of enforcing this indemnity) arising out of or resulting from any breach of this agreement by Potential Bidder or any of its Representatives.

21. **Injunctive Relief** – You acknowledge that disclosure of the Confidential Information or other breach of this agreement would cause serious and irreparable damage and harm to the Debtors and that remedies at law would be inadequate to protect against breach of this agreement, and agree in advance to the granting of injunctive relief in the Debtors' favour for any breach of the provisions of this agreement and to the specific enforcement of the terms of this agreement, without proof of actual damages, and without the requirement to post a bond or other security, in addition to any other remedy to which the Receiver would be entitled.

22. **Term** – Except as otherwise provided herein, confidentiality and non-use obligations described in this agreement shall terminate on the earlier of (a) the date of completion of the proposed Transaction; and (b) the expiration of the Restriction Period. Notwithstanding the foregoing, you acknowledge that the confidentiality and non-use obligations in this agreement pertaining to Personal Information shall survive any termination or expiration of this agreement.

23. **Entire Agreement** – This agreement constitutes the entire agreement between the parties hereto and sets out all the covenants, promises, warranties, representations, conditions and agreements between the parties hereto in connection with the subject matter of this agreement and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, pre-contractual or otherwise. There are no covenants, promises, warranties, representations, conditions or other agreements, whether oral or written, pre-contractual or otherwise, express, implied or collateral, whether statutory or otherwise, between the parties hereto in connection with the subject matter of this agreement except as specifically set forth in this agreement.

24. **Counterparts** – This agreement may be executed and delivered by electronic transmission. An electronic signature shall have the same legal effect as a manual signature. This agreement may be validly executed in any number of counterparts, all of which taken together shall constitute one and the same agreement and each of which shall constitute an original.

***[Signature Page Follows]***

Please acknowledge your agreement to the foregoing by countersigning this letter in the place provided below and returning it to the undersigned.

Very truly yours,

**FTI CONSULTING CANADA INC.** in its capacity as Court-appointed receiver and manager of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc., and Balanced Energy Holdings Inc., and not in its personal or corporate capacity

Per: _____

**CONFIRMED AND AGREED** this day of _____, 2022.

Per: _____

Per: _____

**SCHEDULE 1- SSP**

*See attached*

**Schedule "D" to Sales Solicitation Process**

# ASSET PURCHASE AGREEMENT

**THIS AGREEMENT** has been entered into as of _____, 2022,

**BETWEEN:**

**FTI CONSULTING CANADA INC.**, in its capacity as receiver and manager of Balanced Energy Oilfield Services Inc. ("**BCAN**"), Balanced Energy Oilfield Services (USA) Inc. ("**BUSA**") and Balanced Energy Holdings Inc. ("**BEH**", and collectively with BCAN and BUSA, "**Balanced**"), and not in its personal or corporate capacity (the "**Vendor**")

- and -

_____

_____

("**Purchaser**")

**RECITALS:**

A. Pursuant to a Receivership Order of the Court of Queen's Bench (Alberta) (the "**Court**") made as of March 7, 2022 (the "**Appointment Order**"), Vendor was appointed as receiver and manager, without security, of all of Balanced's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof; and

B. The Vendor has agreed to sell and the Purchaser has agreed to purchase the Purchased Assets (as defined herein) upon the terms and conditions hereinafter set forth.

**NOW THEREFORE** in consideration of the mutual covenants and agreements contained herein, the parties hereby agree with each other as follows:

## ARTICLE 1
## INTERPRETATION

**1.1** Definitions.

The following terms and expressions shall have the meanings set forth below wherever used in this Agreement:

"**Affiliate**" means, in respect of a person, any other person, directly or indirectly, that controls, is controlled by or under common control with the first mentioned person, and for the purposes of this definition "control" means the possession, directly or indirectly, by a person or a group of persons acting in concert of the power to direct or cause the direction of the management and policies of the person, whether through the ownership of voting securities or otherwise;

"**Agreement**" means this Asset Purchase Agreement**;**

"**Appointment Order**" has the meaning ascribed thereto in the recitals to this Agreement;

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"**Approval and Vesting Order**" means an order to be granted by the Court which authorizes, approves and confirms this Agreement and the completion of the Transaction contemplated hereunder and vests the Purchased Assets in the Purchaser, free and clear of all encumbrances (other than Permitted Encumbrances), in a form acceptable to the Vendor and the Purchaser;

"**Assumed Obligations**" has the meaning set out in Section 2.6;

"**Balanced**" has the meaning ascribed thereto in the recitals to this Agreement;

"**BCAN**" has the meaning ascribed thereto in the recitals to this Agreement;

"**BEH**" has the meaning ascribed thereto in the recitals to this Agreement;

"**BUSA**" has the meaning ascribed thereto in the recitals to this Agreement;

"**Business**" means the business carried on by Balanced;

"**Business Day**" means any day other than a Saturday, Sunday or statutory holiday in the Province of Alberta;

"**Closing**" means the completion of the sale to and purchase by the Purchaser of the Purchased Assets under this Agreement;

"**Closing Date**" means that date that is five (5) Business Days after the grant of the Approval and Vesting Order, or such other date as the parties hereto may agree upon in writing;

"**Court**" has the meaning ascribed thereto in the recitals to this Agreement;

"**Deposit**" means a deposit in an amount equal to 10% of the Purchase Price provided to the Vendor;

"**Encumbrance**" means pledges, liens, charges, security interest, mortgages, or adverse claims or encumbrances of any kind or character except Permitted Encumbrances;

"**ETA**" means Part IX of the *Excise Tax Act* (Canada);

"**GST**" means all taxes payable under the ETA or under any provincial legislation similar to the ETA, and any reference to a specific provision of the ETA or any such provincial legislation shall refer to any successor provision thereto of like or similar effect;

"**ITA**" means the *Income Tax Act* (Canada), as amended;

"**Permitted Encumbrances**" means, with respect to the Purchased Assets, liens for taxes, assessments or governmental charges that are not due, or the validity of which is being contested in good faith by the Vendor;

"**Purchase Price**" has the meaning set out in Section 2.2;

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"**Purchased Assets**" means all of Balanced's right, title and interest in and to the assets listed on Schedule "A" attached hereto, together with all operating manuals, keys and codes in respect of the operation of the Purchased Assets;

"**Purchaser**" has the meaning ascribed thereto in the recitals to this Agreement;

"**Receivership Proceedings**" means the receivership proceedings commenced against Balanced pursuant to the order of the Court in Action No. 2201 - 02699;

"**Sales Tax**" means GST and all transfer, sales, excise, stamp, license, production, value-added and other like taxes (including any retail sales taxes and land transfer taxes), assessments, charges, duties, fees, levies or other governmental charges of any kind whatsoever, and includes additions by way of penalties, interest and other amounts with respect thereto;

"**Time of Closing**" has the meaning ascribed thereto in Section 3.1, or such other time as may be agreed to in writing between the Vendor and the Purchaser;

"**Transaction**" means the transaction of purchase and sale contemplated by this Agreement; and

"**Vendor**" has the meaning ascribed thereto in the recitals to this Agreement.

**1.2** **Headings, etc.** The division of this Agreement into articles, sections and paragraphs and the insertion of headings is for convenience of reference only and shall not affect the construction or interpretation hereof. Unless otherwise stated, all references herein to articles or sections are to those of this Agreement.

**1.3** **Including**. Where the word "including" or "includes" is used in this Agreement, it means "including (or includes) without limitation".

**1.4** **Plurality and Gender**. Words used herein importing the singular number only shall include the plural and vice versa and words importing gender shall include all genders and words importing individuals shall include corporations, partnerships, trusts, syndicates, joint ventures, governments and governmental agents and authorities and vice versa.

**1.5** **Governing Law**. This Agreement shall be construed and enforced in accordance with, and the rights of the parties shall be governed by, the laws of the Province of Alberta and the federal laws of Canada applicable therein, without regard to its conflict of law rules. Each of the parties hereto irrevocably submits to the exclusive jurisdiction of the courts of the Province of Alberta over any action or proceeding arising out of or relating to this Agreement or the Transaction and the parties hereto irrevocably agree that all claims in respect of such action or proceeding may be heard and determined in such courts of the Province of Alberta.

**1.6** **Currency**. Unless otherwise specified, all references to money amounts are to lawful currency of Canada.

**1.7** **Time**. Unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and, in the case of calculation

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of the Closing Date, by extending the period to the next Business Day following if the last day of the period is not a Business Day.

**1.8** **Schedules**. The following Schedules are incorporated herein and form part of this Agreement:

| | |
|---|---|
| Schedule "A" | Purchased Assets |
| Schedule "B" | General Conveyance |

## ARTICLE 2
## PURCHASE AND SALE

**2.1** **Sale of Purchased Assets**. Upon the terms and conditions stated herein (which conditions, for greater certainty, include the granting by the Court of the Approval and Vesting Order), effective as of the Closing Date, the Purchaser shall purchase from the Vendor, and the Vendor shall sell, assign, set over and deliver to the Purchaser, the Purchased Assets free and clear of all Encumbrances (other than Permitted Encumbrances) at and for the Purchase Price hereinafter described.

**2.2** **Purchase Price**. The aggregate purchase price payable by the Purchaser to the Vendor for the Purchased Assets shall be the amount of **CAD$_____** (the "**Purchase Price**").

**2.3** **Payment of Purchase Price**. Subject to this Agreement, on or prior to the Closing Date, the Purchaser shall pay the Purchase Price to the Vendor by paying the amount by which the Purchase Price exceeds the Deposit at the Time of Closing (the "**Balance**"). Unless otherwise agreed by the parties, all amounts payable to the Vendor in this Section 2.3 and Section 2.5 below shall be paid to the Vendor in Canadian funds and by wire transfer, or by cheque certified by, or draft of, a Canadian chartered bank.

**2.4** **Deposit.** The Deposit shall be released, and the Balance payable, at the Time of Closing.

**2.5** **Sales Taxes**. At Closing, the Purchaser shall be solely responsible for all Sales Taxes pertaining to their acquisition of the Purchased Assets including, but not limited to, GST. The Purchase Price does not include GST. The Vendor and the Purchaser shall, acting reasonably, mutually agree upon an allocation of the Purchase Price among the Purchased Assets in such a manner as will reduce transfer taxes payable by the Purchaser to the greatest extent possible. If GST is payable in respect of the purchase of the Purchased Assets pursuant hereto, the Purchaser shall be responsible for the payment of, and shall indemnify and save harmless the Indemnified Parties in respect of, the GST and all interest and penalties payable pursuant to the ETA in respect thereof.

**2.6** **Assumption of Obligations**.

(a) The Purchased Assets shall remain at the risk of the Vendor until the Closing Date and thereafter shall be at the sole risk of the Purchaser.

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(b) The Purchaser shall assume such liabilities and obligations arising on or after the Closing Date only to the extent that they relate to the Purchased Assets on or after the Closing Date not related to any default existing prior to or as a consequence of the closing of the Transaction contemplated by this Agreement or any breach or misrepresentation by the Vendor of a representation, warranty or covenant in this Agreement (the "**Assumed Obligations**"). For greater certainty, the Purchaser shall not assume and shall not be deemed to have assumed any liabilities, obligations, contracts (written or unwritten) or commitments of the Vendor or Balanced other than the Assumed Obligations and, except as expressly provided herein, shall have no obligation to discharge any liability or obligation of the Vendor or Balanced.

(c) The Purchaser shall indemnify and save harmless the Indemnified Parties in respect of any liabilities, debts and obligations of the Vendor forming part of the Assumed Obligations. The Purchaser, and its respective successors, assigns, and Affiliates, agree to and do hereby remise, release and forever discharge the Indemnified Parties from and against any and all actions, causes of actions, claims, damages, costs, expenses, interests and demands of every kind and nature whatsoever, whether at law or at equity, or under any statute, which either of them ever had, now have, or may in the future have against the Indemnified Parties, in connection with the Assumed Obligations. The covenants and agreements to indemnify made by the Purchaser in this Section 2.6 shall survive Closing.

## ARTICLE 3
## CLOSING

**3.1** **Time of Closing**. The closing of the Transaction shall occur at 9:00 a.m. (Calgary time) on the Closing Date (the "**Time of Closing**"), at the office of the Vendor's solicitor.

**3.2** **Mutual Condition to Closing.** The obligation of the Purchaser and the Vendor to proceed with the closing of the Transaction is subject to the Vendor obtaining the Approval and Vesting Order, which shall not have been stayed, varied, vacated or be subject to any pending appeal and no order shall have been issued which restrains or prohibits the completion of the Transaction.

**3.3** **Purchaser' Conditions**. The obligation of the Purchaser to complete the Transaction on the Closing Date is subject to the following conditions being fulfilled or performed at or prior to the time indicated:

(a) at or prior to the Time of Closing, all representations and warranties of the Vendor contained in this Agreement shall be true and correct in all material respects with the same effect as though made on and as of that date;

(b) prior to the Time of Closing, the Vendor shall have performed or complied with each of its agreements, covenants and obligations (including, without limitation, those set out in Section 8.1) under this Agreement to the extent required to be performed on or before the Closing Date; and

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(c) prior to the Time of Closing the Vendor shall have executed (as applicable) and delivered all deliverables required under Section 4.1.

The foregoing conditions are for the exclusive benefit of the Purchaser. Any condition may be waived by the Purchaser in whole or in part. Any such waiver shall be binding on the Purchaser only if made in writing. In the event that any of the foregoing conditions is not satisfied or waived by the Closing Date, the Purchaser shall be entitled to terminate this Agreement by notice in writing given to the Vendor on the Closing Date.

**3.4** **Vendor's Conditions**. The obligation of the Vendor to complete the Transaction on the Closing Date is subject to the following conditions being fulfilled or performed at or prior to the Time of Closing, as applicable:

(a) at or Prior to the Time of Closing, all representations and warranties of the Purchaser contained in this Agreement shall be true and correct in all material respects with the same effect as though made on and as of that date; and

(b) prior to the Time of Closing the Purchaser shall have performed or complied with, in all material respects, each of its agreements, covenants and obligations under this Agreement, to the extent required to be performed on or before the Closing Date; and

(c) prior to the Time of Closing the Purchaser shall have executed (as applicable) and delivered all deliverables required under Section 4.2.

The foregoing conditions are for the exclusive benefit of the Vendor. Any condition may be waived by the Vendor in whole or in part. Any such waiver shall be binding on the Vendor only if made in writing. In the event that any of the foregoing conditions is not satisfied or waived by the Closing Date, the Vendor shall be entitled to terminate this Agreement by notice in writing given to the Purchaser on the Closing Date.

## ARTICLE 4
## CLOSING DELIVERIES

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**4.1** **Deliveries by the Vendor at Closing**. At the Time of Closing the Vendor shall deliver, or cause to be delivered, the following to the Purchaser:

(a) a certified copy of the Approval and Vesting Order;

(b) such bills of sale, assignments, instruments of transfer, deeds, assurances, consents and other documents as shall be necessary or desirable to effectively transfer and assign to the Purchaser the Purchased Assets including the General Conveyance attached hereto as Schedule "B"; and

(c) such further and other documentation as is referred to in this Agreement or as the Purchaser may reasonably require to give effect to this Agreement.

**4.2** **Deliveries by the Purchaser at Closing**. At the Time of Closing the Purchaser shall deliver, or cause to be delivered, the following to the Vendor:

(a) an amount equal to the Purchase Price plus applicable GST;

(b) such bills of sale, assignments, instruments of transfer, deeds, assurances, consents and other documents as shall be necessary or desirable to effectively transfer and assign to the Purchaser the Purchased Assets including the General Conveyance attached hereto as Schedule "B"; and

(c) such further and other documentation as is referred to in this Agreement or as the Vendor may reasonably require to give effect to this Agreement.

## ARTICLE 5
## REPRESENTATIONS AND WARRANTIES OF THE VENDOR

**5.1** **Vendor's Representations and Warranties**. The Vendor represents and warrants, and acknowledges that the Purchaser is relying upon such representations and warranties in connection with the acquisition of the Purchased Assets, that, as at the Closing Date:

(a) the Vendor has been appointed by the Court as receiver of the assets, undertakings and properties of Balanced pursuant to the Appointment Order, a copy of which has been provided to the Purchaser;

(b) subject to the Appointment Order, the issuance of the Approval and Vesting Order and any further order made by the Court in the Receivership Proceedings, the Vendor has all necessary power and authority to enter into, execute and deliver this Agreement and all related documents and to carry out its obligations under this Agreement; and

(c) the Vendor is not a non-resident of Canada within the meaning of the ITA.

## ARTICLE 6
## REPRESENTATIONS AND WARRANTIES OF THE PURCHASER

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**6.1** **Purchaser' Representations and Warranties**.

(a) if the Purchaser is a corporation, partnership, unincorporated association or other entity, it has been duly incorporated, organized or formed, as the case may be, it is valid and subsisting under the laws of its jurisdiction of incorporation, organization or formation, as the case may be, and it has the legal capacity, power and authority to execute and deliver this Agreement and to perform its covenants and obligations hereunder and has obtained all necessary approvals in respect thereof, and upon acceptance by the Vendor, this Agreement will constitute a legal, valid and binding contract of the Purchaser in accordance with its terms;

(b) if the Purchaser is an individual, it is of the full age of majority in the jurisdiction in which this Agreement is executed and is legally competent to execute and deliver this Agreement and to perform its covenants and obligations hereunder, and upon

acceptance by the Vendor, this Agreement will constitute a legal, valid and binding contract of the Purchaser in accordance with its terms;

(c) the Purchaser is not a non-Canadian as defined in the *Investment Canada Act* (Canada) and that the completion of the within Transaction is not notifiable or reviewable under the said legislation; and

(d) the Purchaser is not a non-resident of Canada within the meaning of the ITA.

## ARTICLE 7
## LIMITATIONS ON REPRESENTATIONS AND WARRANTIES OF THE VENDOR

**7.1** **Limitations**. Except as set out herein, the Purchased Assets are being sold on an "as is, where is" basis as of the Closing and in their condition as of Closing with "all faults" and:

(a) neither the Vendor, its Affiliates, nor any of their respective officers, directors, employees or other representatives make, have made or shall be deemed to have made any other representation or warranty, express or implied, at law or in equity, in respect of the Purchased Assets, including but not limited to those with respect to title, encumbrances, description, fitness for purpose, merchantability, condition, assignability, collectability, quantity, outstanding amount, value or quality or in respect of any other matter or thing whatsoever concerning the Purchased Assets or the right of the Vendor to sell same and without limiting the generality of the foregoing, any and all conditions, warranties or representations expressed or implied pursuant to any sale of goods or similar legislation in any jurisdiction in Canada or the United States shall not apply hereto and shall be deemed to have been waived by the Purchaser to the maximum extent permitted by law; and

(b) neither the Vendor, its Affiliates, nor any of their respective officers, directors, employees or representatives will have or be subject to any liability or indemnification obligation to the Purchaser or to any other person resulting from the distribution to the Purchaser, its Affiliates or representatives of, or the Purchaser's use of, any information relating to the Purchased Assets, and any information, documents or material made available to the Purchaser, whether orally or in writing, in certain data rooms, management presentations, functional break-out discussions, responses to questions submitted on behalf of the Purchaser or in any other form in expectation of the Transaction. Any such other representation or warranty is hereby expressly disclaimed. The Purchaser warrants, covenants and expressly acknowledges that it has conducted its own independent inspection and investigation of the Purchased Assets and is satisfied with the Purchased Assets in all respects.

**7.2** **Indemnification Procedures for Third Party Claims.**

(a) In the case of claims made by a third party with respect to which indemnification is sought, the Vendor, its Affiliates, or any of their respective officers, directors, employees or representatives (each an "**Indemnified Party**") shall give prompt notice, and in any event within 10 days, to the other Party (the "**Indemnifying Party**") of any such claims made upon it including a description of such third party

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claim in reasonable detail including the sections of this Agreement which form the basis for such claim, copies of all material written evidence of such claim in the possession of the Indemnified Party and the actual or estimated amount of the damages that have been or will be sustained by an Indemnified Party, including reasonable supporting documentation therefor.

(b) The Indemnifying Party shall have the right, by notice to the Indemnified Party given not later than 30 days after receipt of notice described in Section 7.2(a) to assume the control of the defence, compromise or settlement of the claim, provided that such assumption shall, by its terms, be without cost to the Indemnified Party.

(c) Upon the assumption of control of any claim by the Indemnifying Party as set out in Section 7.2(b), the Indemnifying Party shall diligently proceed with the defence, compromise or settlement of the claim at its sole expense, including, if necessary, employment of counsel reasonably satisfactory to the Indemnified Party and, in connection therewith, the Indemnified Party shall co-operate fully, but at the expense of the Indemnifying Party with respect to any out-of-pocket expenses incurred, to make available to the Indemnifying Party all pertinent information and witnesses under the Indemnified Party's control, make such assignments and take such other steps as in the opinion of counsel for the Indemnifying Party are reasonably necessary to enable the Indemnifying Party to conduct such defence. The Indemnified Party shall also have the right to participate in the negotiation, settlement or defence of any claim at its own expense. The Indemnifying Party shall not, without the prior written consent of the Indemnified Party, settle, compromise or offer to settle or compromise any third-party claim if such settlement (i) does not include an unconditional written release by the claimant or plaintiff of the Indemnified Party from all liability in respect of such third-party claim or (ii) would result in (A) the imposition of a consent order, injunction or decree that would restrict the future activity or conduct of the Indemnified Party or any of its Affiliates or (B) a finding or admission of a violation of applicable laws, wrongdoing or violation of the rights of any Person by the Indemnified Party or any of its Affiliates.

(d) The final determination of any claim pursuant to this Section 7.2(b), including all related costs and expenses, shall be binding and conclusive upon the Parties as to the validity or invalidity, as the case may be of such claim against the Indemnifying Party.

(e) If the Indemnifying Party does not assume control of a claim as permitted in Section 7.2(b), the obligation of the Indemnifying Party to indemnify the Indemnified Party in respect of such claim shall terminate if the Indemnified Party settles such claim without the consent of the Indemnifying Party.

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**7.3** **General Indemnity**. The Purchaser shall be liable to the Indemnified Parties for and shall, in addition, indemnify the Indemnified Parties from and against, all losses, costs, claims, damages, expenses and liabilities suffered, sustained, paid or incurred by the Indemnified Parties which arise out of any matter or thing related to the Purchased Assets after the

Closing Date. The covenants and agreements to indemnify made by the Purchaser in this Section 7.2 shall survive Closing.

## ARTICLE 8
## COVENANTS

**8.1** **Vendor's Covenants**. Prior to the Time of Closing, the Vendor shall refrain from transferring, leasing, selling or otherwise disposing of any of the Purchased Assets.

## ARTICLE 9
## NOTICES

**9.1** **Notices**. Any notices or other communications required or given under this Agreement shall be in writing, shall be delivered in person or by facsimile and shall be deemed to have been given and received when delivered in person or when communicated by facsimile during normal business hours on a Business Day (and otherwise on the next Business Day):

if to the Vendor, addressed to:

**FTI CONSULTING CANADA INC.** in its capacity as receiver and manager of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc. and Balanced Energy Holdings Inc.
520 Fifth Avenue S.W.
Suite 1610
Calgary, AB T2P 3R7

Attn: Brett Wilson / Dustin Olver
Facsimile: 403-232-6116
Email: Brett.wilson@fticonsulting.com / dustin.olver@fticonsulting.com

with a copy to:

Osler, Hoskin & Harcourt LLP
Brookfield Place, Suite 2700
225 6 Ave SW, Calgary, AB T2P 1N2

Attention: Randal Van de Mosselaer
Facsimile: (403) 260-7024

if to the Purchaser, addressed to:

_____
_____
_____

Attention: _____
Facsimile: _____

with a copy to:

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_____
_____
_____

Attention: _____
Facsimile: _____

or at such other place or places or to such other person or persons as shall be designated in writing by a party to this Agreement in the manner herein provided.

## ARTICLE 10
## MISCELLANEOUS

**10.1** **Enurement**. This Agreement shall be binding upon and enure to the benefit of the parties hereto and their legal representatives, successors and permitted assigns.

**10.2** **Assignment**. The Purchaser shall not assign any right or interest in this Agreement without the Vendor's prior written consent, which consent may be withheld in the Vendor's sole and absolute discretion, provided that the Purchaser shall be entitled, upon giving notice to the Vendor at any time not less than two Business Days prior to the Closing Date, to assign all of their rights and obligations under this Agreement to any Affiliate of the Purchaser. Any such assignment will not release the Purchaser from any of their obligations or liabilities hereunder.

**10.3** **Severability**. In case any provision in this Agreement shall be prohibited, invalid, illegal or unenforceable in any jurisdiction, such provision shall be ineffective only to the extent of such prohibition, invalidity, illegality or unenforceability in such jurisdiction without affecting or impairing the validity, legality or enforceability of the remaining provisions hereof, and any such prohibition, invalidity, illegality or unenforceability shall not affect or impair such provision in any other jurisdiction.

**10.4** **Further Assurances**. Each of the parties hereto shall at the request and expense of the other party hereto so requesting execute and deliver such further or additional documents and instruments as may reasonably be considered necessary or desirable to properly reflect and carry out the true intent and meaning of this Agreement.

**10.5** **Survival**. In addition to the circumstances above where the survival of certain representations, warranties, covenants and agreements is expressly provided for, the representations, warranties, covenants and agreements made by the parties each to the other in or pursuant to this Agreement shall survive the Closing of the Transaction provided for herein.

**10.6** **Time of Essence**. Time shall be of the essence of this Agreement.

**10.7** **Waiver**. Failure by either party hereto to insist in any one or more instances upon the strict performance of any one of the covenants contained herein shall not be construed as a waiver or relinquishment of such covenant. No waiver by any party hereto of any such

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covenant shall be deemed to have been made unless expressed in writing and signed by the waiving party.

**10.8** **Amendment**. This Agreement may not be amended, modified or terminated except by an instrument in writing signed by the parties hereto.

**10.9** **Entire Agreement**. This Agreement and the agreements and other documents required to be delivered pursuant to this Agreement, constitute the entire agreement between the parties and set out all of the covenants, promises, warranties, representations, conditions and agreements between the parties in connection with the subject matter of this Agreement and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, pre-contractual or otherwise. There are no covenants, promises, warranties, representations, conditions, understandings or other agreements, whether oral or written, pre-contractual or otherwise, express, implied or collateral between the parties in connection with the subject matter of this Agreement except as specifically set forth in this Agreement and any document required to be delivered hereunder or thereunder.

***[Remainder of Page Intentionally Left Blank]***

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**10.10** **Counterparts and Facsimile**. This Agreement may be executed in counterparts, each of which when so executed shall be deemed to be an original and all counterparts together shall constitute one and the same instrument. A signed counterpart provided by way of facsimile transmission or by e-mail in PDF shall be as binding upon the parties as an originally signed counterpart.

**IN WITNESS WHEREOF** the parties hereto have caused this Asset Purchase Agreement to be executed and delivered by its duly authorized officer, to be effective as of the date first written above.

**FTI CONSULTING CANADA INC.**, in its capacity as receiver and manager of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc. and Balanced Energy Holdings Inc., and not in its personal or corporate capacity

Per: _____
Name:
Title:

_____
(***Insert name of Purchaser***)

Per: _____
Name:
Title:

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**SCHEDULE "A"**

**Purchased Assets**

(***To be inserted by Purchaser***.)

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**SCHEDULE "B"**

**General Conveyance**

**(see attached)**

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# GENERAL CONVEYANCE

**THIS AGREEMENT** made the ___ day of _____, 2022.

BETWEEN:

**FTI CONSULTING CANADA INC.**, in its capacity as receiver and manager of Balanced Energy Oilfield Services Inc. ("**BCAN**"), Balanced Energy Oilfield Services (USA) Inc. ("**BUSA**") and Balanced Energy Holdings Inc. ("**BEH**", and collectively with BCAN and BUSA, "**Balanced**"), and not in its personal or corporate capacity (the "**Vendor**")

- and -

_____

_____

("**Purchaser**")

**WHEREAS** the Vendor and the Purchaser entered into an Asset Purchase Agreement made as of _____, 2022 providing, among other things, for the acquisition of the Purchased Assets by the Purchaser from the Vendor.

**NOW THEREFORE THIS AGREEMENT WITNESSES** that Vendor and Purchaser agree as follows:

**Definitions**

Unless otherwise defined in this General Conveyance, capitalized words when used in this General Conveyance have the meaning ascribed to them in the Asset Purchase Agreement.

**Conveyance**

Pursuant to and for the consideration provided for in the Asset Purchase Agreement, Vendor hereby sells, assigns, transfers, conveys and sets over to Purchaser the Purchased Assets (all of which are listed in Exhibit "A" hereto), and Purchaser hereby purchases and accepts the Purchased Assets, to have and to hold the same absolutely, together with all benefits and advantages to be derived therefrom, subject to the terms and conditions of the Asset Purchase Agreement.

**Effective Date**

The Vendor and the Purchaser agree that the effective date of this transaction shall be effective as the date first written above.

Draft

**Subordinate Documents**

This General Conveyance is executed and delivered by the parties hereto pursuant to and for the purposes of the provisions of the Asset Purchase Agreement and the provisions of the Asset Purchase Agreement shall prevail and govern in the event of a conflict between the provisions of the Asset Purchase Agreement and this General Conveyance.

**Enurement**

This General Conveyance shall be binding upon and enure to the benefit of each of the parties hereto and their respective successors and permitted assigns.

**Further Assurances**

The Vendor and the Purchaser will each, from time to time and at all times hereafter, without further consideration, do such further acts and deliver all such further assurances, deeds and documents as shall be reasonably required in order to fully perform and carry out the terms of this General Conveyance.

**Merger**

Nothing contained in this General Conveyance shall in any way result in a merger of the terms and conditions of the Asset Purchase Agreement with the terms and conditions of this General Conveyance and the parties hereto specifically agree that all such terms and conditions of the Asset Purchase Agreement shall continue to apply to the within conveyance.

**Governing Law**

This General Conveyance shall, in all respects, be subject to, interpreted, construed and enforced in accordance with and under the laws of the Province of Alberta and the federal laws of Canada applicable therein and shall, in every regard, be treated as a contract made in the Province of Alberta.

**Counterpart Execution**

This General Conveyance may be executed in counterparts and delivered by one party hereto to the other by facsimile or other electronic means (including by portable document format "pdf"), each of which shall constitute an original and all of which taken together shall constitute one and the same instrument. If this is delivered by facsimile or other electronic means, the party thereto so delivering this General Conveyance shall within a reasonable time after such delivery, deliver an original executed copy to the other.

***[Remainder of Page Intentionally Left Blank]***

Draft

**IN WITNESS WHEREOF** the parties have executed this General Conveyance as of the date first written above.

**FTI CONSULTING CANADA INC.**, in its capacity as receiver and manager of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc. and Balanced Energy Holdings Inc., and not in its personal or corporate capacity

Per: _____
Name:
Title:

_____
**(*Insert name of Purchaser*)**

Per: _____
Name:
Title:

Draft

**EXHIBIT "A"**

**LIST OF PURCHASED ASSETS**

(***To be inserted by Purchaser***.)

Draft

**SCHEDULE "B"**

**Receiver's SSP Certificate**

| | |
|---|---|
| COURT FILE NUMBER | 2201-02699 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | NATIONAL BANK OF CANADA |
| DEFENDANTS | BALANCED ENERGY OILFIELD SERVICES INC., BALANCED ENERGY OILFIELD SERVICES (USA) INC., BALANCED ENERGY HOLDINGS INC., MICHELLE THOMAS, NEIL SCHMEICHEL, DARREN MILLER, and CODY BELLAMY |
| DOCUMENT | **RECEIVER'S CERTIFICATE** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **OSLER, HOSKIN & HARCOURT LLP**<br>Barristers & Solicitors<br>Brookfield Place, Suite 2700<br>225 6 Ave SW<br>Calgary, AB T2P 1N2<br><br>Solicitors: Randal Van de Mosselaer / Emily Paplawski<br>Telephone: (403) 260-7060 / (403) 260-7071<br>Facsimile: (403) 260-7024<br>Email: RVandemosselaer@osler.com / EPaplawski@osler.com<br>File Number: 1230496 |

**RECITALS**

A. Pursuant to an Order of the Honourable Madam Justice A.D. Grosse of the Court of Queen's Bench of Alberta (the "**Court**"), dated March 7, 2022, FTI Consulting Canada Inc. was appointed receiver and manager (the "**Receiver**") of the undertaking, property and assets of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc. ("**BUSA**"), and Balanced Energy Holdings Inc. (the "**Debtors**").

B. Pursuant to an Order (Approval of Sales Solicitation Process, Stalking Horse Term Sheet and Receiver's Conduct and Activities) granted by the Honourable Mr. J.T. Neilson on March 30, 2022 (the "**Order**") the Court approved a binding term sheet between XDI Energy Solutions Inc. and the Receiver, dated March 21, 2022 (as amended, the "**Stalking**

**Horse Term Sheet**"), and a sales solicitation process. This Receiver's Certificate is the certificate referred to in paragraph 6 of the Order.

C. Capitalized terms not otherwise defined herein have the meanings given to those terms in the Order.

**THE RECEIVER CERTIFIES THE FOLLOWING:**

1. No Superior Offers were received by the Receiver in the SSP or, in the alternative, the Stalking Horse Bidder is the Successful Bidder in the SSP and, as a result, the Receiver is proceedings to close the transactions detailed in the Stalking Horse Term Sheet.

2. This Certificate was delivered by the Receiver at _____ on _____, 2022.

FTI Consulting Canada Inc., in its capacity as Receiver of the undertakings, property and assets of Balanced Energy Oilfield Services Inc., Balanced Energy Oilfield Services (USA) Inc., and Balanced Energy Holdings Inc., and not in its personal or corporate capacity.

_____

Name:

Title:

# TAB 2

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
JAN 25 2024
ENTERED

**No. S-240259**
**Vancouver Registry**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF BLACK PRESS LTD., 311773 B.C. LTD., AND THOSE ENTITIES LISTED IN SCHEDULE "A"

PETITIONERS

**O R D E R MADE AFTER APPLICATION**

**(SISP APPROVAL ORDER)**

| | | |
|---|---|---|
| BEFORE THE HONOURABLE JUSTICE | ) ) ) | January 25, 2024 |

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 25th day of January, 2024 (the "**Order Date**"); AND ON HEARING Vicki Tickle and Stephanie Fernandes, counsel for the Petitioners and the non-petitioner affiliates of the Petitioners listed in Schedule "B" hereto (the "**Non-Petitioner Stay Parties**" and collectively with the Petitioners, the "**Black Press Entities**"), and those other counsel listed on Schedule "C" hereto; AND UPON READING the material filed, including the First Affidavit of Christopher Hargreaves made January 12, 2024 (the "**First Hargreaves Affidavit**"), the First Report of KSV Restructuring Inc. in its capacity as monitor of the Petitioners (the "**Monitor**") dated January 23, 2024 (the "**First Report**"); AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended (the "**CCAA**"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

**THIS COURT ORDERS AND DECLARES THAT:**

**SERVICE AND DEFINITIONS**

1. The time for service of this Notice of Application and supporting materials is hereby abridged such that the Notice of Application is properly returnable today.

2. Capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the Sale and Investment Solicitation Process in respect of the business and assets of the Black Press Entities, in the form attached hereto as Schedule "D" (the "**SISP**"), the Amended and Restated Initial Order of this Court dated January 25, 2024 (the "**ARIO**"), or the First Hargreaves Affidavit, as applicable.

**SALE AND INVESTMENT SOLICITATION PROCESS**

3. The SISP is hereby approved and the Petitioners and the Monitor are hereby authorized and directed to implement the SISP pursuant to the terms thereof. The Petitioners and the Monitor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder, subject to prior approval of the Court being obtained before completion of any transaction(s) under the SISP.

4. The Petitioners and the Monitor and their respective affiliates, partners, directors, officers, employees, legal advisors, representatives, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of the Petitioners or the Monitor, as applicable, in performing their obligations under the SISP, as determined by this Court in a final order that is not subject to appeal or other review.

5. In conducting the SISP, the Monitor shall have all of the benefits and protections granted to it under the CCAA, the ARIO and any other Order of this Court in the within proceeding.

**STALKING HORSE PURCHASE AGREEMENT**

6. The Petitioners are hereby authorized and empowered to enter into a definitive share purchase and subscription agreement with the Noteholders and CNL or one or more entities to be formed by the Noteholders and CNL (as applicable, the "**Stalking Horse Purchaser**"), which shall be substantially on the terms set out in the Stalking Horse Term Sheet attached as Appendix "A" to the Amended and Restated Transaction Support Agreement attached as Appendix "B" to the First Report and satisfactory to the Monitor (the "**Stalking Horse Transaction Agreement**"), such minor amendments as may be acceptable to each of the parties thereto, with the approval of the Monitor; provided that, nothing herein approves the sale and the vesting of any Property to the Stalking Horse Purchaser (or any of its designees) pursuant to the Stalking Horse Transaction Agreement and that the approval of any sale and vesting of any such Property shall be considered by this Court on a subsequent application made to this Court if the transaction set out in the Stalking Horse Transaction Agreement is the Successful Bid pursuant to the SISP.

7. As soon as reasonably practicable following the Petitioners and the Stalking Horse Purchaser executing the Stalking Horse Transaction Agreement, and in any event by no later than seven (7) Business Days prior to the Qualified Bid Deadline under the SISP, the Monitor shall post a copy thereof on its website, and the Petitioners shall: (a) serve a copy thereof on the Service List; and (b) provide a copy thereof to each SISP Participant (as hereinafter defined), excluding from the public record any confidential information that the Petitioners and the Stalking Horse Purchaser, with the consent of the Monitor, agree should be redacted.

**BID PROTECTIONS**

8. The Bid Protections are hereby approved and, subject to the entry of the Stalking Horse Transaction Agreement, the Petitioners are hereby authorized and directed to pay the Bid Protections to the Stalking Horse Purchaser (or to such other person as it may direct) in the manner and circumstances described in the Stalking Horse Transaction Agreement.

9. The Stalking Horse Purchaser shall be entitled to the benefit of and is hereby granted a charge (the "**Bid Protections Charge**") on the Property, which charge shall not exceed $1,750,000, as security for payment of the Bid Protections in the manner and circumstances described in the Stalking Horse Transaction Agreement.

10. The filing, registration or perfection of the Bid Protections Charge shall not be required, and that the Bid Protections Charge shall be valid and enforceable for all purposes, including against any right, title or interest filed, registered, recorded or perfected subsequent to the Bid Protections Charge, notwithstanding any such failure to file, register, record or perfect.

11. The Bid Protections Charge shall constitute a charge on the Property and the Bid Protections Charge shall rank in priority to all other Encumbrances in favour of any Person notwithstanding the order of perfection or attachment, other than the Charges.

12. Except for the Charges or as may be approved by this Court on notice to parties in interest, the Petitioners shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Bid Protections Charge, unless the Petitioners also obtain the prior written consent of the Monitor and the Stalking Horse Purchaser.

13. The Bid Protections Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Stalking Horse Purchaser in respect of the Bid Protections Charge shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings and the

declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Petitioners, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Bid Protections Charge nor the execution, delivery, perfection, registration or performance of the Stalking Horse Transaction Agreement shall create or be deemed to constitute a breach by any of the Petitioners of any Agreement to which any of the Petitioners is a party; and

(b) the payments made by the Petitioners pursuant to this Order, the Stalking Horse Transaction Agreement and the granting of the Bid Protections Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

14. The Bid Protections Charge created by this Order over leases of real property shall only be a charge in the applicable Petitioner's interest in such real property lease.

15. The Stalking Horse Purchaser, with respect to the Bid Protections Charge only, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the CCAA, or any proposal filed by the Petitioners under the BIA.

**PIPEDA**

16. Pursuant to section 18(10)(o) of the *Personal Information Protection Act* (British Columbia), and any similar legislation in any other applicable jurisdictions, the Petitioners or the Monitor and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants that are party to a non-disclosure agreement with the Petitioners (each, a "**SISP Participant**") and their respective advisors personal information of identifiable individuals, but only to the extent required to negotiate or attempt to complete a transaction pursuant to the SISP (a "**Transaction**"). Each SISP Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to the SISP Participant's evaluation for the purpose of effecting a Transaction, and, if a SISP Participant does not complete a Transaction, shall return all such information to the Petitioners or the Monitor, or, in the alternative, destroy all such information and provide confirmation of its destruction if requested by the Petitioners or the Monitor.

**GENERAL**

17. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body, wherever located, to give effect to this Order and to assist the Petitioners, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners, the Foreign Representative and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.

18. This Order and all of its provisions are effective as of 12:01 a.m. local Vancouver time on the Order Date.

19. Endorsement of this Order by counsel appearing on this application is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Vicki Tickle
Lawyer for the Petitioners

BY THE COURT

REGISTRAR

**SCHEDULE "A"**

**Petitioners**

**A. Canadian Petitioners**

Black Press Ltd.

311773 B.C. Ltd.

Black Press Group Ltd.

0922015 B.C. Ltd.

Central Web Offset Ltd.

**B. US Petitioners**

Sound Publishing Holding, Inc.

Sound Publishing Properties, Inc.

Sound Publishing, Inc.

Oahu Publications, Inc.

The Beacon Journal Publishing Company

WWA (BPH) Publications, Inc.

San Francisco Print Media Co.

## SCHEDULE "B"

## Non-Petitioner Stay Parties

Black Press (Barbados) Ltd.

Whidbey Press (Barbados) Inc.

Black Press Delaware LLC

Black Press Group Oregon LLC

## SCHEDULE "C"

## LIST OF COUNSEL

| Name of Counsel | Party Represented |
|---|---|
| Mary Buttery, KC | KSV RESTRUCTURING INC., the COURT-APPOINTED MONITOR |
| DAVID GRUBER + MICHAEL SHAKRA | CANSO INVESTMENT COUNSEL LTD. |
| SCOTT STEPHENS + HEATHER FRYDENLUND | VANCOUVER CITY SAVINGS CREDIT UNION + COAST CAPITAL SAVINGS FEDERAL CREDIT UNION |
| EAMONN WATSON | SERVUS CREDIT UNION LTD. |
| RYAN ~~LAIMY~~ LAITY | THE UNITED STATES OF AMERICA |

## SCHEDULE "D"
## SISP

See attached.

# Sale and Investment Solicitation Process

1. On January 15, 2024, the Supreme Court of British Columbia, Vancouver Registry (the "**CCAA Court**") issued an Order (the "**Initial Order**") granting certain relief to Black Press Ltd., 311773 B.C. Ltd., Black Press Group Ltd., 0922015 B.C. Ltd., Central Web Offset Ltd., Sound Publishing Holding, Inc., Sound Publishing Properties, Inc., Sound Publishing, Inc., Oahu Publications, Inc., The Beacon Journal Publishing Company, WWA (BPH) Publications, Inc., San Francisco Print Media Co. (collectively, the "**Petitioners**" and together with the Non-Petitioner Stay Parties (the "**Black Press Entities**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**" and the Petitioners proceedings thereunder, the "**CCAA Proceedings**").

2. Pursuant to the Initial Order, KSV Restructuring Inc. was appointed as monitor (in such capacity, the "**Monitor**") of the Petitioners in the CCAA Proceedings.

3. Pursuant to proceedings commenced in the United States Bankruptcy Court for the District of Delaware (the "**US Bankruptcy Court**") under Chapter 15, Title 11, of the United States Code, the Petitioners obtained, among other things, recognition of the CCAA Proceedings.

4. On January 25, 2024, the CCAA Court granted:

   (i) an Order amending and restating the Initial Order (the "**ARIO**"), and

   (ii) an Order (the "**SISP Approval Order**") that, among other things, authorized: (a) the Petitioners to implement a sale and investment solicitation process in respect of the Black Press Entities (the "**SISP**") in accordance with the terms hereof; (b) the Black Press Entities to negotiate and finalize a definitive Stalking Horse Transaction Agreement (the "**Stalking Horse Bid**") with the Stalking Horse Purchaser; (c) approved the Bid Protections subject to entry of the Stalking Horse Transaction Agreement; and (d) granted the Bid Protections Charge.

5. Capitalized terms that are not otherwise defined herein have the meanings ascribed to them in the ARIO or the SISP Approval Order, as applicable. Copies of the ARIO and the SISP Approval Order can be found at www.ksvadvisory.com/experience/case/black-press (the "**Monitor's Website**").

6. This SISP sets out the manner in which: (a) binding bids for executable transactions involving the business and/or assets of, or the equity interests in, the Black Press Entities will be solicited from interested parties; (b) any such bids received will be addressed; (c) any Successful Bid (as defined below) will be selected; and (d) CCAA Court approval of any Successful Bid will be sought.

7. The SISP shall be conducted by the Petitioners with the assistance and under the oversight of the Monitor and the Monitor shall be entitled to receive all information in relation to the SISP.

8. Parties who wish to have their bids considered must participate in the SISP.

9. The Black Press Entities and the Monitor, in accordance with section 10 below, shall:

a) disseminate marketing materials and a process letter to potentially interested parties identified by the Black Press Entities and the Monitor;

b) solicit interest from parties with a view to such interested parties entering into non-disclosure agreements (each an "**NDA**") (parties shall only obtain access to the virtual data room and be permitted to participate in the SISP if they execute an NDA, in form and substance satisfactory to the Black Press Entities; provided that those parties that have already executed a NDA with the Black Press Entities shall not be required to execute a further agreement unless such agreement has expired or will expire during the SISP);

c) provide applicable parties who have entered into an NDA with the Black Press Entities access to a virtual data room containing, among other things, diligence information; and

d) request that such parties submit a binding offer meeting at least the requirements set forth in Section 11 below, as determined by the Black Press Entities and the Monitor (each a "**Qualified Bid**"), by the Qualified Bid Deadline (as defined below).

10. The SISP shall be conducted subject to the terms hereof and the following key milestones, which milestones may be extended by the Black Press Entities, with the consent of the Monitor and the Stalking Horse Purchaser:[1]

a) the CCAA Court issues the SISP Approval Order by no later than January 25, 2024;

b) the Black Press Entities and the Monitor commence the solicitation process by no later than January 25, 2024, it being understood that the Black Press Entities and/or the Monitor shall be at liberty to contact, provide marketing materials and commence discussions with interested parties prior to such date as they consider appropriate;

c) deadline to submit a Qualified Bid – 5:00 p.m. Pacific Time on February 16, 2024 (the "**Qualified Bid Deadline**");

[1] To the extent any dates fall on a non-business day in British Columbia, they shall be deemed to be the first business day thereafter.

d) deadline to determine whether a bid is a Qualified Bid and, if applicable, to notify those parties who submitted a Qualified Bid of the Auction (as defined below) – by no later than 5:00 p.m. Pacific Time on February 21, 2024;

e) the Black Press Entities and the Monitor to hold an Auction (if applicable) and select the successful bid(s) (the "**Successful Bid**") – by no later than 10:00 a.m. Pacific Time on February 26, 2024 (the "**Definitive Agreement Deadline**");

f) Transaction Order (as defined below) hearing:

- (if there is no Auction) – by no later than March 1, 2024 subject to CCAA Court availability; or

- (if there is an Auction) – by no later than March 6, 2024, subject to CCAA Court availability; and

g) closing of the Successful Bid as soon thereafter as possible and, in any event, by no later than 5:00 p.m. Pacific Time on March 15, 2024 (the "**Outside Date**").

11. In order to constitute a Qualified Bid, a bid must comply with the following:

a) it provides for aggregate consideration, payable in cash in full on closing in an amount equal to or greater than (i) all outstanding obligations under the Senior Secured Notes (as defined in the First Hargreaves Affidavit), (ii) all outstanding obligations under the DIP Term Sheet, (iii) any obligations in priority to amounts owing under the DIP Term Sheet, including any Charges, (iv) the amount of $500,000 to fund any professional fees incurred in connection with the wind-up of the Petitioners' CCAA proceedings and any further proceedings or wind-up costs; and (v) the amount of $1,750,000 to satisfy the Bid Protections (the "**Consideration Value**"), and provides a detailed sources schedule that identifies, with specificity, the composition of the Consideration Value and any assumptions that could reduce the net consideration payable including details of any material liabilities that are being assumed or being excluded;

b) it contemplates closing of the proposed transaction by not later than the Outside Date;

c) it contains:

i. duly executed binding definitive transaction document(s);

ii. the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, and the name(s) of each of its equityholder(s);

iii. a redline to the Stalking Horse Transaction Agreement posted in the virtual data room;

iv. evidence of authorization and approval from the bidder's board of directors (or equivalent governing body) and, if necessary to complete the transaction, the bidder's equityholder(s);

v. disclosure of any past or current connections or agreements with the Black Press Entities or any of their affiliates, any known, potential, prospective bidder, or any current or former officer, manager, director, member or known current or former equity security holder of any of the Black Press Entities or any of their affiliates;

vi. such other information reasonably requested by the Black Press Entities or the Monitor;

vii. indicates whether any Transaction Order (as defined below) approving the bid will require recognition from the US Bankruptcy Court;

d) it includes a letter stating that the bid is submitted in good faith, is binding and is irrevocable until closing of the Successful Bid; provided, that if such bid is not selected as the Successful Bid or as the next-highest or otherwise best Qualified Bid as compared to the Successful Bid (such bid, the "**Back-Up Bid**") it shall only remain irrevocable until selection of the Successful Bid;

e) it provides that the bid will serve as a Back-Up Bid if it is not selected as the Successful Bid and if selected as the Back-Up Bid it will remain irrevocable until the earlier of: (i) closing of the Successful Bid; or (ii) closing of the Back-Up Bid;

f) it provides written evidence of a bidder's ability to fully fund and consummate the transaction (and satisfy its obligations under the transaction documents, including binding equity/debt commitment letters and/or guarantees covering the full value of all cash consideration and the additional items (in scope and amount) covered by the guarantees provided by affiliates of the bidder in connection with the Successful Bid;

g) it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;

h) it is not conditional upon:

i. approval from the bidder's board of directors (or equivalent governing body) or equityholder(s);

ii. the outcome of any unperformed due diligence by the bidder; or

iii. the bidder obtaining financing;

i) it includes acknowledgments and representations that the bidder: (i) has had an opportunity to conduct any and all required due diligence prior to making its bid, and has relied solely upon its own independent review, investigation and inspection in making its bid; (ii) is not relying upon any written or oral statements, representations, promises, warranties, conditions, or guaranties whatsoever, whether express or implied (by operation of law or otherwise), made by any person or party, including the Black Press Entities, the Monitor and their respective employees, officers, directors, agents, advisors and other representatives, regarding the proposed transactions, this SISP, or any information (or the

completeness of any information) provided in connection therewith, except as expressly stated in the proposed transaction documents; (iii) is making its bid on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Black Press Entities, the Monitor or any of their respective employees, officers, directors, agents, advisors and other representatives, except to the extent set forth in the proposed transactions documents; (iv) is bound by this SISP and the SISP Approval Order; and (v) is subject to the exclusive jurisdiction of the CCAA Court with respect to any disputes or other controversies arising under or in connection with the SISP or its bid;

j) it specifies any regulatory or other third-party approvals the party anticipates would be required to complete the transaction (including the anticipated timing necessary to obtain such approvals);

k) it includes full details of the bidder's intended treatment of the Petitioners' employees, customers, contracts, collective bargaining agreements, pension and benefit obligations and vendors under the proposed bid;

l) it is accompanied by a cash deposit (the "**Deposit**") paid by wire transfer of immediately available funds in an amount equal to at least 10% of the Consideration Value, which Deposit shall be retained by the Monitor in an interest-bearing trust account in accordance with the terms hereof;

m) it includes a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and

n) it is received by the Black Press Entities, with a copy the Monitor, by the Qualified Bid Deadline at the email addresses specified on Schedule "A" hereto.

12. The Black Press Entities, with the consent of the Monitor, may in their sole discretion waive compliance with any one or more of the requirements specified in Section 11 above and deem a non-compliant bid to be a Qualified Bid, provided that requirements 11(a), 11(b) and 11(l) may not be waived without the consent of the Stalking Horse Bidder.

13. Notwithstanding the requirements specified in Section 11 above, the transaction contemplated by the Stalking Horse Transaction Agreement (the "**Stalking Horse Bid**"), is deemed to be a Qualified Bid, provided that, for greater certainty, no Deposit shall be required to be submitted in connection with the Stalking Horse Bid.

14. If one or more Qualified Bids (other than the Stalking Horse Bid) has been received by the Black Press Entities on or before the Qualified Bid Deadline, the Black Press Entities shall proceed with an auction process to determine the successful bid(s) (the "**Auction**"), which Auction shall be administered in accordance with **Schedule "B"** hereto. The successful bid(s) selected pursuant to the Auction shall constitute the "**Successful Bid(s)**". Forthwith upon determining to proceed with an Auction, the Black Press Entities shall provide written notice to each party that submitted a Qualified Bid (including the Stalking Horse Bid) of which Qualified Bid is the highest or otherwise best bid (as determined by the Black Press Entities, in consultation with the Monitor) along with a copy of such bid.

15. If by the Qualified Bid Deadline, no Qualified Bid (other than the Stalking Horse Bid) has been received by the Black Press Entities, then the Stalking Horse Bid shall be deemed the Successful Bid and shall be consummated in accordance with and subject to the terms of the Stalking Horse Transaction Agreement.

16. Following selection of a Successful Bid, if any, the Black Press Entities, with the assistance of its advisors, and in consultation with the Monitor, shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bid in accordance with the milestones set out in Section 10. Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by the Black Press Entities in consultation with the Monitor, the Petitioners shall apply to the CCAA Court for an order or orders approving such Successful Bid and/or the mechanics to authorize the Petitioners to complete the transactions contemplated thereby, as applicable, and authorizing the Petitioners to: (a) enter into any and all necessary agreements and related documentation with respect to the Successful Bid; (b) undertake such other actions as may be necessary to give effect to such Successful Bid; and (c) implement the transaction(s) contemplated in such Successful Bid (each, a "**Transaction Order**"). If the Successful Bid is not consummated in accordance with its terms, the Black Press Entities shall be authorized, but not required, to elect that the Back-Up Bid (if any) is the Successful Bid.

17. The highest Qualified Bid may not necessarily be accepted by the Black Press Entities. The Black Press Entities, with the written consent of the Monitor, reserve the right not to accept any Qualified Bid or to otherwise terminate the SISP. The Black Press Entities, with the written consent of the Monitor, reserve the right to deal with one or more Qualified Bidders to the exclusion of others, to accept a Qualified Bid for different parts of the Black Press Entities business and assets or to accept multiple Qualified Bids and enter into definitive agreements in respect of all such bids, provide that the aggregate of such Qualified Bids satisfies the requirements of Section 11(a) and (b).

18. If a Successful Bid is selected and a Transaction Order authorizing the consummation of the transaction contemplated thereunder is granted by the Court, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Qualified Bid that is not selected as a Successful Bid will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten (10) business days) after the date upon which the Successful Bid is approved pursuant to a Transaction Order or such earlier date as may be determined by the Black Press Entities, in consultation with the Monitor; provided, the Deposit in respect of the Back-Up Bid shall not be returned to the applicable bidder until the closing of the Successful Bid.

19. The Black Press Entities shall be permitted, in their discretion, to provide general updates and information in respect of the SISP to legal counsel to any creditor (each a "**Creditor**") on a confidential basis, upon: (a) irrevocable confirmation in writing from such counsel that the applicable Creditor will not submit any bid in the SISP; and (b) counsel to such Creditor entering into confidentiality arrangements with the Black Press Entities, in form and substance satisfactory to the Black Press Entities and the Monitor.

20. The Interim Lender shall only be entitled to the consultation rights specified herein in its favour and confidential updates and information from the Black Press Entities and the

Monitor in respect of the SISP, including copies of any Qualified Bids, upon the Interim Lender (in its capacity as Stalking Horse Bidder) irrevocably confirming in writing to the Petitioners and the Monitor that it will not submit any bid in the SISP except for the Stalking Horse Agreement and will not participate in the Auction.

21. Any amendments to this SISP may only be made by the Black Press Entities with the written consent of the Monitor and the Interim Lender or by further order of the court.

## SCHEDULE "A": E-MAIL ADDRESSES FOR DELIVERY OF BIDS

To the counsel for the Black Press Entities:

vtickle@cassels.com; jenns@cassels.com; rjacobs@cassels.com; jbellissimo@cassels.com; jbornstein@cassels.com

and with a copy to the Monitor:

ngoldstein@ksvadvisory.com; jknight@ksvadvisory.com; ebrenner@ksvadvisory.com

## SCHEDULE "B": AUCTION PROCEDURES

1. **Auction.** If the Black Press Entities receive at least one Qualified Bid (other than the Stalking Horse Bid), the Black Press Entities will conduct and administer the Auction in accordance with the terms of the SISP. Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.

2. **Participation.** Only parties that provided a Qualified Bid by the Qualified Bid Deadline, including, for greater certainty, the Stalking Horse Bid (collectively, the "**Qualified Parties**" and each a "**Qualified Party**"), shall be eligible to participate in the Auction. No later than 5:00 p.m. Pacific Time on the day prior to the Auction, each Qualified Party must inform the Black Press Entities and the Monitor in writing whether it intends to participate in the Auction. The Black Press Entities will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party (including the Stalking Horse Purchaser) provides such expression of intent, the highest or otherwise best Qualified Bid as determined by the Black Press Entities, in consultation with the Monitor, shall be designated as the Successful Bid (as defined below).

3. **Auction Procedures.** The Auction shall be governed by the following procedures:

   a. **Attendance.** Only the Black Press Entities, the Qualified Parties and the Monitor, and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any Overbids (as defined below) at the Auction;

   b. **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (a) it has not engaged in any collusion with respect to the Auction and the bid process; and (b) its bid is a good-faith *bona fide* offer, it is irrevocable and it intends to consummate the proposed transaction if selected as the Successful Party (as defined below);

   c. **Minimum Overbid and Back-Up Bid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by the Black Press Entities, in consultation with the Monitor (the "**Initial Bid**"), and any bid made at the Auction by a Qualified Party subsequent to the Black Press Entities' announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional cash increments of $100,000, and all such Overbids shall be irrevocable until closing of the Successful Bid; provided, that if such Overbid is not selected as the Successful Bid or as the Back-Up Bid (if any) it shall only remain irrevocable until selection of the Successful Bid;

   d. **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video-conference, on an open basis, and all Qualified Parties will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each

subsequent Qualified Bid will be fully disclosed to all other Qualified Parties throughout the entire Auction; provided, however, that the Black Press Entities, in their discretion, may establish separate video conference rooms to permit interim discussions among the Black Press Entities, the Monitor and individual Qualified Parties with the understanding that all formal bids will be delivered in one group video conference, on an open basis;

e. **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit an Overbid with full knowledge and confirmation of the then-existing highest or otherwise best bid and no Qualified Party submits an Overbid; and

f. **No Post-Auction Bids**. No bids will be considered for any purpose after the Successful Bid has been designated, and therefore the Auction has concluded.

## Selection of Successful Bid

4. **Selection.** During the Auction, the Black Press Entities, in consultation with the Monitor, will: (a) review each subsequent Qualified Bid, considering the factors set out in Section 11 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in (i) above, (iii) the likelihood of the Qualified Party's ability to close a transaction by not later than the Outside Date (including factors such as: the transaction structure and execution risk; conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to the Black Press Entities and their stakeholders and (vi) any other factors the directors or officers of the Black Press Entities may, consistent with their fiduciary duties, reasonably deem relevant; and (b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").

5. **Acknowledgement.** The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by the Black Press Entities in their sole discretion, subject to the milestones set forth in Section 10 of the SISP.

# TAB 3

**COURT FILE NO.: 09-8482-00CL**
**DATE: 20091218**

2009 CanLII 72333 (ON SC)

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

**RE:** **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 BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC.**

**APPLICANTS**

**BEFORE:** **MORAWETZ J.**

**COUNSEL:** **Jay Swartz and Jim Bunting, for the Applicants**

**G. Moffat, for Deloitte & Touche Inc., Monitor**

**Joseph Bellissimo, for Roynat Capital Inc.**

**Peter J. Osborne, for R. N. Singh and Purchaser**

**Edmond Lamek, for the Toronto-Dominion Bank**

**D. Dowdall, for Noteholders**

**D. Ullmann, for Procom Consultants Group Inc.**

**HEARD & DECIDED:** **DECEMBER 11, 2009**

## E N D O R S E M E N T

[1] At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

[2] The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

[3] The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

[4] The Monitor recommends that the motion be granted.

[5] The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

[6] Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

[7] Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

[8] The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

[9] Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

[10] The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

[11] It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

[12] Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

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[13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp*. [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(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?

(d) Is there a better viable alternative?

[14] The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

[15] Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

[16] Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

[17] I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[18] In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

[19] In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

[20] With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue

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has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

[21] For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

[22] For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

[23] The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

[24] Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

[25] An order shall issue to give effect to the foregoing.

**MORAWETZ J.**

**DECIDED: December 11, 2009**

**REASONS: December 18, 2009**

2009 CanLII 72333 (ON SC)

# TAB 4

# SUPERIOR COURT OF JUSTICE
# COMMERCIAL LIST

# ENDORSEMENT

**COURT FILE NO.:**

**DATE: February 28, 2024**

**NO. ON LIST: 1 (4:30pm)**

**TITLE OF PROCEEDING:**

**IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP., AND FINAL BELL CORP.**

**BEFORE: JUSTICE OSBORNE**

## PARTICIPANT INFORMATION

**For Plaintiff, Applicant:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| ZWEIG, SEAN<br>SHAKRA, MIKE<br>FROH, ANDREW<br>ERNST, JAMIE | BZAM LTD.,<br><br>BZAM HOLDINGS INC.,<br><br>BZAM MANAGEMENT INC.,<br><br>BZAM CANNABIS CORP.,<br><br>FOLIUM LIFE SCIENCE INC.,<br><br>102172093 SASKATCHEWAN LTD.,<br><br>THE GREEN ORGANIC DUTCHMAN LTD.,<br><br>MEDICAN ORGANIC INC.,<br>HIGH ROAD HOLDING CORP.<br><br>FINAL BELL CORP. | zweigs@bennettjones.com<br>shakram@bennettjones.com<br>froha@bennettjones.com<br>ernstj@bennettjones.com |

**For Defendant, Respondent:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| CHAITON, HARVEY | STONE PINE CAPITAL | Harvey@chaitons.com |
| BELLISSIMO, JOSEPH<br>LEVINE, NATALIE | CORTLAND CREDIT LENDING CORPORATION | jbellissimo@cassels.com<br>nlevine@cassels.com |
| | | |
| | | |

**For Other, Self-Represented:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| | | |
| | | |
| YANG, PHILIP<br>KONYUKHOVA, MARIA<br>ROSENBERG, JEFF<br>HAMIDI, KAMRAN | FTI AS PROPOSED MONITOR | pyang@stikeman.com<br>mkonyukhova@stikeman.com<br>Jeffrey.rosenberg@fticonsulting.com<br>Kamran.hamidi@fticonsulting.com |

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**ENDORSEMENT OF JUSTICE OSBORNE:**

1. This is an Application for relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA") by BZAM Ltd. ("BZAM"), BZAM Holdings Inc., BZAM Management Inc., BZAM Cannabis Corp., Folium Life Science Inc., 102172093 Saskatchewan Ltd., The Green Organic Dutchman Ltd. ("TGOD"), Medican Organic Inc. , High Road Holding Corp., and Final Bell Corp. (collectively, the "Applicants" or the "Companies").

2. Following the hearing, I granted the initial order with reasons to follow. These are those reasons.

3. In particular, the Applicants seek:

    a. a declaration that they are companies to which the CCAA applies;

    b. the appointment of FTI Consulting Canada Inc. ("FTI") as Monitor;

    c. the approval for TGOD to borrow up to a principal amount of $2,400,000 by way of a debtor-in-possession ("DIP") credit facility (the "DIP Loan") to finance critical working capital requirements for the Applicants over the next 10 days;

    d. a stay in effect for an initial period of not more than 10 days;

    e. the extension of the benefit of the stay to the Non-Applicant Stay Parties (as defined in the materials) and their respective directors and officers;

    f. relief from certain securities reporting obligations until further order of this Court; and

g. approval of the Administration Charge, the DIP Lender's Charge, the Edmonton Property Charge and the Directors' Charge (each as defined in the motion materials) in the priorities as set out in the motion materials.

4. BZAM is the ultimate parent company to several entities in the cannabis industry in Canada (collectively, the "Company"). It is a reporting issuer listed on the Canadian Securities Exchange, and its shares trade in the United States on the OTCQX.

5. The Company engages in the production, cultivation, processing and distribution of cannabis and cannabis related products.

6. The Applicants are insolvent. One of their cannabis licences is set to expire imminently. Absent protection under the CCAA, as well as access to the proposed DIP financing, the Applicants lack sufficient cash to meet their obligations as they come due, their liabilities exceed the value of their assets, and they will be forced to immediately cease operations.

7. The Applicants seek protection from their creditors while they continue as a going concern to allow time to explore various restructuring options and possibilities for the benefit of stakeholders. Those options will likely include, it is submitted, a Court-supervised sale and investor solicitation process ("SISP").

8. The relief sought by the Applicants today is fully supported by the senior secured creditor, the subordinate creditor, and is recommended by the Proposed Monitor. The Applicants submit that it is also limited to what is reasonably necessary to allow them to maintain the status quo and continue operations during the initial 10 day stay of proceedings.

9. With this context in mind, the issues on this Application are:

    a. does the Court have jurisdiction to grant the relief requested under the CCAA and should a stay of proceedings be granted?

    b. should the Court approve the DIP Loan?

    c. should FTI be appointed as Monitor?

    d. should the benefit of the stay be extended to the Non-Applicant Stay Parties?

    e. should relief from the securities reporting obligation be granted? and

    f. should the Charges be approved, and approved in the proposed priority?

**Jurisdiction**

10. The Applicants rely on the Affidavit of Matthew Milich sworn February 28, 2024 together with the exhibits thereto, and the Pre-filing Report of the Proposed Monitor dated February 28, 2024. Defined terms in this Endorsement have the meaning given to them in the Application materials unless otherwise indicated.

11. Each of the Applicants is incorporated under Canadian corporate statute. All of the non-BZAM Applicants are wholly-owned, directly or indirectly, by BZAM except for Folium Life and BZAM Cannabis, in respect of which BZAM Holdings is the majority shareholder as to 80% and 80.3%, respectively.

12. Five of the Applicants are licenced with Health Canada and operate cannabis facilities in Ontario, Alberta and British Columbia. 102 Saskatchewan leases a retail store in Saskatchewan.

13. The majority of the Company's business is conducted out of Ontario. Two cannabis facilities of the Applicants, including its largest facility, are located in Ontario and approximately 256 of the 441 employees of the Applicants are employed in Ontario.

14. The Company's senior secured creditor, Cortland Credit Lending Corp. ("Cortland") is also headquartered in Toronto.

15. The majority of BZAM's directors reside in Ontario, and its Chief Financial Officer and Chief Executive Officer divide their time between the Company's offices in Ontario and British Columbia.

16. The Non-Applicant Stay Parties include four directly or indirectly wholly-owned subsidiaries of BZAM: 9430-6347 Québec Inc. ("943 Québec), a company incorporated under the QBCA; (ii) The Green Organic Beverage Corp. ("Green Organic"), a company based in Delaware; (iii) TGOD Europe B.V. ("TGOD Europe"), a company based in the Netherlands; and (iv) The Green Organic Dutchman Germany GmbH ("TGOD Germany"), a company based in Germany.

17. 943 Québec is a licensed entity with Health Canada operating out of a leased facility in Québec.

18. The evidence satisfies me that the Applicants are unable to meet their obligations as they become due. They have accrued payables in the ordinary course of business that they cannot meet and are unable to pay amounts owed to secured parties.

19. As at January 1, 2024, the Company had total consolidated assets with a book value of approximately $95,711,080 and liabilities with a book value of approximately $112,873,839. The Applicants anticipate having on hand only approximately $1,848,000 in cash at the close of business today, with the result that they face an urgent liquidity crisis.

20. Secured financing has been provided by Cortland pursuant to a credit agreement entered into on March 31, 2020 between Cortland as Agent for the Lenders and TGOD as borrower. It has been amended and restated including as recently as January 8, 2024 (as amended, the "Credit Agreement").

21. Pursuant to the Credit Agreement, Cortland provided TGOD with an interest-bearing revolving credit facility totaling $34 million. The guarantors under the Credit Agreement are TGOD, BZAM, Medican Organic, BZAM Holdings, BZAM Management, BZAM Cannabis, Folium Life, High Road and BZAM Labs (together, in such capacity, the "Cortland Obligors").

22. As of February 28, 2024, approximately $31,919,208.84 of principal is owing together with interest of an additional $362,916.21.

23. In addition, BZAM has entered into six (6) promissory notes (the "Stone Pine Promissory Notes") with Stone Pine Capital Ltd. ("Stone Pine"), an entity controlled by BZAM's largest shareholder and current Chairman. The Stone Pine Promissory Notes were all amended on January 4, 2024, to each be payable upon demand, provided that Stone Pine shall not be permitted to make a demand until the later of either: (i) the maturity date of the Cortland Credit Agreement; and (ii) March 31, 2025.

24. Contemporaneously with the execution of the Stone Pine Promissory Notes, BZAM and Stone Pine entered into general security agreements (the "Stone Pine GSAs") under which Stone Pine was granted security over all present and after-acquired property, assets and undertakings of BZAM. Additionally, BZAM, Stone Pine and Cortland entered into subordination and postponement agreements to subordinate the amounts loaned under the Stone Pine Promissory Notes to the amounts loaned under the Credit Agreement with Cortland.

25. As of February 28, 2024, approximately $8,515,000 of principal is owing to Stone Pine, and approximately an additional $509,755 of interest accrued month-to-date for a total amount owing of

$9,024,795.07. The Stone Pine Promissory Notes each carry an interest rate of 8% or 10% per annum, with interest being calculated monthly and payable on the last day of each month. No interest has ever been paid on the Stone Pine Promissory Notes.

26. BZAM Cannabis entered into a $5 million loan from for private lenders that is secured against the Edmonton Facility pursuant to a commitment letter dated May 19, 2021 as well as a general security agreement over all of the property of BZAM Cannabis and a corporate guarantee from BZAM Management.

27. In addition to the above, the Applicants have a number of unsecured obligations including a promissory note issued by BZAM to Final Bell Holdings International Inc. dated January 5, 2024 in the amount of $8 million and employee liabilities including monthly aggregate payroll obligations of approximately $2,344,764 related to both salaried and hourly employees. The Applicants also owe $1,103,860 and accrued and unpaid vacation pay and another $702,000 in unpaid bonuses.

28. The Applicants had accounts payable and accrued liabilities as at January 31, 2024 of approximately $28,211,004, and CRA liabilities as at February 15, 2024 of approximately $4,440,000 in excise tax arrears, $2,650,000 in sales tax arrears, and a modest amount in respect of unremitted payroll deductions. BZAM Management and TGOD have entered into payment plans with the CRA in respect of their excise and/or sales tax arrears.

29. It is clear that the current cash position of the Applicants is not sufficient to meet their obligations as they come due, particularly relating to ongoing and future payroll obligations and the cash required to maintain business operations while preventing the expiry of valuable (and required) cannabis licences.

30. The CCAA applies in respect of a "debtor company or affiliated debtor companies" whose liabilities exceed $5 million. The term "debtor company" is defined as "any company that: (a) is bankrupt or insolvent […]", and the term "company" is defined as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province […]".

31. The CCAA also specifies companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company. Each of the Applicants is a "company" within the meaning of the CCAA as each was incorporated under Canadian provincial or federal laws. All of the Applicants other than BZAM are direct or indirect subsidiaries of BZAM. Accordingly, the Applicants are all affiliated companies.

32. Each of the Applicants is a "debtor company" as defined in the CCAA. The insolvency of a debtor company is assessed as of the time of filing the CCAA application. Courts have taken guidance from the definition of "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act*, which, in relevant part, provides that an "insolvent person" is a person:

    a. who is for any reason unable to meet his obligations as they generally become due;
    b. who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
    c. the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

33. A company is also insolvent for the purposes of the CCAA "if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

34. The Applicants collectively have over $55,500,000 in debt and only approximately $1,848,000 of cash on hand. Absent the Stay of Proceedings and the approval of the DIP Loan, the Applicants will be unable to meet their obligations as they come due. As such, the Applicants are affiliated debtor companies to which the CCAA applies.

35. I am also satisfied that Ontario is the chief place of business of the Applicants, and as such this Application is properly made to this Court.

36. Section 9(1) of the CCAA provides that an application for a stay under the CCAA may be made to the court that has jurisdiction in the province in which the head office or chief place of business of the company in Canada is situated.

37. In *Nordstrom Canada Retail, Inc*. , this Court found that the company's "chief place of business" was Ontario despite the fact that Nordstrom Canada Retail was incorporated and had significant business operations in British Columbia. In determining whether the court had jurisdiction over the proceedings, this Court considered multiple factors, including the location of the company's assets, employees and sales.

38. The Court found that there was sufficient evidence establishing Ontario as the proper jurisdiction based on the following: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled $220 million, compared to $148 million in British Columbia and $77 million in Alberta.

39. The same analysis can be applied here. Approximately 58% of the employees of the Applicants are situated in Ontario. While the Applicants have two cannabis facilities in each of Ontario and British Columbia, the largest facility of the Company is in Hamilton, Ontario. The Company maintains corporate offices in both Ontario and British Columbia and a majority of the BZAM directors reside in Ontario. In addition, the principal place of business of the senior secured lender, Cortland, is Ontario.

**Stay of Proceedings**

40. Section 11.02(1) of the CCAA provides that the Court may order a stay of proceedings on an initial CCAA application for a period of not more than 10 days. Section 11.001 of the CCAA provides that relief granted on an initial CCAA application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day period.

41. A stay of proceedings is clearly necessary here if any form of restructuring process is to be successful. The relief sought today is limited to what is reasonably necessary.

**Non-Applicant Stay Parties**

42. I am also satisfied that the stay should apply to the Non-Applicant Stay Parties. The Court has authority to extend the stay to non-parties pursuant to sections 11 and 11.02(1) of the CCAA, which permits the Court to make an initial order on any terms imposed. In determining whether a stay should be extended to non-parties, courts have considered numerous factors, including whether the subsidiaries of applicants had guaranteed secured loans of the applicants, whether the non-applicants were deeply integrated into the business operations of the applicants, and whether the claims against the non-applicants were derivative of the primary liability of the applicants: See *MPX International Corporation*, 2022 ONSC 4348 ("*MPX*") at para 52, *Lydian International Limited, (Re),* 2019 ONSC 7473 at para 39; *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at paras 5, 18, and 31; at paras 28-29; and *Target Canada Co.,* 2015 ONSC 303 ("*Target*") at paras 49-50.

43. All of the Non-Applicant Stay Parties here are highly integrated into the business as wholly-owned subsidiaries (direct or indirect) of BZAM, or in the case of 943 Québec, as a soon to be acquired company. None carry on active business. The three entities other than 943 Québec also have tax attributes which could be beneficial to the objective of maximizing value for stakeholders.

44. I am satisfied that the stay should be extended to these parties to prevent uncoordinated realization and enforcement attempts from being made in different jurisdictions all of which would be counterproductive to the maximization and protection of value for stakeholders of the Applicants.

45. Moreover, the Applicants advise that they intend to seek approval of a SISP in this proceeding which will include the Non-Applicant Stay Parties with the result that the stay should apply to them to give comfort to potential bidders that enforcement actions against those parties will be stayed while a sales process is being conducted.

**Regulatory Stay of Licences**

46. CCAA courts have granted regulatory stays over licences where, absent such a stay, the applicable regulators were likely to suspend or cancel licences due to the commencement of the CCAA proceeding. Other courts have observed that permitting the immediate termination of the licenses of a debtor company would not avoid social and economic losses but rather would amplify them. See: *Re Just Energy* Corp., at para 87; *Abbey Resources Corp., Re, (29 July 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB); Original Traders Energy Ltd. et al., (30 January 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00693758-00CL* (Initial Order) at para 19.

47. Canadian courts have also granted stays to prevent the Canada Revenue Agency from seeking to enforce its rights through regulatory actions related to an excise licence for a cannabis company during the period in which it was under protection in an insolvency regime: *Tantalus Labs Ltd., Re*, 2023 BCSC 1450 ("*Tantalus*")and *Aleafa Health Inc*. SISP Approval Order August 22, 2023 [CV-23-00703350-00CL].

48. In *Tantalus,* the British Colombia Supreme Court granted an order as part of the BIA proposal maintaining the status quo of a cannabis excise licence during the course of the proposal proceeding. It did so, rejecting the submission of the CRA, which had submitted that a ministerial decision to not renew a licence could not be the subject of a stay under the *BIA*. The same principles apply to a CCAA proceeding.

49. The cannabis licences of the Applicants are among their most valuable assets. Just as importantly, they are required to permit the Applicants to continue operating their underlying business. The expiry or cancellation of licences will suspend or terminate completely the operation and delivery of products by the Applicants with the result that the ability of the Applicants to restructure or continue as a going concern business will in all probability be eliminated.

**Appointment of FTI as Monitor**

50. The Applicants propose to have FTI appointed as the Monitor. FTI is a "trustee" within the meaning of subsection 2(1) of the BIA, is established and qualified, and has consented to act as Monitor. The involvement of FTI as the court-appointed Monitor will lend stability and assurance to the Applicants' stakeholders. FTI is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

51. I am satisfied that FTI should be appointed as Monitor in these CCAA Proceedings.

**The DIP**

52. Pursuant to a DIP facility agreement dated February 28, 2024 (the "DIP Agreement"), Cortland as proposed DIP Lender, has agreed to provide TGOD as borrower with a super priority, non-revolving

credit facility up to a maximum principal amount not to exceed the lesser of $41 million and the Revolving Facility Limit (as defined in the Second ARCA) plus $7 million, subject to certain conditions. Each of the Applicants is a guarantor under the DIP Agreement.

53. The DIP Loan has a commitment fee of $98,000 and bears interest at the greater of the Toronto-Dominion Bank's floating annual rate of interest plus 8.05% per annum and 12% per annum (an interest rate that I observe is the same as that set out in the Second ARCA).

54. The DIP Loan is conditional on the granting of the DIP Charge.

55. The amount of the DIP Loan to be funded during the initial stay period of 10 days (up to $2,400,000) is only that portion necessary to ensure the continued operation of the business of the Applicants in the ordinary course for that period of time such that I am satisfied it is appropriate that it be approved at this time pursuant to section 11.2(5) of the CCAA, as was approved in *Mjardin Group, Inc., (Re),* 2022 ONSC 3338 at para. 31.

56. While the DIP Agreement contemplates what the Applicants describe as a "creeping-roll up" structure pursuant to which all post-filing receipts by the Applicants will be applied to repay pre-filing obligations owing to Cortland, it is important to note that the DIP Charge does not secure any obligation that existed prior to the granting of the Initial Order. This Court has previously approved DIP facilities that use receipts from operations post-filing to repay pre-filing amounts, pursuant to the jurisdiction found in section 11.2(1). The emphasis is on preserving the pre-filing status quo, so as to uphold the relative pre-stay priority position of each secured creditor: *Comark Inc., (Re)*, 2015 ONSC 2010 at paras. 40-41; and *Performance Sports Group Ltd*., 2016 ONSC 6800 at para. 22.

57. Moreover, and in accordance with section 11.2(1), notice has been provided to the secured creditors proposed to be primed by the DIP, and as noted above, the proposed DIP Charge does not secure any pre-filing obligations of the Applicants. Cortland, the proposed DIP Lender, is already in first position as the senior secured creditor in respect of all of the property of the Applicants save and except for the Edmonton Facility which is not proposed to be primed by the DIP in any event. Stone Pine Capital is supportive of the proposed DIP Loan.

58. Section 11.2(4) of the CCAA sets out a non-exhaustive list of criteria that the Court must consider in deciding whether to grant a DIP lender's charge. Those criteria include the period during which the Applicants are expected to be subject to CCAA proceedings, how the Applicants' business and financial affairs are to be managed during the proceedings, whether the Applicants' management has the confidence of its major creditors, whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants, the nature and value of the Applicants' property, whether any creditor would be materially prejudiced as a result of the security or charge, and whether the monitor supports the charge.

59. DIP financing may be approved even if it potentially prejudices some creditors, as long as the prejudice is outweighed by the benefit to all stakeholders.

60. It is important that an applicant meet the criteria in section 11.2(1) as well as those in section 11.2(4). (See *CanWest Publishing Inc., Re*, 2010 ONSC 222 ("*CanWest*") at paras. 42-44).

61. I am satisfied that the Applicants are facing a liquidity crisis and the Cash Flow Statement shows that financing even on an interim basis is required to fund these proceedings.

62. I am also satisfied that the terms of the proposed DIP Loan are appropriate. I recognize that the interest rate is at the very high end of the range within which DIP loans have been approved by this Court. However, I am satisfied that it is appropriate here. First, the rate is exactly the same as the rate applicable to the existing credit facilities of the senior secured creditor, Cortland, who is the proposed DIP Lender,

so there is no increase in the cost of borrowing relative to the current facilities. Second, the commitment fee is relatively modest as against the total funding be made available. The cost of borrowing necessarily involves a consideration of the commitment fee together with the applicable interest rate. Third, interest rates generally have increased materially over the last year, so one must proceed with caution in considering a previously established range of interest rates. Fourth, the cannabis sector generally has faced and continues to face significant challenges and risks, with the result that the cost of borrowing within the sector generally is expensive.

63. Finally, the Proposed Monitor is supportive of the DIP Loan and corresponding charge, and is further in agreement that those amounts proposed to be advanced during the initial 10 day period are required in order to preserve the status quo and the going concern operations of the Applicants.

**Administration Charge**

64. The Court has jurisdiction to grant an administration charge under s. 11.52 of the CCAA. It is to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge, and the position of the Monitor. (See *CanWest*, at para. 54).

65. The administration charge of $500,000 is appropriate. It is supported by the Proposed Monitor and the senior creditors.

**Directors' Charge**

66. The Court has jurisdiction to grant a directors' charge under section 11.51 of the CCAA, provided notice is given to the secured creditors who are likely to be affected by it. To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors and officers, who have considerable institutional knowledge and specialized expertise.

67. Here, I recognize that the proposed quantum of the Directors' Charge is very significant at $5,300,000. However, almost all of that is as a result of the excise tax obligations owing by the Applicants which are very material and which, I observe, will increase going forward.

68. The Monitor supports the Applicants' request for the Directors' Charge. I am satisfied it is appropriate here.

69. The Directors' Charge is approved.

**Relief from Securities Obligations**

70. The Applicants seek relief to dispense with certain securities filing requirements and in particular, the authority to incur no further expenses in relation to any filings, and that none of the directors or officers, employees or other representatives of the Applicants or the Monitor shall have personal liability with respect thereto.

71. This Court has previously granted such relief and I am satisfied that it is appropriate here. See: *Aleafa Health Inc*., amended and restated initial order issued August 4, 2023 [CV-23-00703350-00CL] paras 45-46; *MPX International Corporation*, amended and restated initial order issued July 25, 2022 [CV-22-00684542-00CL] at para 46-47; *CannTrust Holdings Inc., Re,* initial order issued March 31, 2021 [Court File No. CV-20-00638930] at paras 46-47; and *Pure Global Cannabis, Inc., Re*, initial order issued March 19, 2020 [CV-20-00638503-00CL] at para. 49.

**Authorization for Pre-Filing Payments**

72. The Applicants seek the authority but not the requirement to make payments for goods or services supplied to the Applicants prior to the date of the Initial Order, but in all cases only with the consent of the Monitor and the DIP Lenders, and only in circumstances where, in the opinion of the Applicants and the Monitor, the supplier or service provider is critical to preserve, protect or enhance the value of the business.

73. While section 11.4 of the CCAA gives the Court authority to declare a person to be a critical supplier and to grant a charge on the debtor's property to secure amounts owing for services provided post-filing, nothing in that section removes the inherent jurisdiction of the court to allow the payment of pre-filing amounts to suppliers who services are critical to the post-filing operations of the debtor, even where the debtor does not propose to secure the payment of post-filing goods or services with a critical supplier charge: See *Cline Mining Corp., Re,* 2014 ONSC 6998 at para. 38, and *MPX* at para. 70.

74. Such relief may be included in an initial order: see *Target*, at paras. 64-65.

75. I am satisfied that such relief is appropriate here, particularly given that the consent of the Monitor is required for such payments to be made.

**Comeback Hearing**

76. The comeback hearing shall take place on Friday, March 8, 2024 commencing at 2:00 PM via Zoom.

77. The order I have signed is effective immediately and without the necessity of issuing and entering.

Osborne, J.

# TAB 5

**CITATION:** Cannapiece Group Inc v. Carmela Marzili, 2022 ONSC 6379
**COURT FILE NO.:** CV-22-00689631-00CL
**DATE:** 20221114

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**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 CANNAPIECE GROUP INC., CANNAPIECE CORP., CANADIAN CRAFT GROWERS CORP., 2666222 ONTARIO LTD., 2580385 ONTARIO INC. AND 2669673 ONTARIO INC.

**RE:** **CANNAPIECE GROUP INC**, Plaintiff

**AND:**

**CARMELA MARZILI**, Defendant

**BEFORE:** Penny, J.

**COUNSEL:** *David S. Ward* and *Jennifer Quick* Counsel, for the Plaintiff

*Robert Kennedy* Counsel, for BDO Canada LLP

*Clifton Prophet* Counsel, for 2125028 Ontario Inc

*John Peddle* Counsel, for Carmela Marzilli

*Vincent Pion* Counsel, for Solid Packaging Robotik Group Inc

*Robert McDonald* Counsel, for 2726398 Ontario Inc.

*Philippe Tremblay* Counsel, for Solid Packaging Robotik

*Russell Bennett* Counsel, for certain unnamed investors

*Clark Lonergan*, trustee in bankruptcy at BDO, Canada Limited

*Rory McGovern* Counsel, to Cardinal Advisory Limited

**HEARD:** November 10, 2022

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[1] On November 3, 2022, I made an Initial Order in this matter under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The relief granted in the Initial Order was limited to that which was reasonably necessary for continued operations during the initial ten-day stay of proceedings.

[2] At the comeback hearing on November 10, 2022, the applicants sought:

(a) an amended and restated initial order:

(i) extending the stay of proceedings granted pursuant to Initial Order to February 3, 2023;

(ii) extending the scope of the stay of proceedings to include claims against directors and officers in respect of their potential liability under personal guarantees of corporate obligations;

(iii) approving a key employee retention plan and authorizing the applicants to make payments in accordance with its terms;

(iv) authorizing the Company to make payments to certain third party suppliers for pre-filing expenses which are necessary to facilitate the applicants' ongoing operations; and

(v) approving an increase to the Administration Charge to the maximum amount of $500,000; and

(b) a sale process approval order:

(i) approving a sale and investment solicitation process;

(ii) authorizing a stalking horse purchase agreement; and

(iii) approving the payment of a break fee, professional fee, and the deposit repayment.

[3] On November 10, 2022 I issued an amended and restated initial order and took under reserve certain aspects of the proposed sales process order, with reasons to follow. These are my reasons on all issues.

Sales Process

*The Stalking Horse Agreement*

[4] Stalking horse agreements are recognized by the court as a reasonable and useful component of a sales process. Here, the 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

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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.

[5] The reasonableness of the break fee ($175,000) is subject to the exercise of the applicants' business judgment so long as it lies within a range of reasonable alternatives. In my view it does. The Monitor is satisfied that the break fee is reasonable in the circumstances. It has noted, among other things, that: (a) the applicants were insolvent and did not have sufficient cash to continue beyond the week of the Initial Order without the DIP Loan that was provided by the stalking horse bidder; (b) the applicants made significant efforts to improve their financial situation prior to commencing the CCAA proceedings; (c) the stalking horse bidder required the break fee as compensation for its efforts; and (d) the stalking horse bidder was the only party showing any interest in acquiring the applicants' business, funding the stalking horse sales process and these CCAA proceedings. I accept the Monitor's recommendations on this issue.

*The Sales Process*

[6] Both by way judicial precedent and under the CCAA, a number of factors have been developed to assist in deciding whether to approve a proposed sales process. Having regard to those factors, I am satisfied that the sales process contemplated here is appropriate.

[7] A sale transaction is warranted at this time. The applicants are insolvent and unable to continue operations without restructuring the Company's debt. A sale of the business is the only option available at this time.

[8] The sale transaction will benefit a wide range of stakeholders. The stalking horse agreement sets a minimum price and the bidding procedures in the stalking horse sales process is designed to test the market by soliciting the best bids available, thereby maximizing value for stakeholders. Importantly, it is anticipated under the stalking horse agreement that, if the stalking horse bidder is the ultimate purchaser in the process, the purchaser will maintain the employment of the vast majority of employees.

[9] The senior secured creditor of the applicants, Carmela Marzilli, and the equipment financer, 2125028 Ontario Inc., are supportive of the stalking horse sales process and no other creditor has indicated that they object.

[10] There is no other, better, or viable alternative. The applicants, in consultation with their advisors, pursued a number of strategic initiatives to improve their operations and financial position. Despite their attempts, no other alternative to the stalking horse sales process has materialized. The stalking horse bidder is the only party who showed any interest in acquiring the applicants' business to date.

[11] The Monitor was consulted about and will administer the stalking horse sales process in consultation with its sales agent and the applicants. The Monitor is supportive of the process, including the stalking horse agreement acting as the minimum bid. The Monitor will also have

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certain consent rights in connection with material decisions, including extending timelines, dispensing with bid requirements, and terminating the stalking horse sales process. The Monitor is not aware of any stakeholders who will be prejudiced by the stalking horse sales process.

[12] During the initial stay period, the applicants have communicated with various stakeholders, including secured and unsecured creditors, to provide information and answer questions. There is support from key customers and critical suppliers for a stalking horse sales process as well.

[13] On the evidence, the stalking horse sales process is the best and only value-maximizing option available to the debtor. The sales process is intended to avoid the value destruction that would follow from a cessation of manufacturing operations and customer order fulfilment. The process provides interested parties with sufficient time to evaluate the opportunity presented by the process and to submit a bid before the deadline.

*Critical Suppliers*

[14] The court may grant a request for approval of payment of pre-filing liabilities to critical suppliers. This is because one of the purposes of the CCAA is to permit an insolvent corporation to remain in business. The court has broad jurisdiction to make orders that will facilitate a restructuring of a business as a going concern. The Monitor supports the need for this order in the circumstances of this case.

[15] The applicants' request for an order granting approval to make payments to critical suppliers advances the goal of allowing the applicants to continue operating in the ordinary course of business throughout the stalking horse sales process. This will benefit the applicants' stakeholders.

*The KERP*

[16] The Court has jurisdiction to approve a key employee retention plan under s. 11 of the CCAA to make any order it considers appropriate.

[17] The purpose of a KERP is to retain employees who are important to the management or operations of the debtor company in order to keep their skills within the company at a time when, because of the company's financial distress, they might otherwise look for alternate employment. KERPs have been approved in numerous insolvency proceedings where the retention of certain employees was deemed critical to a successful restructuring.

[18] I accept that a KERP is warranted in the circumstances of this case. The eleven identified employees have senior level roles and responsibilities that are essential to ensure the stability of the business, enhance effectiveness of the sale process, and facilitate an effective restructuring. These key employees have specialized experience and unique knowledge about the operations of the Company. Their involvement in the sale process appears to be important to the success of the restructuring. The potential KERP beneficiaries may well seek other employment if the KERP is not authorized. The applicants developed the KERP with input from the Monitor and the Monitor supports the proposed KERP in this case.

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*Administration Charge*

[19] The amount of the Administration Charge in the Initial Order was limited to the estimated professional fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants during the initial stay period. The applicants seek to increase the Administration Charge from $250,000 to $500,000 in order to remain current with the projected fees and disbursements of the professionals during the proposed extended stay period.

[20] Section 11.52 of the CCAA provides for the grant of an administration charge. On the evidence, I find the increase in the Administration Charge is appropriate. The cannabis industry is complex, highly regulated and subject to many statutory and regulatory restrictions and requirements. Successful restructuring will require the extensive input of the professionals who have been retained. The beneficiaries of the Administration Charge have and will continue to contribute to these CCAA proceedings and assist the applicants with achieving the restructuring objectives. Each of the proposed beneficiaries of the Administration Charge is performing unique functions without duplication of roles. The quantum of the proposed increase to the Administration Charge appears to be fair and reasonable and is in line with the nature and size of the applicants' business and the involvement required by the professionals. The Monitor, the DIP Lender, and the applicants' senior secured lender, Ms. Marzilli, are supportive of the increase in the Administration Charge.

*Stay of Claims Against Directors*

[21] The applicants seek to extend the Initial Order stay to include a stay of an action on guarantees of unpaid Company debt given by three directors. The stay is opposed by the plaintiff/creditor in that action. This was the only issue of controversy before the Court on this motion. The controversy arises in the following context.

[22] 2726398 Ontario Inc. is an unsecured creditor of the Company, having originally loaned the principal sum of $7,000,000. As security for its loan, 272 received mortgage security over property as well as personal guarantees from certain officers and directors of the Company. This included guarantees from Ali Etemadi, Afshin Souzankar and Reza Khadem Shahreza. These three individuals are all founders, directors and senior officers of the Company.

[23] In August 2022 the Company sold the mortgaged property in Clarington, Ontario. However, the sale did not generate sufficient funds to pay the entire debt owing to 272. 272 agreed to accept the total sum of $7,000,000 in exchange for a discharge of its mortgage security, without prejudice to its right to claim the balance of the debt owing from the Company and the guarantors. Following the sale of the property, $7,000,000 was delivered to 272. 272 granted discharges of its mortgage security, leaving a balance owing to it of about $815,000.

[24] On October 18, 2022, 272 issued a statement of claim in the Superior Court of Justice for payment of the remaining balance on its loan plus additional accrued interest. The Company and each of the guarantors are named as defendants in that proceeding. I was advised that service on all defendants has not yet been completed, and that no defences have yet been filed.

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[25] The applicants started this proceeding on November 2, 2022. The supporting affidavit on the motion for the Initial Order acknowledged the existence of the guarantees given to 272, the shortfall 272 suffered when its mortgage security was discharged, and that 272's discharge of its mortgage security was without prejudice to its right to claim the balance outstanding to it.

[26] My Initial Order in this proceeding included a limited stay of proceedings against the Company's directors. The order stipulated that "*except as permitted by subsection 11.03(2) of the CCAA*, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants [emphasis added]" whereby the directors or officers were alleged to be liable for the payment or performance of the Company's obligations.

[27] The present motion seeks to extend the stay of proceedings by excluding the limitation contained in the "except as permitted by subsection 11.03(2) of the CCAA" proviso in the Initial Order. The issue turns on the interpretation of ss. 11, 11.02 and 11.03 of the CCAA.

## The CCAA Provisions

[28] Section 11 of the CCAA provides that, "subject to the restrictions set out in this Act" the court may "make any order that it considers appropriate in the circumstances".

[29] Section 11.02 provides that the court may make an order staying all proceedings taken "in respect of the company".

[30] Section 11.03(1) states that an order under s. 11.02 may prohibit "any action against a director of the company" that arose before the commencement of the CCAA proceedings and that relates to an obligation of the company "if directors are under any law liable *in their capacity as directors* for the payment of those obligations [emphasis added]". Section 11.03(2) contains an exception to 11.03(1), however. It provides that s. 11.03(1) "does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations".

[31] Thus, s. 11.03 distinguishes between proceedings based on the director's personal liability under "any law" in his or her "capacity as a director" (s. 11.03(1)) and proceedings based on the director's personal liability arising out of a personal contract that he or she gave to guarantee the obligations of the company (11.03(2)): *Re Magasin Laura (PV) inc.*,2015 Carswell Que 9722, 31 C.B.R. (6th) 168 (Que. Bktcy).

### Analysis

[32] The applicants submit that my jurisdiction to stay the action on the guarantees arises out of the broad general powers under s. 11. They further submit that this jurisdiction was exercised in *McEwan Enterprises Inc*., 2021 ONSC 6453, at para. 44(a), in parallel circumstances to those existing here.

[33] I am unable to accept these arguments.

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[34] In my view, the CCAA, by its own terms, limits the general powers in s. 11 by expressly making the scope of those powers "subject to the restrictions set out in this Act". Section 11.03(1) permits the court to extend the stay power in s. 11.02 (regarding claims against the debtor company) to the directors of the company, if the director's personal liability arises under any law in his or her capacity as a director. However, s. 11.03(2) limits the power to order a stay by stipulating that s. 11.03(1) "does not apply" to an action against a director on a guarantee relating to the company's obligations. The use of the phrase "does not apply to" in s. 11.03(2) means that, although the court *may* make an order in the circumstances covered by s. 11.03(1), the court *may not* make such an order in the circumstances covered by s. 11.03(2). Since the 272 action is a claim against the directors under a personal contract given to guarantee the obligations of the company, the provisions of s. 11.03(2) apply. Accordingly, I conclude that I do not have jurisdiction to order a stay in these circumstances. Such an order is prohibited by the express language of s. 11.03(2).

[35] *McEwan Enterprises Inc*. does not support the applicants' argument. The passage they rely on in that decision makes it clear that the parties and the court were concerned with a guarantee given by Mr. McEwan in connection with obligations owed by another company, not the applicant debtor (a "non-filing party" which did not fall within the language of s. 11.03(2)). Although it may be the case as a matter of fact that Mr. McEwan also guaranteed obligations of the applicant debtor and that actions on those guarantees were also stayed, there is no indication that s. 11.03(2) was even raised with the court, much less considered by the court in its decision. It is, for example, (given Mr. McEwan's overarching importance to the business -- he *was* the business and all stakeholders understood that), entirely possible that potential plaintiffs in any actions on Mr. McEwan's guarantees were content to have those potential actions stayed, wagering that this was their only hope of recovery in the long run in any event. And, as para. 44(c) makes plain, the obligations which Mr. McEwan guaranteed were not anticipated to be impacted by the CCAA proceedings as they were be assumed as part of the proposed restructuring transaction. I simply cannot found my jurisdiction to make the order sought in the face of s. 11.03(2) on a decision in which the point in issue was neither raised nor ruled upon.

[36] Accordingly, for these reasons, I decline to order a stay of the 272 action against Messrs. Etemadi, Souzankar and Shahreza.

[37] This does not end the matter, however. The stay was only being sought until the end of the sales process; that is, February 3, 2023. I agree with the applicants that Messrs. Etemadi, Souzankar and Shahreza will be heavily engaged in the restructuring effort until the contemplated closing of the sales process. 272 has not even completed the necessary service on all defendants. The proceeding is in its infancy. It is an action on a debt/guarantee. There is no suggestion of urgency. 272's action has been brought for the benefit of one creditor. The sales process in these proceedings is calculated to benefit many stakeholders, including other creditors, employees and customers. While I have declined, for jurisdictional reasons, to order a stay of 272's action, it is appropriate in these circumstances to make a procedural order in the 272 action that these three defendants shall have until February 10, 2023 (one week after the forecast close of the sales process) to deliver their statements of defence.

*The Temporal Extension of the Stay*

2022 ONSC 6379 (CanLII)

[38] The Initial Order granted an initial 10-day stay of proceedings ending on November 10, 2022. The applicants seek an order extending the stay of proceedings to and including February 3, 2023. I am satisfied that the requested extension is justified. The evidence supports the conclusion that since the Initial Order, the applicants have acted and continue to act in good faith and with due diligence to communicate with stakeholders and to develop the sales process, while continuing to operate in the ordinary course of business to preserve the value of their business. The cash flow forecast appended to the Monitor's First Report shows sufficient liquidity during the extended stay period to fund obligations and the costs of the CCAA proceedings. The extension of the stay is required to complete the sales process without having return to Court to seek a further extension. There is no evidence that any creditor will suffer material prejudice as a result of the extension of the stay. And, the Monitor supports the requested extension of the stay of proceedings.

*Conclusion*

[39] For the forgoing reasons, the orders sought are approved and granted, other than the request for an order to extend the stay of proceedings to include the action on Messrs. Etemadi, Souzankar and Shahreza's personal guarantees, which is denied (subject to the procedural direction outlined in my reasons).

*Other Matters*

[40] Mr. Russell Bennett appeared on behalf of certain unnamed investors who claim to have invested in some aspect of this business. No material was filed on their behalf. Mr. Bennett described concerns these investors have about the propriety of Miller Thompson and BDO representing the applicants in these proceedings. He sought a two-week adjournment of the applicants' motion to enable the investors to decide whether to file material and pursue the matter. In the absence of any material and, given the highly time-sensitive nature of the proposed sales process/restructuring, I declined this request.

Penny J.

**Date:** November 14, 2022

2022 ONSC 6379 (CanLII)

# TAB 6

Court File No. CV-20-00638930-00CL

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

| | | |
|---|---|---|
| THE HONOURABLE | ) | TUESDAY, THE 31ST |
| | ) | |
| MR. JUSTICE HAINEY | ) | DAY OF MARCH, 2020 |

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 CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Applicants

**INITIAL ORDER**

**THIS APPLICATION**, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the affidavit of Greg Guyatt sworn March 31, 2020 and the Exhibits thereto (the "**Guyatt Affidavit**"), the consent of Ernst & Young Inc. ("**EYI**") to act as the Monitor (in such capacity, the "**Monitor**"), and the Pre-Filing Report of EYI in its capacity as the proposed Monitor, and on hearing the submissions of counsel for the Applicants and the Monitor.

**SERVICE**

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

**APPLICATION**

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

**PLAN OF ARRANGEMENT**

3. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court one or more plans of compromise or arrangement (hereinafter referred to as the "**Plan**").

**POSSESSION OF PROPERTY AND OPERATIONS**

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their businesses (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, contractors, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business, to preserve the value of the Property or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize the central cash management system currently in place or, with the consent of the Monitor, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any

transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages, salaries, contract amounts, employee and pension benefits, vacation pay and expenses (including, without limitation, in respect of expenses charged by employees to corporate credit cards) payable on or after the date of this Order to employees or contractors, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Applicants, or retained by employees or officers of the Applicants that the Applicants have agreed to reimburse, in respect of these proceedings, at their standard rates and charges.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

(b) expenses required to ensure compliance with any governmental or regulatory rules, orders or directions; and

(c) payment for goods or services actually supplied to the Applicants following the date of this Order.

8. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes and all federal excise taxes and duties (collectively, "**Sales & Excise Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales & Excise Taxes are accrued or collected after the date of this Order, or where such Sales & Excise Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicants and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the

first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:

(a) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate; and

(b) pursue all avenues of refinancing or selling their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or sale,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

**NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY**

12. **THIS COURT ORDERS** that until and including April 9, 2020 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property (including, for greater certainty, any process or steps or other rights and remedies under or relating to any class action proceeding against any of the Applicants or in respect of the Property), except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all

Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

13. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14. **THIS COURT ORDERS** that, during the Stay Period, all rights and remedies of any Person against or in respect of Cannabis Coffee and Tea Pod Company Ltd., Cannatrek Ltd., Elmcliffe Investments [No. 2] Inc. and O Cannabis We Stand on Guard For Thee Corporation (each, an "**Affected Party**", and collectively, the "**Affected Parties**") arising out of, relating to, or triggered by the insolvency of any of the Applicants, the making or filing of these proceedings or any allegation, admission or evidence in these proceedings (collectively, the "**Cross-Default Matters**"), are hereby stayed and suspended except with the written consent of the relevant Applicants, the relevant Affected Party and the Monitor, or leave of this Court, and the operation of any provision of any agreement or other arrangement between any Person and any of the Affected Parties whether written or oral that purports to accelerate, terminate, cancel, suspend or modify such agreement or arrangement or create a right to purchase, a right of first refusal or a lien with respect to any property of an Affected Party as a result of any of the Cross-Default Matters is hereby stayed and restrained pending further order of this Court.

**NO INTERFERENCE WITH RIGHTS**

15. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right,

contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

**CONTINUATION OF SERVICES**

16. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

17. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

18. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their

capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

**DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

19. **THIS COURT ORDERS** that the Applicants shall indemnify their current and future directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

20. **THIS COURT ORDERS** that the current and future directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $550,000, as security for the indemnity provided in paragraph 19 of this Order. The Directors' Charge shall have the priority set out in paragraphs 40 and 42 herein.

21. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 19 of this Order.

**APPOINTMENT OF MONITOR**

22. **THIS COURT ORDERS** that EYI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

23. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) review and approve Intercompany Advances (as defined below);

(c) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(d) advise the Applicants in the preparation of the Applicants' cash flow statements, which information shall be reviewed with the Monitor;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(g) perform such other duties as are required by this Order or by this Court from time to time.

24. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

25. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of (i) any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law

respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), or (ii) any of the Property, the administration and control of which is subject to the provisions of any federal, provincial or other law respecting, among other things, the manufacturing, possession, processing and distribution of cannabis or cannabis products including without limitation, the *Cannabis Act* (Canada), the *Cannabis Regulations* (Canada) the *Controlled Drugs and Substances Act* (Canada), the *Excise Tax Act* (Canada), the *Cannabis Control Act* (Ontario), or other such applicable federal or provincial legislation ("**Cannabis Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation or Cannabis Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation or the Cannabis Legislation, unless it is actually in possession.

26. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

27. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

**APPROVAL OF CHIEF RESTRUCTURING OFFICER ENGAGEMENT**

28. **THIS COURT ORDERS** that the agreement dated as of March 27, 2020 pursuant to which the Applicants have engaged FTI Consulting Canada Inc. ("**FTI**") to act as Chief Restructuring Officer ("**CRO**") and provide certain financial advisory and consulting services to the Applicants, a copy of which is attached as Exhibit "G" to the Guyatt Affidavit (the "**CRO Engagement Letter**"), the execution of the CRO Engagement Letter by the Applicants, *nunc pro tunc*, and the appointment of the CRO pursuant to the terms thereof is hereby approved, including, without limitation, the payment of the fees and expenses contemplated thereby.

29. **THIS COURT ORDERS** that the CRO shall not be or be deemed to be a director, *de facto* director or employee of the Applicants.

30. **THIS COURT ORDERS** that the CRO shall not, as a result of the performance of its obligations and duties in accordance with the terms of the CRO Engagement Letter, be deemed to be in Possession of (i) any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to the Environmental Legislation, (ii) any of the Property, the administration and control of which is subject to the provisions of the Cannabis Legislation; however, if the CRO is nevertheless later found to be in Possession of any Property, then the CRO shall be entitled to the benefits and protections in relation to the Applicants and such Property as are provided to a monitor under Section 11.8(3) of the CCAA, provided however that nothing herein shall exempt the CRO from any duty to report or make disclosure imposed by applicable Environmental Legislation or Cannabis Legislation.

31. **THIS COURT ORDERS** that the CRO shall not have any liability with respect to any losses, claims, damages or liabilities, of any nature or kind, to any Person from and after the date of this Order except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct on the part of the CRO.

32. **THIS COURT ORDERS** that no action or other proceeding shall be commenced directly, or by way of counterclaim, third party claim or otherwise, against or in respect of the CRO, and all rights and remedies of any Person against or in respect of them are hereby stayed and suspended, except with the written consent of the CRO or with leave of this Court on notice

to the Applicant, the Monitor and the CRO. Notice of any such motion seeking leave of this Court shall be served upon the Applicants, the Monitor and the CRO at least seven (7) days prior to the return date of any such motion for leave.

33. **THIS COURT ORDERS** that the obligations of the Applicant to the CRO pursuant to the CRO Engagement Letter shall be treated as unaffected and may not be compromised in any Plan or proposal filed under *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") in respect of the Applicants.

**ADMINISTRATION CHARGE**

34. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, the CRO and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and in the case of the CRO in accordance with the CRO Engagement Letter, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, the CRO, and counsel for the Applicants on a bi-weekly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, the CRO and counsel to the Applicants, retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

35. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

36. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, the CRO and counsel to the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at their standard rates and charges, and in the case of the CRO in accordance with the CRO Engagement Letter, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 40 and 42 hereof.

**INTERCOMPANY FINANCING**

37. **THIS COURT ORDERS** that CannTrust Holdings Inc. (the "**Intercompany Lender**") is authorized to loan to each of CannTrust Inc., Elmcliffe Investments Inc. and CTI Holdings (Osoyoos) Inc. (each, an "**Intercompany Borrower**"), and each Intercompany Borrower is authorized to borrow, repay and re-borrow, such amounts from time to time as the Intercompany Borrower, with the approval of the Monitor, considers necessary or desirable on a revolving basis to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order (the "**Intercompany Advances**") up to an aggregate of $4.2 million (subject to increase in accordance with further Order of this Court), on terms consistent with existing arrangements or past practice or otherwise approved by the Monitor.

38. **THIS COURT ORDERS** that the Intercompany Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Intercompany Charge**") on all of the Property of each Intercompany Borrower, as security for the Intercompany Advances made to such Intercompany Borrower, which Intercompany Charge shall not secure an obligation that exists before the Initial Filing Date. The Intercompany Charge shall have the priority set out in paragraphs 40 and 42 hereof.

39. **THIS COURT ORDERS AND DECLARES** that the Intercompany Lender shall be treated as unaffected and may not be compromised in any Plan or any proposal filed under the BIA in respect of the Applicants, with respect to any Intercompany Advances made on or after the date of this Order.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

40. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Directors' Charge and the Intercompany Charge (the "**Charges**"), as among them with respect to any Property to which they apply, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – Directors' Charge (to the maximum amount of $550,000);

Third – Intercompany Charge.

41. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

42. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

43. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtains the prior written consent of the Monitor and the beneficiaries of the Charges, or further Order of this Court.

44. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Applicants pursuant to this Order and the granting of the Charges do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

45. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

**RELIEF FROM REPORTING OBLIGATIONS**

46. **THIS COURT ORDERS** that the decision by the Applicants to incur no further expenses in relation to any filings, 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, including, without limitation, the *Securities Act* (Ontario) and comparable statutes enacted by other provinces of Canada, the *Securities Act of 1933* (United States) and the *Securities Exchange Act of 1934* (United States) and comparable statutes enacted by individual states of the United States, the TSX Company Manual and other rules, regulations and policies of the Toronto Stock Exchange, and the NYSE Listed Company Manual and other rules, regulations and policies of the New York Stock Exchange (collectively, the "**Securities Provisions**"), is hereby authorized, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of the Applicants failing to make any Securities Filings required by the Securities Provisions.

47. **THIS COURT ORDERS** that none of the directors, officers, employees, and other representatives of the Applicants, the Monitor (and its directors, officers, employees and representatives), nor the CRO shall have any personal liability for any failure by the Applicants to make any Securities Filings required by the Securities Provisions.

**SERVICE AND NOTICE**

48. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in the Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, or cause to be sent, in the prescribed manner or by electronic message to the e-mail address as last shown on the records of the Applicants, a notice to every known creditor who has a claim against the Applicants of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

49. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: http://www.ey.com/ca/canntrust.

50. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

**GENERAL**

51. **THIS COURT ORDERS** that the balance of the relief sought by the Applicants in the Notice of Application dated March 31, 2020 be and is hereby reserved to be heard by this Court on April 9, 2020, or such other date as determined by this Court.

52. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

53. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

54. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory body or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

55. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that CannTrust Holdings Inc. is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in the United States and any other jurisdiction outside Canada.

56. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

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 CANNTRUST HOLDINGS INC. ET AL.

Court File No: CV-20-00638930-00CL

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

Proceeding commenced at Toronto

**INITIAL ORDER**

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# TAB 7

**COURT FILE NO.:** CV-09-8241-OOCL
**DATE:** 20091013

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

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

2009 CanLII 55114 (ON SC)

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
*Alan Merskey* for the Special Committee of the Board of Directors
*David Byers and Maria Konyukhova* for the Proposed Monitor, FTI Consulting Canada Inc.
*Benjamin Zarnett and Robert Chadwick* for Ad Hoc Committee of Noteholders
*Edmond Lamek* for the Asper Family
*Peter H. Griffin and Peter J. Osborne* for the Management Directors and Royal Bank of Canada
*Hilary Clarke* for Bank of Nova Scotia,
*Steve Weisz* for CIT Business Credit Canada Inc.

## REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

[2] The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

[3] No one appearing opposed the relief requested.

Backround Facts

[4] Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

[5] As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

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[6] Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

[7] Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

[8] The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

[9] Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

[10] In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six

[2] R.S.C. 1985, c.C.44.

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occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

[11] Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

[12] The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

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[13] On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

[14] On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

[15] Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

[16] The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to

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fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

[17] In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

[18] Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

[19] The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a

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support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

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[20] CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

[21] The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

[22] The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

[23] I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having

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reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

[24] This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

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(a) Threshhold Issues

[25] Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Re Stelco*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

[26] Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

[28] The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

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[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

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

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

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> (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.
>
> (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.

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

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$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

[34] Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

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is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

[36] For all of these reasons, I was prepared to approve the DIP facility and charge.

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(d) Administration Charge

[37] While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[38] I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

[39] As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

[40] Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

[41] The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that

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> the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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[42] Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

[44] The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

[45] Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

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> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[46] I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[47] The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

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believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

[49] Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

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[10] (2003), 39 C.B.R. (4th) 216.

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orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

[52] In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

[53] The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

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[54] CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

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Other

[55] The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

[56] Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

[57] Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

[58] This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

[59] I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

[60] Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Pepall J.

**Released:** October 13, 2009

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# TAB 8

**CITATION:** Canwest Publishing Inc., 2010 ONSC 222
**COURT FILE NO.:** CV-10-8533-00CL
**DATE:** 20100118

**ONTARIO**

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

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

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COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
*Mario Forte* for the Special Committee of the Board of Directors
*Andrew Kent and Hilary Clarke* for the Administrative Agent of the Senior Secured Lenders' Syndicate
*Peter Griffin* for the Management Directors
*Robin B. Schwill and Natalie Renner* for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
*David Byers and Maria Konyukhova* for the proposed Monitor, FTI Consulting Canada Inc.

**PEPALL J.**

## REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

*Companies' Creditors Arrangement Act*[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

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[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

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[1] R.S.C. 1985, c. C. 36, as amended.

[2] On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

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principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year

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ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

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(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75

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[3] Subject to certain assumptions and qualifications.

[4] Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

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Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

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[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

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LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

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[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

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proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

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Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

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[5] 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6]and *Re Lehndorff General Partners Ltd*[7].

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

[6] 2009 CarswellOnt 6184 at para. 29 ( S.C.J.).

[7] (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

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addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

[8] 1999 CarswellOnt 4673 (S.C.J.).

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secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

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[9] Ibid at para. 16.

[10] (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

[11] Ibid at para. 34.

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(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

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[12] Supra, note 7 at paras. 31-35.

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consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

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[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

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[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

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counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

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[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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[13] This exception also applies to the other charges granted.

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

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

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of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

[14] Supra note 7 at paras. 44-48.

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restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

[15] Supra note 7.

[16] [2009] O.J. No. 3344 (S.C.J.).

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during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an

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[17] R.S.O. 1990, c. C.43, as amended.

[18] [2002] 2 S.C.R. 522.

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order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[65] In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

[19] Supra, note 7 at para. 52.

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any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

**Released:** January 18, 2010

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**CITATION:** CanWest Global Communications Corp., 2010 ONSC 222
**COURT FILE NO.:** CV-10-8533-00CL
**DATE:** 20100118

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**ONTARIO**

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

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

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**REASONS FOR DECISION**

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Pepall J.

**Released:** January 18, 2010

# TAB 9

**CITATION:** Re Chalice Brands Ltd., 2023 ONSC 3174
**COURT FILE NO.:** CV-23-00699872-00CL
**DATE:** 20230526

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**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 CHALICE BRANDS LTD.

**BEFORE:** Kimmel J.

**COUNSEL:** *Shawn Irving, / Marc Wasserman, / Kathryn Esaw, / Fabian Suárez-Amaya*, for Chalice Brands Ltd.

*Jeremy Bornstein*, Counsel for KSV Restructuring Inc., the Proposed Monitor

**HEARD:** May 23, 2023

**ENDORSEMENT**
**(CCAA- INITIAL ORDER)**

[1] Chalice Brands Ltd. brings this application for an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Having been satisfied that the preconditions were met, I signed the Initial Order on May 23, 2023 with a brief endorsement and reasons to follow. These are my reasons.

**Background – The Chalice Group and its Current Liquidity Crisis**

[2] Chalice Brands Ltd. ("Chalice" or the "Applicant") is the ultimate parent company of the Chalice Group, a vertically integrated group of cannabis companies operating primarily in Oregon's regulated adult-use market. The Chalice Group operates a farm-to-table cannabis business. They grow, process, distribute and sell their own cannabis and cannabis products.

[3] Chalice is incorporated and headquartered in Ontario.

[4] The Ontario Securities Commission issued a cease-trade order on May 6, 2022 ("CTO") after Chalice missed its 2021 annual filing deadline. Prior to the CTO, Chalice's common shares traded on the Canadian Securities Exchange ("CSE") as well as over the counter on the OTCQX®.

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[5] Chalice's assets are comprised of cash and its direct and indirect ownership of the remaining entities in the Chalice Group. Chalice has five bank accounts in Canada. Chalice is the 100 percent owner of Greenpoint Holdings Inc. ("Greenpoint Holdings"), a Delaware company. Greenpoint Holdings is the 100 percent owner of each operating company in the Chalice Group.

[6] All entities in the Chalice Group, other than Chalice, are United States based direct and indirect subsidiaries of Chalice with no assets in Canada (the "Non-Filing Affiliates"). Most of the operating entities are in Oregon.

[7] The Chalice Group has twenty-one active bank accounts in the United States. The Chalice Group leases certain properties in Oregon, including its 16 retail stores, 3 production facilities and its cultivation location. Chalice has guaranteed some of those leases.

[8] The Chalice Group does not own any real property in Canada or the United States.

[9] The Chalice Group holds 32 regulatory licenses in Oregon related to producing, processing, wholesaling and retailing cannabis and cannabis products. While all these licenses are in good standing, four are on temporary closure status under the licensing regime. In Nevada, the Chalice Group holds four licenses related to cultivation and product manufacturing of medical marijuana. All four licenses are in good standing but are currently inactive.

[10] The Chalice Group has 134 full-time employees and 37 part-time employees, all of whom work in the United States. All employees of the Chalice Group are employed and paid by one of Chalice's subsidiaries, Greenpoint Workforce, Inc. ("Greenpoint Workforce").

[11] Employee retention tax credits are an important asset of the Chalice Group. In 2020, the U.S. Congress passed the *Coronavirus Aid, Relief, and Economic Security (CARES) Act* which, among other things, created a new employee retention tax credit ("ERTCs"). The ERTCs are a refundable tax credit created to encourage employers to keep their employees on the payroll during the months in 2020 affected by the pandemic.

[12] To date, Greenpoint Workforce has received $2,700,000 worth of ERTCs. Greenpoint Workforce anticipates receiving another $2,300,000 of ERTCs in the near future.

[13] The Chalice Group's most recent financial statements are its unaudited, consolidated financial statements as at December 31, 2021. These statements disclosed that its liabilities exceeded its assets and that it had a net loss of almost $17 million. The evidentiary record indicates that its financial situation has deteriorated since 2021.

[14] The current financial circumstances of the Chalice Group appear to be the result of its premature pursuit of an expansion plan. Anticipating that cannabis would be legalized on a Federal level in the United States, in 2021, the Chalice Group undertook an acquisition-based strategy, taking on debt to acquire retail stores and production facilities in Oregon to support its vertical integration. However, Federal deregulation did not occur.

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[15] In the meantime, capital investments in the cannabis industry have become more difficult to secure and Chalice's inability to finalize its 2021 (and subsequently, its 2022) audited financial statements and the subsisting CTO prevent the Chalice Group from raising funds through issuing securities. This, combined with supply chain issues, inflation, oversupply in the retail cannabis market driving retail prices down and detrimental tax treatment of controlled substances in the United States have reduced the Chalice Group's gross margins, profitability and cash flows.

[16] Chalice's primary assets are inter-company receivables from the Non-Filing Affiliates. Its principal liabilities consist of outstanding debt obligations under three notes and two series of unsecured debentures with an aggregate outstanding principal of $10,259,297 (USD). Four of its subsidiaries also have funded debt obligations of $8,864,616 (USD). Chalice and certain of the Non-Filing Affiliates are alleged to be, or are, in default under their respective debt obligations.

[17] These circumstances have led to the urgent liquidity crisis that the Chalice Group now faces. Chalice and its operating subsidiaries are unable to satisfy their obligations as they come due. The Chalice Group cannot pay its trade creditors, its landlords or its employees. At present, the Chalice Group owes approximately $6 million in trade payables, including over $1 million in missed rent.

[18] Of immediate concern is that:

a. One of the lenders has threatened to move forward with nonjudicial foreclosure on the collateral and has written directly to the Oregon's cannabis regulator (the "OLCC") advising that they were purportedly taking steps to foreclose on assets of the Chalice Group and seeking approval for temporary authority to operate five of the Chalice Group's cannabis licenses; and

b. Chalice's subsidiaries have also fallen behind on making lease payments to certain of their landlords, which may entitle the landlords to declare a default under the lease and lock them out. This, in turn, would put the Chalice Group's store-based cannabis licenses at risk since, in Oregon, cannabis licenses are specific to a particular retail location. Therefore, the licenses risk being suspended or terminated if the retail location ceases operating.

[19] Chalice and its subsidiaries (the Non-Filing Affiliates) need "breathing space" from their creditors to pursue a going-concern sale. Chalice seeks to extend the benefit of the *CCAA* stay in this proceeding to its Non-Filing Affiliates, all of which are integral to the operations of the Chalice Group. If proceedings were taken against the Non-Filing Affiliates, it would be highly detrimental to the Chalice Group's ability to achieve a going-concern solution.

[20] Chalice has prepared a Cash Flow Forecast for the period from the week ending May 22, 2023 to the week ending August 18, 2023 (the "Period"). It indicates that Chalice requires $1,030,000 cash flow to meet anticipated obligations during the Period. Chalice's ability to do so is based on it having already received, or receiving, partial repayments of intercompany loans owing to it using proceeds from the recent ERTCs received by Greenpoint Workforce. Based on

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this Cash Flow Forecast, Chalice is not expecting to require a debtor-in-possession facility. Chalice intends to use these funds, in addition to certain other anticipated receipts, to fund Chalice's operations during this *CCAA* proceeding.

[21] KSV Restructuring Inc. is the proposed monitor (the "Proposed Monitor" or "KSV"). The Proposed Monitor's pre-filing report reflects its understanding that, aside from Chalice, Greenpoint Workforce's only other creditors are three bridge lenders (the "Bridge Lenders") that advanced Greenpoint Workforce approximately $831,250 in aggregate loans (together the "Bridge Loans") to fund working capital requirements until it received the ERTCs from the Internal Revenue Service. The Proposed Monitor further reports, based on discussions with Scott Secord, the Chief Restructuring Officer ("CRO"), that the Chalice Group intends to repay the Bridge Lenders during the *CCAA* proceeding. The receipts in the Cash Flow Forecast represent the repayment of the intercompany debt from the anticipated receipt of the second round of ERTC payments less the repayment of the Bridge Loans.

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**The Planned Oregon Receivership – the Intended Co-ordinated Going Concern Solution**

[22] Since cannabis has not been legalized Federally in the United States, the Chalice Group is unable to seek protection under the U.S. Bankruptcy Code, irrespective of its compliance with state cannabis laws. As such, concurrently with the filing of this Application, proceedings were commenced in Oregon to place certain Non-Filing Affiliates which are formed or have assets in Oregon (the "Oregon Subsidiaries") into state receivership (the "Oregon Receivership"). Should the Oregon Subsidiaries be placed in receivership, there shall be an automatic stay of proceedings against those entities and their property in Oregon; however, there was no such stay as of May 23, 2023 when the Initial *CCAA* Order was granted.

[23] Chalice seeks to have the *CCAA* stay of proceedings extended to all the Non-Filing Affiliates, with a carve-out for the Oregon receivership proceedings and the potential for a parallel stay in that jurisdiction. Subsidiaries in other states, such as Delaware, California and Nevada, will remain subject to the *CCAA* proceedings.

[24] It is intended that Chalice, together with the CRO and the proposed Monitor, will work in a coordinated manner with the receiver appointed in Oregon (the "Oregon Receiver") to conduct a sales process to achieve a going concern solution.

**Issues**

[25] The following issues raised by the relief sought are whether:

a. The Applicant meets the criteria for *CCAA* protection;
b. The *CCAA* stay should be extended to the Non-Filing Affiliates; and
c. The Administration Charge should be granted.

**Analysis**

*Is the Applicant Eligible for CCAA Protection?*

[26] Section 9(1) of the *CCAA* provides that an application under the *CCAA* may be made to the court that has jurisdiction in the province where the debtor company has its "head office or chief place of business." The *CCAA* applies to a "debtor company" or "affiliated debtor companies" where the total claims against the debtor or its affiliates exceeds $5 million.

[27] Chalice is incorporated in Ontario, with assets in Ontario (its bank accounts and shareholdings) and with total claims against it exceeding $5 million.

[28] Chalice is in default under various secured debt obligations and does not have sufficient liquidity to make payments on unsecured debentures when the next interest payments come due on June 30, 2023. Given the CTO and the lack of interest in the capital markets for cannabis companies, Chalice's only immediate sources of funds are its subsidiaries. Those subsidiaries are struggling to pay retail landlords and employees.

[29] Chalice has established that it is unable to meet its obligations as they become due and that it has ceased paying its current obligations in the ordinary course of business. It is an "insolvent person" within the meaning of s. 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and under the expanded concept of insolvency accepted by this court in *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.), leave to appeal to ONCA ref'd, 2004 CarswellOnt 2936, leave to appeal to SCC ref'd, [2004] S.C.C.A. No. 336.

[30] Chalice fits within the definition of a debtor company under s. 2 of the *CCAA* and is eligible to make this application under the *CCAA*.

[31] Under s. 11.7 of the *CCAA*, when an Initial Order is made in respect of a *CCAA* debtor company, the court shall at the same time appoint a monitor. Chalice proposes to have KSV appointed as the monitor. KSV has consented to act as such.

[32] KSV is a "trustee" within the meaning of subsection 2(1) of the *BIA*, it is established and qualified and has consented to act as monitor. KSV's involvement as the court-appointed monitor will lend stability and assurance to the Chalice Group's stakeholders. KSV is not subject to any of the restrictions set out in s. 11.7(2) of the *CCAA*.

*Should the Stay of Proceedings be Extended to the Non-Filing Affiliates?*

[33] Section 11.02(1) of the *CCAA* permits this court to grant an initial stay of up to 10 days on an application for an initial order, provided the applicant establishes that such a stay is appropriate and that the applicant has acted with due diligence and in good faith (s. 11.02(3)(a-b)). The primary purpose of the *CCAA* stay is to maintain the *status quo* for a period while the debtor company consults with its stakeholders with a view to continuing its operations for the benefit of its creditors.

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[34] I am satisfied that the Applicant requires a stay of proceedings in order to provide it with the breathing room necessary to obtain the required funding to continue operations while pursuing various restructuring options.

[35] Chalice seeks to extend the stay of proceedings to the Non-Filing Affiliates. The court's authority to grant such an order is derived from the broad jurisdiction under s. 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. The court has, on other occasions, extended the initial stay of proceedings to non-applicants, including foreign non-applicant affiliates. See for example, *Re Tamerlane Ventures Inc.*, 2013 ONSC 5461, 6 C.B.R. (6th) 328, at para. 2; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Re Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422, at para. 42; *In the matter of a plan of compromise or arrangement of Lydian Group*, Court File No. CV-19-00633392-00CL (SCJ: Toronto, Commercial List) Order of Morawetz J. (Initial Order) dated December 23, 2019, at paras. 2, 10.

[36] Further, in proceedings under Part IV of the *CCAA*, this court routinely extends a *CCAA* stay over non-applicants subject to foreign main insolvency proceedings. See for example, *In the matter of Hollander Sleep Products, LLC*, CV-19-620484-00CL (SCJ: Toronto, Commercial List) Order of Hainey J. (Initial Recognition Order) dated May 23, 2019, at para. 4; *In the matter of Brooks Brothers Group, Inc.*, Court File No. CV-20-00647463-00CL (SCJ: Toronto, Commercial List) Order of Hainey J. (Initial Recognition Order) dated September 14, 2020, at para. 4.

[37] It has been held to be just and reasonable to extend a stay of proceedings to non-applicant affiliates when:

a. The applicant and its subsidiaries are "highly integrated … and indispensable to the Applicants' business and restructuring… Failure to [extend the stay] would undermine the intent of the stay." See *Re Imperial Tobacco Canada Limited, et al*, 2019 ONSC 1684, 68 C.B.R. (6th) 322, at para. 12);
b. Without the benefit of a stay, the Non-Filing Affiliates would "run out of liquidity before the time that would reasonably be required to implement a restructuring." See *Re Urbancorp Toronto Management Inc.*, 2016 ONSC 3288, 37 C.B.R. (6th) 44, at para. 44.

[38] The Proposed Monitor explains that the extension of the stay over the Non-Filing Affiliates is critical to the stabilization of the Chalice Group's operation and ensuring a co-ordinated restructuring process, for a variety of reasons, including:

a. The vertically integrated nature of the Chalice Group's business, in which most key decision making is done through the Canadian parent company;
b. Greenpoint Workforce acts as the only employer within the Chalice Group and funds payroll;
c. The Non-Filing Affiliates hold the cannabis licences, operate the cultivation and production facilities and operate the sixteen retail stores;
d. Certain creditor and landlord-driven enforcement action is being pursued against certain Non-Filing Affiliates that may put the licences at risk; and

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e. If enforcement steps are taken against the Non-Filing Affiliates, it is expected to materially destroy value and negatively impact a going-concern sale of the Chalice Group's assets or business.

[39] These are among the factors described in *Re JTI-Macdonald Corp.*, 2019 ONSC 1625 at para. 15, as well as factors identified in the other case law cited above, that exist in this case in support of the extension of the stay to the Non-Filing Affiliates. The Applicant summarizes these factors in their factum as follows:

a. The business and operations of the Non-Filing Affiliates are significantly intertwined with those of the Applicant. The Chalice Group operates as a vertically integrated business and most key decision-making is done through the Applicant.
b. Not extending the stay to the Non-Filing Affiliates could jeopardize the success of a potential going concern sale of the business. Creditors are already pursuing enforcement action against the Non-Filing Affiliates that may put the Chalice Group's cannabis licenses at risk.
c. Failure of the restructuring would be more detrimental than extending the stay to the Non-Filing Affiliates. Enforcement action against the Non-Filing Affiliates, in Canada or elsewhere, would be detrimental to the Applicant's efforts to pursue a going concern sale of the Chalice Group and would undermine a process that would otherwise benefit the stakeholders of the Chalice Group as a whole.
d. The Non-Filing Affiliates will run out of liquidity before this proceeding can be completed. The Non-Filing Affiliates do not have enough cash to maintain regular operations, and cannot even independently fund the proposed Oregon Receivership.
e. The balance of convenience favours extending the stay. Extending the *CCAA* stay, concurrent with the stay of proceedings pursuant to the Oregon Receivership, will protect the Applicant's creditors by protecting the investment in its subsidiaries, as well as the stakeholders including employees, suppliers, customers, and lenders.
f. The Proposed Monitor supports extending the stay to the Non-Filing Affiliates.

[40] Federal laws in the United States have precluded Chalice from pursuing a coordinated U.S. *Bankruptcy Code* proceeding. Any stay granted pursuant to the Oregon Receivership may not have effect beyond Oregon. In the circumstances, where protection under the U.S. *Bankruptcy Code* is not available to the Chalice Group, extending the *CCAA* stay to the Non-Filing Affiliates is the best option to achieve the breathing space necessary to preserve the value of the Chalice Group while efforts are co-ordinated between the Monitor, the CRO and the Oregon Receiver in the Oregon Receivership (if granted) for a going concern transaction.

[41] No authority was cited for the precise situation in this case, of the *CCAA* stay being extended over Non-Filing Applicants that include some entities over which it is expected that a stay may be granted in another jurisdiction (the Oregon Receivership). However, it is not expected to be a conflicting or competing stay, but rather one that will be complementary and utilized in the co-ordinated efforts of the Monitor, the CRO and the Oregon Receiver.

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[42] The commencement of a *CCAA* proceeding to address the significant issues the Chalice Group faces represents the only realistic path forward at this time. An inability to restructure in a coordinated, court-supervised manner would be potentially disastrous for many stakeholders of the Chalice Group, including the employees and creditors of Chalice and its Non-Filing Affiliates.

*Should the Administration Charge be Granted?*

[43] The proposed Initial Order creates a first-ranking Administration Charge of $400,000 CAD over Chalice's assets to secure the fees and expenses disbursements of the Proposed Monitor and its counsel and of Chalice's counsel. The services of these advisors are critical to the Applicant's ability to restructure. The Chalice Group requires the expertise of these professionals who will have distinct roles in the cross-border restructuring efforts of the Chalice Group. The Proposed Monitor has reviewed the Administration Charge and considers it to be reasonable and appropriate in the circumstances given the anticipated services to be provided by the professionals involved.

[44] The Cash Flow Forecast anticipates professional fees payable as of June 2, 2023 of $300,000, with a similar monthly amount payable in early July and August. The initial anticipated payment of professional fees reflects the fact that pre-filing efforts have been undertaken to organize a co-ordinated restructuring plan which have brought the Applicants to the point they are in the current proceedings. The court expects that the payment of any professional fees will be subject to the usual review requirements in *CCAA* proceedings.

[45] Section 11.52 of the *CCAA* gives this court the jurisdiction to grant a charge for the fees and expenses of financial, legal and other advisors or experts. Such charge can rank in priority to the claims of existing secured creditors. I am satisfied that the Administration Charge is necessary in the circumstances, is appropriately sized given the nature and complexity of the proceeding and should be granted.

**The Initial Order and the Comeback Hearing**

[46] Chalice has worked with its advisors and the Proposed Monitor to limit the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its businesses within the initial stay period. I am satisfied that the requested relief is necessary for the immediate stabilization of Chalice's businesses and to protect it and the interests of its various stakeholders. Additional authorizations must be addressed at the comeback hearing.

[47] For the foregoing reasons the Initial Order was granted on May 23, 2023.

[48] The "come back" hearing shall take place before me on June 1, 2023 at 2:00 p.m. on Zoom.

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Kimmel J.

**Date:** May 26, 2023

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# TAB 10

CANADA

CONSOLIDATION

CODIFICATION

# Companies' Creditors Arrangement Act

# Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to February 20, 2024

Last amended on April 27, 2023

À jour au 20 février 2024

Dernière modification le 27 avril 2023

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### Form of applications

**10 (1)** Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

### Documents that must accompany initial application

**(2)** An initial application must be accompanied by

**(a)** a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

**(b)** a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

**(c)** copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

### Publication ban

**(3)** The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

### 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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

### Relief reasonably necessary

**11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

### Forme des demandes

**10 (1)** Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

### Documents accompagnant la demande initiale

**(2)** La demande initiale doit être accompagnée :

**a)** d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

**b)** d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

**c)** d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

### Interdiction de mettre l'état à la disposition du public

**(3)** Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

### Pouvoir général du tribunal

**11** Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

### Redressements normalement nécessaires

**11.001** L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

### Rights of suppliers

**11.01** No order made under section 11 or 11.02 has the effect of

**(a)** prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

**(b)** requiring the further advance of money or credit.

2005, c. 47, s. 128.

### Droits des fournisseurs

**11.01** L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

**a)** d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

**b)** d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

### Stays, etc. — initial application

**11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

**(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

**(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

**(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

### Suspension : demande initiale

**11.02 (1)** Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

**a)** suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

**b)** surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

**c)** interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

### 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

### Suspension : demandes autres qu'initiales

**(2)** Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

**a)** suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

**b)** surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

**(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**c)** interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

**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.

**Preuve**

**(3)** Le tribunal ne rend l'ordonnance que si :

**a)** le demandeur le convainc que la mesure est opportune;

**b)** dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

**Restriction**

**(4)** Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

**Restriction**

**(4)** L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

**Stays — directors**

**11.03 (1)** An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

**Suspension — administrateurs**

**11.03 (1)** L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

**Exception**

**(2)** Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

**Exclusion**

**(2)** La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

**Persons deemed to be directors**

**(3)** If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

**Présomption : administrateurs**

**(3)** Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

**Persons obligated under letter of credit or guarantee**

**11.04** No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

**Suspension — lettres de crédit ou garanties**

**11.04** L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la

establishes a *provincial pension plan* as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 128; 2009, c. 33, s. 28.

province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 128; 2009, ch. 33, art. 28.

### Meaning of *regulatory body*

**11.1 (1)** In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

### Définition de *organisme administratif*

**11.1 (1)** Au présent article, ***organisme administratif*** s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

### Regulatory bodies — order under section 11.02

**(2)** Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

### Organisme administratif — ordonnance rendue en vertu de l'article 11.02

**(2)** Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

### Exception

**(3)** On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

**(a)** a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

**(b)** it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

### Exception

**(3)** Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

**a)** il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

**b)** l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

### Declaration — enforcement of a payment

**(4)** If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may,

### Déclaration : organisme agissant à titre de créancier

**(4)** En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à

is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

**Filling vacancy**

**(2)** The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

**Security or charge relating to director's indemnification**

**11.51 (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

**Priority**

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

**Restriction — indemnification insurance**

**(3)** The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

**Negligence, misconduct or fault**

**(4)** The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

**Court may order security or charge to cover certain costs**

**11.52 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

**Vacance**

**(2)** Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

**Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants**

**11.51 (1)** Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

**Priorité**

**(2)** Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

**Restriction — assurance**

**(3)** Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

**Négligence, inconduite ou faute**

**(4)** Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

**Biens grevés d'une charge ou sûreté pour couvrir certains frais**

**11.52 (1)** Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

**(a)** the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

**(b)** any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

**(c)** any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

**Priority**

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

### *Bankruptcy and Insolvency Act* matters

**11.6** Notwithstanding the *Bankruptcy and Insolvency Act*,

**(a)** proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

**(b)** an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

**(i)** the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

**(ii)** the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

### Court to appoint monitor

**11.7 (1)** When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

**a)** les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

**b)** ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

**c)** ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

**Priorité**

**(2)** Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

### Lien avec la *Loi sur la faillite et l'insolvabilité*

**11.6** Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

**a)** les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

**b)** le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

**(i)** de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

**(ii)** du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

### Nomination du contrôleur

**11.7 (1)** Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

# TAB 11

**CITATION:** Danier Leather Inc. (Re), 2016 ONSC 1044
**COURT FILE NO.:** 31-CL-2084381
**DATE:** 20160210

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**IN THE MATTER OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC.**

**BEFORE:** Penny J.

**COUNSEL:** *Jay Swartz* and *Natalie Renner* for Danier

*Sean Zweig* for the Proposal Trustee

*Harvey Chaiton* for the Directors and Officers

*Jeffrey Levine* for GA Retail Canada

*David Bish* for Cadillac Fairview

*Linda Galessiere* for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge

*Clifton Prophet* for CIBC

**HEARD:** February 8, 2016

## ENDORSEMENT

### The Motion

[1] On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

[2] Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to :

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

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(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

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**Background**

[3] Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

[4] Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

[5] In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

[6] As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

[7] Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow

negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

[8] Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

**The Stalking Horse Agreement**

[9] The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

[10] On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

[11] The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

[12] The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

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[13] The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

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**The SISP**

[14] Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

[15] Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

[16] Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

[17] The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

[18] The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

[19] Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

[20] The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies*, 2012 ONSC 1750 at para. 7 [Commercial List].

[21] The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 22-26 (S.C.J.).

[22] A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

[23] In *Re Brainhunter*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

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*Re Brainhunter*, 2009 CarswellOnt 8207 at paras. 13-17 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 at para. 49 (S.C.J. [Commercial List]).

[24] While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60 at para 24; *Re Indalex Ltd.*, [2013] 1 S.C.R. 271 at paras. 50-51.

[25] Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Re Mustang GP Ltd.*, 2015 CarswellOnt 16398 at paras. 37-38 (S.C.J.).

[26] These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

[27] The SISP is warranted at this time for a number of reasons.

[28] First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

[29] Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

[30] Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

[31] Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

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(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

[32] There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

[33] Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

[34] Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[35] In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

[36] The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

[37] The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

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[38] The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

[39] A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

[40] Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

**The Break Fee**

[41] Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

[42] Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Re Nortel Networks Corp.*, [2009] O.J. No. 4293 at paras. 12 and 26 (S.C.J. [Commercial List]); *Re W.C. Wood Corp. Ltd.*, [2009] O.J. No. 4808 at para. 3 (S.C.J. [Commercial List], where a 4% break fee was approved.

[43] The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

[44] In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

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(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

[45] I find the break fee to be reasonable and appropriate in the circumstances.

**Financial Advisor Success Fee and Charge**

[46] Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

[47] Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

*Re Sino-Forest Corp.*, 2012 ONSC 2063 at paras. 46-47 [Commercial List]; *Re Colossus Minerals Inc.*,*supra*.

[48] The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

[49] The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

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[50] In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

[51] Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

[52] Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

[53] Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

[54] A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

**Administration Charge**

[55] In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

[56] Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

[57] Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.).

[58] This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

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**D&O Charge**

[59] The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

[60] Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

[61] Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

[62] Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

[63] The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

[64] The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

[65] In *Colossus Minerals* and *Mustang, supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

[66] I approve the D&O Charge for the following reasons.

[67] The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

[68] The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

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[69] The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

[70] The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

[71] Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

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**Key Employee Retention Plan and Charge**

[72] Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

[73] Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

[74] Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

[75] Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Re Nortel Networks Corp. supra.*

[76] In *Re Grant Forest Products Inc.*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

*Re Grant Forest Products Inc.*, [2009] O.J. No. 3344 at paras. 8-22 (S.C.J. [Commercial List]).

[77] While *Re Grant Forest Products Inc*. involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

[78] The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

**Sealing Order**

[79] There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

[80] Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

[81] In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

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(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 at para. 53 (S.C.C.).

[82] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, *supra*.

[83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

[84] The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

[85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

[86] As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Penny J.

**Date:** February 10, 2016

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# TAB 12

**CITATION:** Fire & Flower Holdings Corp., et al., 2023 ONSC 4048
**COURT FILE NO.:** CV-23-00700581-00CL
**DATE:** 20230625

**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 ARRANGEMNT OF FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC., 13318184 CANADA INC., 11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER HOLDINGS CORP., PINEAPLE EXPRESS DELIVERY INC., and HIFYRE INC, Applicants

**BEFORE:** Peter J. Osborne J.

**COUNSEL:** Dan Murdoch and Philip Yang, Counsel for the Applicants
Larry Ellis, Patrick Corney and Sam Massie, Counsel for Green Acre Capital LP
Christopher Yung, Counsel for Trevor Fencott
Haddon Murray, Counsel for Turning Point Brands (Canada) Inc.
Max Starnino, Counsel for David Gordon
Rebecca Kennedy, Counsel for the Monitor
Natalie Renner and Christian Lachance, Counsel for the DIP Lender
Michael A. Katzman, Counsel for commercial landlord 431-441 Spadina Investments Inc. and for commercial landlord Queen and Brock Holdings Inc.

**HEARD:** June 25, 2023

## SUPPLEMENTARY ENDORSEMENT

1. On June 21, 2023, I granted an order approving the SISP proposed by the Applicants and dismissing the cross-motion of Green Acre and I released a short Endorsement that stated reasons would follow. These are those reasons.

2. The background and context for this matter is set out in the endorsement of Steele, J. made when the Initial Order was granted, and in my Endorsements of June 15 and June 21, 2023. Defined terms in this Endorsement have the meaning given to them in the motion materials or my earlier Endorsements unless otherwise stated.

3. As I previously noted, I had adjourned the Applicants' motion on its original return date of June 15, 2023 until the hearing of this motion at the request of Green Acre. As further described below, I granted other relief on June 15, 2023 which was not opposed by any stakeholder. That included approval of a DIP Facility provided to the Applicants by ACT.

4. The adjournment of the SISP approval motion last week was granted at the request of Green Acre in part on the basis that it wished to cross-examine on the Trudel Affidavit relied upon by the Applicants. Green Acre subsequently advised that it did not intend to do so, and instead, as noted above, served its cross-motion materials.

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5. The proposed SISP was developed by the Applicants, with the assistance and oversight of the Court-appointed Monitor with a view to maximizing the value of the business assets of the Applicants. As is clear from the motion materials, the SISP was designed to be flexible and broad, 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; and/or b) an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Applicants or their Business.

6. The SISP includes a Stalking Horse Agreement between the Applicants and ACT. ACT is a significant shareholder of the Applicants, holding approximately 35.7% of the issued and outstanding common shares, in addition to warrants. It is also the senior secured creditor, and an unsecured creditor, and the DIP Lender.

7. The terms of the proposed SISP and the timeline for key milestones are set out in the Affidavit of Stephane Trudel sworn June 14, 2023 together with exhibits thereto, and the First Report of the Monitor and the Supplement to the First Report, all of which is relied upon by the Applicants.

8. Green Acre is a minority shareholder with approximately 5% of the equity. Counsel advised the Court at the hearing of this motion that over the course of last weekend, it also purchased certain debt of the Applicants (there is no evidence before me as to the quantum or size) with the result that it is now also a creditor.

9. All parties are in agreement about the dire circumstances in which the Applicants find themselves, and about the necessity for fundamental change. Very material operating losses have been incurred and continue. Similar challenges to those facing the Applicants are facing other operators in the retail cannabis sector as well.

10. At its core, the position of Green Acre is that the business of the Applicants is viable and needs to be recapitalized and restructured, but not sold. It submits that ACT, as senior secured creditor and also proposed stalking horse bidder, will obtain an unfair advantage if the relief sought is approved, and all potentially available options will not be available for consideration.

11. Accordingly, Green Acre opposes the motion of the Applicants for approval of the SISP, and submits that approval of a SISP should be adjourned *sine die*. It also now brings a cross-motion for approval of a new DIP facility to be approved to replace the DIP Facility approved last week in this proceeding, which would be paid out and cancelled. It relies on the Affidavit of Shawn Dym sworn June 19, 2023 together with exhibits thereto.

12. Green Acre submits in its cross-motion that ACT is "improperly using its influence over the Applicants to force the Applicants into a premature SISP" (Notice of Motion, para. 8). Green Acre submits that since ACT has advised that it will not advance further funds under the DIP until a SISP is commenced, and since a SISP is not in the best interest of the Applicants since it will not maximize stakeholder value, the DIP facility approved last week will not maximize stakeholder value and should be replaced.

13. Green Acre, recognizing the problem created if, as it requests, the proposed SISP is not approved, in that the DIP Facility already approved will not, according to its terms, provide the

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liquidity and funding required by the Applicants to carry on operations and fun restructuring costs, therefore proposes a replacement DIP facility.

14. Green Acre submits that the DIP Facility should be replaced with the alternative DIP facility now proposed by Green Acre on behalf of a newly formed syndicate of lenders which, it submits, "has no interest in the immediate sale of the Applicants". Instead, the syndicate "supports a restructuring of the business of the Applicants with a view to continuing operations as a going concern, or, if necessary, allowing the business of the Applicants to be marketed at a later date as an EBITDA-generating asset."

15. Green Acres submits that its alternative proposed DIP facility contains a more favourable interest rate (10% as opposed to 12%) and a lower exit fee ($300,000 as opposed to $400,000) and provides for funding of up to $9.8 million.

16. Fundamentally, I am not persuaded that the potential strategic options and alternatives that Green Acre submits that it wishes to pursue are precluded or foreclosed by the relief being sought by the Applicants.

17. On the contrary, 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. It is not as restrictive as is submitted by Green Acre and is specifically intended to solicit interest in, and opportunities for, the Applicants through a variety of different avenues or transaction structures. I do not accept the submission of Green Acre that the result will inevitably be a sale of the assets of the Applicants to the exclusion of all other alternatives. That may well be the result, but the SISP will canvass the market for all possible transactions and/or recapitalization alternatives.

18. The evidence in the Record supports this conclusion. These alternative structures may include a sale, or successive sales of the Property and/or the Business of the Applicants, in whole, or alternatively, in part. The alternative structures may also include an investment in, restructuring, recapitalization, and/or refinancing or other form of reorganization of the Applicants or their Business (Trudel Affidavit, para. 23).

19. The Court-appointed Monitor, in recommending approval of the SISP, confirmed in its First Report that all of these possible alternatives were available and would be available as part of the SISP, if approved (paragraph 22). The Monitor confirms that potential bidders may include local and international strategic and financial parties (paragraph 23).

20. There is no prohibition on any stakeholder, specifically including Green Acre, from participating in the process and submitting such proposal or proposals as it may see fit. As further described below, however, there is downside protection for the most economically affected stakeholders, in the form of the proposed stalking horse bid.

21. It is principally as a result of my conclusion that the proposed SISP does not prohibit or foreclose the exploration and development of alternative transactions, including but not limited to recapitalization transactions, that I also conclude that the concerns expressed by the Court in the principal authority relied upon by Green Acre, *Quest University Canada (Re)*, 2020 BCSC 318, do not assist Green Acre here.

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22. In that case, the Court was rightly concerned in the circumstances that the proposed SISP would likely foreclose other possible solutions that would better serve stakeholders, and that the imposition of an SISP at that time would be antithetical to the purposes and objectives of the CCAA, which is intended to afford financially troubled companies with the breathing room to address, within appropriate constraints, its financial difficulties (paras. 104 -109).

23. It is important to remember that no approval of a stalking horse transaction is being sought or granted on this motion. That may be for another day, depending upon the manner in which circumstances unfold. In particular, and at the risk of stating the obvious, the appropriateness, or lack thereof, of approval of the stalking horse transaction will depend on what other proposals are received as part of that SISP. If there is a superior bid, it may very well be that application of the *Soundair* Principles would militate in favour of approval of an alternative transaction.

24. The mechanics of the proposed SISP are fully set out in the motion materials and the First Report of the Monitor. The timelines and key dates are relatively concise, with Phase 1 Bid Deadline of July 13 and the possibility of a Phase 2, if other qualified Bids are received, to take place through August, 2023 with the proposed outside date for closing of September 15. The relatively tight timeline is necessitated by the dire financial circumstances facing the Applicants, and the availability of DIP funding to sustain operations and restructuring costs.

25. I am satisfied that the factors identified by the Court to be considered in a determination of whether to approve a sales process as contemplated by ss. 11 and 36 of the CCAA are met here: *Nortel Networks Corporation (Re),* 2009 CanLII at paras. 47 – 48.

26. 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: *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 ("*CCM*") at paras. 6-14.

27. 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. (See *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
b. the interests of all parties;
c. the efficacy and integrity of the process by which the party obtained offers; and
d. whether the working out of the process was unfair.

28. 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. (See *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20).

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29. I observe again that the transaction contemplated by the Stalking Horse Agreement is not being approved today. 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.

30. I recognize that the Stalking Horse Agreement includes a break fee. This is one of the terms to which Green Acre points in support of its argument that the relief sought by the Applicants is not in the best interest of stakeholders.

31. That break fee has been reduced from that originally proposed, as noted above and confirmed by the Affidavit of Philip Yang sworn June 18, 2023. At the original return of the motion, I had expressed some concern with respect to the appropriateness of the quantum of the break fee, particularly in circumstances here where the transaction being proposed was a credit bid, meaning that there was no new capital at risk. While I recognize that whether a proposed transaction is a credit bid is only one of several factors to be taken into account, it certainly is a factor to be considered.

32. I am satisfied that the quantum of the break fee, as revised, is both within a reasonable range as has been accepted previously by this Court (see, for example, *CCM* at paras. 12 -14), and is appropriate in the particular circumstances of this case.

33. The First Report of the Monitor is also of assistance with respect to the break fee. At paragraph 44, the Monitor confirms that it, together with its counsel, have reviewed all stalking horse processes valued at over $5 million and approved in CCAA and BIA proceedings between January, 2019 and April 2023 in order to assess the reasonableness of break fees approved by the Court.

34. The Monitor conducted the same analysis for all credit bids approved by the Courts and the First Report attaches as Appendix “B” a chart of observed fees which range from 0.9% to 3.4% and break fees ranging from 2.8% to 3.4%. The Monitor specifically supports the proposed break fee and opined that it is reasonable in the circumstances.

35. The SISP, including the Stalking Horse Agreement, is appropriate and is approved.

36. It follows that I am not persuaded that the replacement DIP facility proposed by Green Acre should be approved. It was proposed by Green Acre to fill the funding vacuum that would be created if, as that party requested, the SISP was not approved. That is, now, not the situation.

37. Moreover, the ACT DIP Facility already in place was approved less than one week ago, and that approval was not opposed by Green Acre. There may well be circumstances in which an existing DIP facility should be replaced, even so soon after it was approved, but in my view Courts should consider carefully when and in what circumstances that should occur. There is inevitable disruption and therefore increased uncertainty and instability created by substituting one DIP lender for another. While, as noted, there may very well be circumstances in which this disruption is warranted, instability and uncertainty are to be minimized to the greatest extent possible during a restructuring period.

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38. Green Acre relies on caselaw setting out the factors to be considered in approval of a DIP facility, and submits that those factors are equally applicable in deciding who (i.e., which proposed DIP lender, if there is more than one) ought to be the approved DIP lender, and on what terms the DIP financing ought to be provided (see, for example, *Great Basin Gold Ltd. Re*, 2012 BCSC 1459).

39. That those factors are generally applicable is not at the core of the dispute here. However, in my view, they do not militate, in the particular circumstances of this matter, in favour of replacing a DIP facility approved (without opposition from anyone, including but not limited to the party now proposing the alternative DIP) less than one week ago.

40. I am also cognizant of the cautionary note in *Great Basin* to the effect that courts must scrutinize interim financing proposals to ensure that they are reasonable and appropriate in the circumstances and that they do not inappropriately advantage one party over another to the detriment of that party and the stakeholders generally.

41. The slightly more favourable interest rate in the proposed alternative DIP does not, in my view justify the introduction of additional instability and uncertainty at this stage, less than a week after the DIP Facility was approved without opposition. I accept the submission of counsel for the Applicants that the dollar value of the interest savings to be realized by the alternative DIP is relatively minor - in the order of approximately $50,000.

42. The uncertainty and instability that would be increased by replacing the DIP lender is compounded by the fact that the proposed alternative DIP would extend the maturity date to December 15 although the cash flow forecasts in the record show that the Applicants would be out of funds to continue to be able to operate by October. Counsel for Green Acre submits that it is likely that the syndicate on whose behalf Green Acre advances its cross-motion would likely be prepared to invest additional funds. However, I must base my decision on the committed terms as reflected in the record before me.

43. Both DIP facilities contemplate funding in the amount of up to $9,800,000. However, as noted, the cash flow forecasts reflect that these funds would be sufficient for the applicants the Applicants through the restructuring period only until October.

44. In addition, I recognize that the approved DIP Facility contemplates an exit fee to which Green Acre takes objection today. I also recognize, however, that that term was in the materials served more than two weeks ago and was fully disclosed to all parties when the DIP Facility was approved last week.

45. Moreover, the alternative DIP Facility includes a covenant compelling the Applicants to engage in good faith discussions with Green Acre and then if, and only if, those discussions do not bear fruit, (in the words of Mr. Dym, the affiant for Green Acre), the “parties will pivot to a SISP strategy by July 15, 2023 and market themselves from a position of financial stability” (Dym Affidavit, para. 52).

46. I am concerned that this effectively gives Green Acre a period of exclusivity for negotiations with the Applicants to the exclusion of other parties, but which has the result of shortening by the same period of time (approximately one month) the period of time within which

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alternative transactions or structures (with an unlimited and unrestricted number of potential strategic partners or investors), might be explored.

47. One of the factors persuading me that the SISP should be approved today is the desire to maximize the period within which options and alternatives can be explored. As stated above, there is no reason why Green Acre cannot participate fully in that SISP process, and propose, if it (or the syndicate of arm's length lenders with which it is working and who, it is said, oppose a sale at this time) wishes, a recapitalization of the business of the Applicants rather than a sale.

48. For all of these reasons, I granted the order approving the SISP (with the Stocking Horse Bid Agreement), declined to adjourn the SISP approval *sine die*, and dismissed the cross-motion of Green Acre for approval of the alternative DIP facility.

Osborne J.

**Date:** June 25, 2023

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# TAB 13

**CITATION:** IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., 2020 ONSC 3565
**COURT FILE NO.:** CV-20-00641220-00CL
**DATE:** 20200617

2020 ONSC 3565 (CanLII)

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| 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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED | ) | *Ashley Taylor* and *Sanja Sopic*, for the Applicants |
| | ) | *Marc Wasserman* and *Mary Paterson*, for the Monitor |
| | ) | *Wael Rostom, Stephen Brown-Okruhlik, Guneev Bhinder*, for All Js Greenspace LLC |
| | ) | *Wojtek Jaskiewicz*, for the Capital Transfer Agency, ULC |
| Applicants | ) | *Graham Phoenix* and *Thomas Lambert*, for WMB Resources LLC and Green Ops Group LLC |
| | ) | *Lou Brzezinski*, *Stephen Gaudreau*, *Eric Golden* and *Varoujan Arman*, for Michael D. Horvitz Revocable Trust |
| | ) | *Joe Groia* and *Martin Mendelzon*, for Chiron Ventures Inc. |
| | ) | **HEARD:** May 29 and June 1, 2020 |

## ENDORSEMENT

**MCEWEN J.**

[1] On May 20, 2020 I granted the Initial Order sought by the Applicants, Green Growth Brands Inc. ("GGB"), GGB Canada Inc., Green Growth Brands Realty Ltd., and Xanthic Biopharma Limited (collectively, "the Applicants"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, As Amended ("*CCAA*"). The Initial Order provided for,

amongst other things, a stay of proceedings to allow GGB, the parent entity, an opportunity to market the sale of its business.

[2] At that time, I also appointed Ernst & Young Inc. as the Monitor (the "Monitor") and approved a stay of proceedings for the initial 10-day period. I further approved certain court ordered charges and interim financing (the "DIP Financing") to be provided by All Js Green Space LLC ("All Js").

[3] The comeback motion was scheduled for May 29, 2020 and ultimately was heard on May 29 and June 1, 2020.

[4] Due to the COVID-19 crisis, the comeback motion proceeded by way of video conference. It was held in accordance with the Notices to the Profession issued by Morawetz C.J. and the Commercial List Advisory.

[5] At the comeback motion, I granted the orders sought, being an Amended and Restated Initial Order, and a Sale and Investment Solicitation Process ("SISP") Order, the latter of which approved the SISP and the fully binding and conditional Acquisition Agreement dated May 19, 2020 (the "Stalking Horse Agreement"). I further granted a sealing order with respect to a Term Sheet and the Florida LOI that will be referred to in the body of this endorsement, on an unopposed basis, as the criteria set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, were met. I dismissed the cross-motion brought by Mr. Michael D. Horvitz.

[6] I indicated at the comeback motion that I would provide a more detailed endorsement. This is my endorsement.

**BACKGROUND**

[7] The Applicants are part of a corporate group ("GGB Group"). The GGB Group is in the business of growing, processing and selling cannabis. GGB is the parent entity of the GGB Group.

[8] The GGB Group, until recently, operated two distinct lines of business. The first involves cannabis cultivation, processing, and production, and the distribution of certain tetrahydrocannabinol (commonly referred to as THC) products through wholesale and retail channels in medical and adult-use dispensaries in Florida, Massachusetts and Nevada (the "MSO Business"). The second concerned cannabidiol (commonly referred to as CBD)-infused consumer product production, wholesale and retail operations online and through a mall-based kiosk shop system (the "CBD Business").

[9] The MSO Business continues to operate through indirect, wholly-owned subsidiaries of GGB. Operations of the CBD Business, however, were indefinitely suspended at the outset of the COVID-19 crisis. Thereafter, an Ohio court appointed a Receiver over the CBD Business to wind-down their operations.

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[10] I note from the outset that Mr. Horvitz, an investor in GGB, makes significant allegations against the GGB Group and other significant stakeholders, particularly Jay, Joseph and Jean Schottenstein and Wayne Boich.

[11] In order to put this dispute between Mr. Horvitz, GGB and some of the other stakeholders in context, it is important to understand the relationship between the relevant stakeholders with respect to the secured debt that was in place at the time of the Initial Order, which secured debt included:

- A promissory note issued by GA Opportunities Corp. (the "GAOC Note") in the amount of CAD $39,000,000. It was held by an arm's-length investor, Aphria Inc. Shortly before the May 20, 2020 motion the GAOC Note was acquired by Green Ops Group LLC ("Green Ops").

- Secured convertible debentures issued in May 2019 in the aggregate principal amount of US $45,500,000 (the "May Debentures"). The May Debentures were issued pursuant to the terms of a Debenture Indenture (the "May Debenture Indenture") between GGB and Capital Transfer Agency, ULC ("CTA").

- Secured convertible debentures issued pursuant to equity commitment letters with All Js and Chiron Ventures Inc. ("Chiron") (the "Backstop Debentures"). All Js and Chiron committed to subscribe for the Backstop Debentures in the aggregate principal amounts of US $57,350,000 and US $10,000,000, respectively, although not all of these funds had been fully drawn. The Backstop Debentures, too, were issued pursuant to the terms of a Debenture Indenture (the "Backstop Debenture Indenture") between GGB and CTA.

- Two promissory notes issued to All Js in May 2020, each in the amount of US $400,000.

[12] Mr. Horvitz, as Grantor and Trustee for and on behalf of the Michael D. Horvitz Revocable Trust, owns US $5 million of the May Debentures.

[13] Mr. Wayne Boich, generally speaking, controls Green Ops, which purchased the GAOC Note. He also controls WMB Resources LLC ("WMB"), which owns US $5 million in the May Debentures. In addition to the above, Green Ops also acquired the "Spring Oaks Notes" from GGB Florida LLC ("GGB Florida") in May 2020. I will comment more about this transaction later in this endorsement.

[14] Jay Schottenstein and his sons, Joseph and Jean Schottenstein, generally speaking, control a trust that owns All Js. As noted, All Js owns a majority of the Backstop Debentures. All Js also owns a significant number of shares in GGB and is the Debtor-in-possession ("DIP") Lender.

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[15] Messrs. Schottenstein also control LS Green Investments LLC and Delancey Financial LLC, which own US $20 million and US $10 million of the May Debentures, respectively.

[16] As can be seen from the above, Messrs. Schottenstein and Mr. Boich, through companies controlled by them, own a great deal of GGB's debt (and, in fact, the majority of that debt) with All Js also being a significant shareholder in GGB.[1]

[17] The Stalking Horse Agreement contemplates the purchase of GGB's assets, as defined, by All Js and CTA, in its capacity as the Debenture Trustee of the May Debentures and the Backstop Debentures (collectively, the "Stalking Horse Bidder"). The purchase is comprised of a credit bid of all of the secured debt held by All Js, the May Debentures, the Backstop Debentures and certain assumed liabilities totaling approximately US $106 million. It does not involve any cash consideration.

[18] The Schottensteins' and Mr. Boich's controlled companies, All Js and Green Ops, respectively, have entered into a Term Sheet for the capitalization of a company ("AcquireCo") to ultimately purchase the shares and inter-company debt of GGB as set out in the Term Sheet. Accordingly, the Term Sheet, amongst other things, sets out how the May Debentures will be treated.

[19] Mr. Horvitz' complaints essentially surround two events. The first was an Extraordinary Resolution that was passed by the holders of the May Debentures on May 3, 2020 without notice to him, which permitted the incurrence of new senior indebtedness and related security which allowed the All Js Secured Notes to rank in priority to the security held by the holders of the May Debentures. The second event involves another Extraordinary Resolution that was passed on May 18, 2020, again without notice, which approved the provisions of the Term Sheet that further diluted the value of his ownership in the May Debentures by removing any priority the May Debentures had over the Backstop Debentures (amongst other things). Mr. Horvitz also submits that provisions of the Term Sheet ensure that the Stalking Horse Bid is unbeatable.

[20] As a result, Mr. Horvitz raised a number of objections to the proposed SISP and the Stalking Horse Agreement. Mr. Horvitz' position was not supported by any of the other stakeholders. All of the significant stakeholders who attended at the comeback motion supported the relief sought by GGB. The Monitor also supported the relief sought.

[21] I also pause to note that Mr. Horvitz' counsel in his submissions conceded that the provisions of the May Debentures allowed the requisite majority to pass the Extraordinary Resolutions without notice to Mr. Horvitz. Mr. Horvitz' submission, however, is that the majority of the holders of the May Debentures, the corporations controlled by Messrs.

[1] The exact nature of Messrs. Schottensteins' and Mr. Boich's involvement in the above companies was not disclosed. No one, however, objected to the above general description.

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Schottenstein, failed to act in good faith towards Mr. Horvitz as did others, notably companies controlled by Mr. Boich, with respect to the creation of AcquireCo and the related Term Sheet.

## THE RELIEF SOUGHT BY THE APPLICANTS AND MR. HORVITZ

### The Applicants

[22] As noted, the Applicants sought an extension of the stay period to August 15, 2020 as well as approval of the SISP and the Stalking Horse Agreement entered into between GGB and CTA/All Js.

### Mr. Horvitz

[23] Mr. Horvitz, at the initial return of the motion on May 29, 2020, sought the following relief:

- an order setting aside my Initial Order of May 20, 2020 granting the Applicants protection under the *CCAA* for failure to make full and fair disclosure;

- an order adjourning the comeback motion of GGB for 14 days so that he could obtain an order pursuant to s. 11.9 of the *CCAA* requiring the production of financial records of several persons and corporations including GGB, Jay, Joseph and Jean Schottenstein, Mr. Boich, All Js, WMB, Chiron and others;

- compliance, within three days, with a Request to Inspect he served on May 25, 2020 and with a cross-examination of GGB's interim chief executive officer, Raymond Whitaker III; and

- an order requiring, within seven days, Messrs. Schottenstein and Mr. Boich to attend a r. 39.03 examination.

[24] After hearing submissions, I adjourned the motion to June 1, 2020 and ordered that the examination of Mr. Whitaker (which GGB had agreed to) take place in the interim and that there be fulsome production of relevant documents without ordering any particular documents be produced (All Js agreed to produce the Term Sheet on a confidential basis).

[25] Mr. Whitaker's examination was completed and documents produced to Mr. Horvitz. When the matter returned before me on June 1, 2020, Mr. Horvitz, as per para. 3 of his Supplementary Factum, pursued only the following relief:

- an order dismissing the Applicants' motion approving the SISP, the Stalking Horse Agreement and DIP Financing;

- an order requiring the Applicants to resubmit a revised process that is fair and meets the purpose and policies of the *CCAA*;

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- an order directing the Monitor to investigate the following: Green Ops' acquisition of the GAOC Note; the Term Sheet (as being a preference); Green Ops' purchase of the Spring Oaks Notes (as being a preference); the Spring Oaks Forbearance Agreement (as being a preference); and whether certain of these transactions should be set aside; and

- additional disclosure of documentation and examination of witnesses, as requested.

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**ANALYSIS**

**The Abandoned Relief**

[26] I wish to deal briefly with the relief originally sought by Mr. Horvitz but that was abandoned upon the return of the motion on June 1, 2020.

[27] At the return of the motion, Mr. Horvitz did not pursue the relief originally sought setting aside the Initial Order on the basis that the Applicants failed to act in good faith. This is a serious accusation, however, that merits comment.

[28] Had Mr. Horvitz continued to pursue this relief, such a request would have been dismissed.

[29] The Applicants, at the initial hearing, provided the court with the necessary information needed to consider whether the Initial Order should be granted. All relevant agreements were attached. Mr. Horvitz' complaints concerning lack of good faith and disclosure deal with his own disputes with Messrs. Schottenstein and Mr. Boich, the companies they control and how he was treated with respect to his ownership of the May Debentures and the provisions of the Term Sheet. They do not involve the Applicants. While knowledge of the interaction between the investors and GGB would have helped add context it would not have affected the granting of the Initial Order.

[30] Mr. Horvitz' complaints concerning his treatment, as I will outline below, constitute inter-creditor disputes and ought to be dealt with outside of the parameters of this *CCAA* proceeding.

**Discovery**

[31] As noted, Mr. Whitaker was examined and documentary discovery was made in advance of the June 1, 2020 hearing date. The documentary production that was made, or refused, is set out in the Second Report of the Monitor dated May 31, 2020 (the "Second Report") at paras. 65-78. No further documentation was requested on the return of the motion. In any event, it is my view that adequate production was made to Mr. Horvitz.

[32] With respect to the examinations, Mr. Horvitz did not pursue the examinations of Messrs. Schottenstein or Mr. Boich. I would not have granted the order in any event. They were not properly served with the motion record and reside in the United States of America. They were not represented at the motion. At the May 29, 2020 motion, I questioned Mr. Horvitz' counsel as

to whether I had jurisdiction to make the orders sought and whether letters rogatory were appropriate. Mr. Horvitz did not take the necessary steps to attempt to comply with the letters rogatory process. I therefore considered this issue to be at an end.

**Mr. Horvitz' Complaints Concerning the May Debentures and the Term Sheet**

[33] In my view, as noted, Mr. Horvitz' objections with respect to the way his investment in the May Debentures was treated, and the provisions of the Term Sheet, are inter-creditor issues that fall outside of the context of this *CCAA* proceeding.

[34] Notwithstanding the fact that counsel conceded at the motion that the other May Debentures holders had the legal right to pass the Extraordinary Resolutions, without notice to Mr. Horvitz, Mr. Horvitz nonetheless alleges that the May Debentures holders who passed the Extraordinary Resolutions failed to act in good faith. He makes the same claim with respect to the parties to the Term Sheet.

[35] This issue was considered by the Court of Appeal for Ontario in *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (C.A.), at para. 32, wherein the court stated:

> First, as the supervising judge noted, the CCAA itself is more compendiously styled "An Act to facilitate compromises and arrangements between companies and their creditors." There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (QL), 110 A.C.W.S. (3d) 259 (B.C.S.C.), at para. 24 (after referring to the full style of the legislation):
>
> > [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, **it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company**. [Emphasis added.]

[36] The objections raised by Mr. Horvitz concerning the May Debentures and the Term Sheet all constitute inter-creditor disputes. The terms of the May Debentures and the capitalization of AcquireCo, set out in the Term Sheet, do not involve the Applicants. Accordingly, these *CCAA* proceedings are not the proper venue for Mr. Horvitz to seek these remedies.

[37] As I have noted, Mr. Horvitz conceded at this motion that the Extraordinary Resolutions were passed in accordance with the terms of the May Debenture Indenture. Similarly, the terms of the AcquireCo Term Sheet involved matters concerning the May Debentures holders that have

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been determined by the aforementioned requisite majority. While All Js owns a significant amount of GGB shares, Mr. Horvitz' complaints, with respect to the May Debentures and the Term Sheet, do not lie with GGB but rather with the way he feels he has been treated by the other investors, primarily Messrs. Schottenstein and Mr. Boich.

**Mr. Horvitz' Request for the Monitor's Investigation**

[38] I am not prepared to order that the Monitor conduct investigations concerning Green Ops' acquisition of the GAOC Note, the Term Sheet (as being a preference) and Green Ops' purchase of the Spring Oaks Notes (as being a preference). This relief was not contained in the Notice of Motion and only arose in Mr. Horvitz' Supplementary Factum. While I would not dismiss the request for this relief on this ground alone, it typifies the shifting nature of the relief that Mr. Horvitz sought during the hearings.

[39] These investigations, sought by Mr. Horvitz, relate to inter-creditor issues between Mr. Horvitz and others. None of the proposed investigations involve the Applicants. The focus of this motion should be on the *CCAA*-related issues, primarily the SISP and the Stalking Horse Agreement. The issues surrounding the May Debentures and the Term Sheet should only be considered to the extent that they are germane to the *CCAA* proceeding.

[40] The Monitor does not believe that it is appropriate to carry out these investigations based on the materials that it has reviewed. I accept the Monitor's submission that it would not be appropriate in a *CCAA* proceeding to have it carry out an investigation of transfers for value between American corporations which are non-debtors. I further agree with the Monitor that the case upon which Mr. Horvitz relies, *Cash Store Financial Services, Re*, 2014 ONSC 4326, 31 B.L.R. (5th) 313, is entirely distinguishable since it dealt with a transfer of value from the debtor to an unsecured creditor.

[41] I also do not believe the Monitor ought to conduct the investigation requested by Mr. Horvitz with respect to the Spring Oaks Forbearance Agreement (as being a preference).

[42] Mr. Horvitz' complaint in this regard essentially involves two issues. The first being that the SISP should include the Florida Assets to maximize value. The second involves his complaint concerning Mr. Boich. Mr. Boich's company, Green Ops, as noted, purchased the Spring Oaks Notes which holds unsecured debt as security for the Florida Assets. Mr. Horvitz claims that this is another example of self-dealing and lack of transparency.

[43] While I agree that the Florida Assets would add value to the *CCAA* process, it is not practicable to add them to the SISP. Prior to the Initial Order being granted Green Ops could have foreclosed on the debt. GGB looked for another solution and has obtained an LOI from a third-party buyer in excess of the debt held by Green Ops. If the transaction is not completed by mid-June, Green Ops has the right to foreclose. While the situation is not ideal, the mid-June deadline precludes rolling the Florida Assets into the SISP. It seems to me, however, that GGB has followed a reasonable path to deal with the Florida Assets, which is subject to its agreement with Green Ops which had the right to foreclose and granted a Forbearance Agreement to see if the Florida Assets can be sold. The Monitor concurs. In this regard, I am reminded of the

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observation in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115, at para. 5, that "insolvency proceedings typically involve what is feasible, not what is flawless".

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[44] I will now turn to the complaints Mr. Horvitz makes concerning the SISP and the Stalking Horse Agreement.

**The SISP**

[45] Mr. Horvitz makes a number of complaints concerning the SISP and I will deal with each in turn.

[46] First, Mr. Horvitz complains that the SISP does not include the retention of an investment banker to market the assets of GGB. A separate investment banker is not required. It is certainly not unusual for the Court-appointed Monitor to run a SISP. The Monitor has the necessary experience and has acted in this capacity as Monitor in at least one other cannabis case before this court, AgMedica Bioscience Inc. As set out at para. 28 of the Second Report, the Monitor is well-qualified to run the SISP in this case.

[47] Second, Mr. Horvitz complains that the SISP does not include the preparation of a "teaser" or other short description of the proposed acquisition opportunity. As noted by the Monitor in para. 29 of the Second Report, it is, in fact, in the process of forming such a document which will be made available along with other information included in a data room. It is virtually complete at this time.

[48] Third, Mr. Horvitz complains that the Monitor has failed to develop a list of likely strategic and financial buyers. This has, in fact, been done, with 243 potential parties being identified. This includes all of the typical types of businesses one would expect in the cannabis space.

[49] Fourth, Mr. Horvitz complains about the lack of Non-disclosure Agreements, telephone calls, "transparent and market-based compensation arrangements", preliminary indications of interest and management presentations. In my view, all of these complaints are unfounded and the Second Report, once again, deals with these complaints comprehensively in paras. 29-34.

**The Stalking Horse Agreement**

[50] Mr. Horvitz raises a number of issues with respect to the Stalking Horse Agreement.

[51] First, he complains of a number of features that are typical in Stalking Horse Agreements. Particularly, he objects to the US $2 million Break Fee; the US $150,000 Expense Reimbursement to All Js; the overbid increment of US $250,000; and a refundable 5 percent deposit that has to be paid by bidders. In my view, none of these provisions in the Stalking Horse Agreement are problematic.

[52] While the Break Fee and Expense Reimbursement are not itemized, they represent approximately 1.9 percent of the purchase price that is set out in the Stalking Horse Agreement. This is well within the range of payments that have been approved by this court on numerous occasions. The fees, in addition to compensating Stalking Horse purchasers for the time, resources and risk taken in developing the agreement, also represent the price of stability. Therefore, some premium over simply providing for expenses may be expected: *Danier Leather Inc. (Re)*, 2016 ONSC 1044, 33 C.B.R. (6th) 221, at paras. 40-42; *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750, 90 C.B.R. (5th) 74. This *CCAA* process, given the nature, size and location of GGB's operations, has been and will continue to be significant.

[53] Similarly, the overbid increment, which is typical in a large auction, is well within the range of reasonableness. Insofar as the 5 percent deposit is concerned, Mr. Horvitz complains that such an obligation is not placed upon the Stalking Horse Bidder. This is not surprising since the Stalking Horse Agreement provides for a credit bid of the secured debt held by All Js and the holders of the May Debentures and the Backstop Debentures, as well as some certain assumed liabilities. It does not involve cash consideration and therefore it is not necessary to seek a deposit.

[54] Second, Mr. Horvitz further complains that a third-party bidder can impose no conditions which are not in the Stalking Horse Agreement and that overall the DIP Financing and Stalking Horse Agreement make it impractical, if not impossible, for any arm's-length party to make a bid that would properly reflect the market value of the cannabis licence that GGB holds through its subsidiaries. Mr. Horvitz further complains that an outside bidder must pay off the GAOC Note in full, whereas the Stalking Horse Bidder can assume the obligation for later payment.

[55] With respect to the complaint concerning the inability to impose conditions, I do not read the SISP in this way. There is nothing in the SISP that prevents an alternative transaction from containing conditions that are not in the Stalking Horse Agreement. The SISP provides for a range of different transaction structures and it is designed to find the highest and/or best offer for a restructuring or refinancing of GGB. The wording of the SISP does not prevent a bidder from attempting to propose different terms or conditions than those found in the Stalking Horse Agreement. The Monitor has opined that the conditions in the SISP dealing with alternative transactions are standard in SISPs to protect the debtor's estate and ensure that the outside buyer has limited exit rights from the deal, all of which is reasonable. I accept this view.

[56] I also do not accept Mr. Horvitz' allegation that the DIP Financing and the Stalking Horse Agreement make it impractical, if not impossible, to reflect the market value of the cannabis licences and in particular the valuable Nevada licences. The Stalking Horse Agreement is structured in such a way that the successful purchaser would obtain the shares of GGB and the relevant licences, including the Nevada licences. This assists in the sale price process since it would help facilitate the transfer of the cannabis licences, which is difficult to do, and help facilitate a sale. Further, the value of the Nevada licences (and indeed all licences) are subject to a fluctuating market. The best way to determine the value is to run the SISP and determine if there is interest in the marketplace. In any event, a credit bid need not be limited to the fair market value of the corresponding encumbered assets; otherwise it would require an evaluation

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of such encumbered assets which is a difficult, complex and costly exercise which can also result in unwarranted delay: see *Whitebirch Paper Holding Co., Re*, 2010 QCCS 4915, 72 C.B.R. (5th) 49, at para. 34. In order to facilitate this process, the Monitor has included, in its First Report, a table entitled "Illustrative Value of the Stalking Horse Agreement" to assist bidders in understanding the value of the consideration contained in the Stalking Horse Agreement.

[57] Further, in response to Mr. Horvitz' complaint that the SISP treats the Stalking Horse Bidder and Qualified Bidders differently with respect to the GAOC Note, GGB has revised the proposed SISP, which now allows Qualified Bidders to negotiate an agreement with Green Ops, which holds the GAOC Note. Now, both the Stalking Horse Bidder and Qualified Bidders may assume the GAOC Note while at the same time not precluding a Qualified Bidder from proposing to pay off the GAOC Note. Mr. Horvitz complains that Green Ops would be more likely to strike a deal with the Stalking Horse Bidder. This may prove to be the case but, of course, much depends on the offer put forth by the Qualified Bidder. The structure proposed by GGB, however, presents a level playing field.

[58] Similarly, I do not see any difficulty with the proposed DIP Financing. It is not unique to this case and the amount proposed is reasonable. It will help support the SISP process which, in my view, provides the best possible chance for a sale and the potential retention of approximately 170 employees. Further, insofar as the DIP Financing is concerned, Mr. Horvitz also complains that it is being used, in part, to pay for prefiling GGB debt contrary to s. 11.2 of the *CCAA*. When one looks closely at GGB's operations, however, it is clear that GGB has not paid any of the prefiling expenses in Canada. The DIP Financing has been used to pay some relatively modest prefiling expenses for the operating companies in the United States of America that cannot avail themselves of relief given the nature of the cannabis industry in that country. Further, in any event, it is in everyone's best interest that these expenses be paid since the value of GGB exists in these licences and, obviously, in keeping those licences current for the purposes of the SISP.

[59] Last, Mr. Horvitz makes a number of what I would consider to be lesser, additional complaints including a vague closing date, a requirement that Qualified Bidders hold cannabis licences (since removed from the SISP), "bad faith inclusive arrangements" and other related arguments. I have considered each and every one of these arguments and do not find them to be persuasive.

[60] Clearly, Mr. Horvitz does not like the way he has been treated with respect to his ownership of the May Debentures. He is particularly upset with the provisions of the Term Sheet. At the same time, Mr. Horvitz proposes no alternative to the existing process. It bears noting that the Monitor has been significantly involved in the process and agrees that there is no better, viable alternative. As I have noted, Mr. Horvitz' complaints largely involve inter-creditor disputes and only become relevant if the Stalking Horse Bidder is the successful bidder. Mr. Horvitz, presumably, retains his legal rights and can bring an action against those whom he believes have caused him legal harm.

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[61] In the interim, in my view, the SISP and the Stalking Horse Agreement satisfy the criteria set out in s. 36(3) of the *CCAA* and the factors set out by this court in *Nortel Networks Corporation (Re)*, 55 C.B.R. (5th) 229 (Ont. S.C.), at para. 49. The process is supported by the Monitor and no other creditor, aside from Mr. Horvitz, objects. For all of the reasons above, I believe Mr. Horvitz' complaints are misplaced.

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**DISPOSITION**

[62] For these reasons I granted the Amended and Restated Initial Order and the SISP Order approving the SISP and the Stalking Horse Agreement on June 2, 2020 and dismissed Mr. Horvitz' motion.

**McEwen J.**

**Released:** June 17, 2020

**CITATION:** IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., 2020 ONSC 3565
**COURT FILE NO.:** CV-20-00641220-00CL
**DATE:** 20200617

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Applicants

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**ENDORSEMENT**

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**McEwen J.**

**Released:** June 17, 2020

# TAB 14

**CITATION:** JTI-Macdonald Corp., Re, 2019 ONSC 1625
**COURT FILE NO.:** CV-19-615862-00CL
**DATE:** 2019/03/12

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**- COMMERIAL LIST**

**RE:** **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 JTI-MACDONALD CORP.**

**Applicant**

**BEFORE:** Hainey J.

**COUNSEL:** *Robert I. Thornton, Leanne M. Williams, Rachel Bengino and Mitch Grossell*, for the Applicant

*Scott A. Bomhof and Adam M. Slavens,* for Respondents JT Canada LLC, and PWC, in its capacity as Receiver of JTI-MacDonald TM

*Pamela L.J.Huff, Linc A. Rogers and Christopher Burr*, for the Proposed Monitor, Deloitte Restructuring Inc.

**HEARD:** March 8, 2019

**ENDORSEMENT**

**Background**

[1] On March 8, 2019 JTI-Macdonald Corp. ("JTIM" or "Applicant") sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* ("CCAA"). I granted the Initial Order and endorsed the record as follows:

> I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

[2] These are my Reasons.

**Facts**

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[3] As a result of a judgment of the Quebec Court of Appeal released on March 1, 2019 in a class proceeding ("Quebec Class Action"), JTIM and two other defendants are liable for damages totaling $13.5 billion ("Quebec Judgment"). If this judgment is not stayed, its enforcement could destroy the company because JTIM does not have sufficient funds to satisfy the judgment.

[4] According to JTIM, enforcement of the Quebec Judgment would destroy the company's value for its 500 employees and 1,300 suppliers. It would also impact approximately 28,000 retailers that sell JTIM's products and 790,000 consumers of its products. Enforcement of the Quebec Judgment would also jeopardize federal and provincial taxes and duties in excess of $1.3 billion paid annually in connection with JTIM's operations (of which $500 million per year is paid directly by JTIM and another $800 million per year is paid by third parties and consumers).

[5] JTIM is also a defendant in a number of significant health care costs recovery actions ("HCCR Actions"). The total claims in the HCCR Actions exceed $500 billion.

[6] JTIM wishes to seek a "collective solution" to the Quebec Judgment and the HCCR Actions for the benefit of all of its stakeholders. It is for this reason that it seeks a stay of all proceedings in its application for an Initial Order pursuant to the CCAA.

[7] In its application JTIM seeks protection from its creditors and the following additional relief under the CCAA:

(a) declaring that it is a company to which the CCAA applies;

(b) granting a stay of proceedings against it, and the Other Defendants in the Pending Litigation, as defined and described in the Notice of Application;

(c) appointing Deloitte Restructuring Inc. ("Proposed Monitor") as Monitor in these CCAA proceedings;

(d) granting an Administrative Charge, Directors' Charge and Tax Charge;

(e) authorizing the Applicant to pay its pre-filing and post-filing obligations in respect of suppliers, trade creditors, taxes, duties, employees (including outstanding and future pension plan contributions, other post-employment benefits and severance packages) and royalty payments and to pay post-filing interest of certain of its secured obligations in the ordinary course of business in order to minimize any disruption of the Applicant's business;

(f) approving the engagement letter dated April 23, 2018 (the "CRO Engagement Letter") appointing Blue Tree Advisors Inc. as the Applicant's Chief Restructuring Officer ("CRO");

(g) authorizing it to apply for leave and, if successful, to appeal the Quebec Judgment to the Supreme Court of Canada; and

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(h) sealing Confidential Exhibit "1" of Robert Master's affidavit.

**Issues**

[8] I must decide the following issues:

(a) Should the Court grant protection to JTIM under the CCAA?

(b) Is it appropriate to grant the requested stay of proceedings?

(c) Should the Proposed Monitor be appointed as Monitor in these proceedings?

(d) Should the Court grant the requested charges?

(e) Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

(f) Should Blue Tree Advisors be appointed as CRO?

(g) Should JTIM be authorized to continue its application for leave to appeal of the Quebec Judgment to the Supreme Court of Canada?

**Analysis**

**Should the Court grant protection to JTIM under the CCAA?**

[9] The CCAA applies to an insolvent company whose liabilities exceed $5 million.

[10] JTIM is a company incorporated pursuant to the *Canada Business Corporations Act*.

[11] JTIM's liabilities clearly exceed $5 million. It faces a judgment for $13.5 billion. According to Robert McMaster, JTIM's Director, Taxation and Treasury, the company does not have sufficient funds to satisfy the Quebec Judgment which is currently payable. Accordingly, JTIM is an insolvent company to which the CCAA applies.

**Is it appropriate to grant the requested stay of proceedings?**

[12] The Court may grant a stay of proceedings pursuant to s. 11.02 of the CCAA in respect of a debtor company if it is satisfied that circumstances exist that make the order appropriate. In order to determine whether a stay order is appropriate the Court should consider the purpose behind the CCAA. The primary purpose of the CCAA is to maintain the *status quo* for a period while the debtor company consults with its creditors and stakeholders with a view to continuing the company's operations for the benefit of the company and its creditors.

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[13] JTIM cannot pay the amount of the Quebec Judgment. Any steps to enforce the judgment could cause serious harm to JTIM's business to the detriment of all of its stakeholders. In my view, it is appropriate for this reason to grant the requested stay of proceedings in favour of JTIM.

[14] JTIM also requests a stay of proceedings in favour of the other defendants in other litigation relating to tobacco claims in which JTIM is a defendant, including the Quebec Class Action and the HCCR Actions. The Court has discretion under s. 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties. In *Tamerlane Ventures Inc., Re,* 2013 ONSC 5461, Newbould J stated as follows at para. 21:

> Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, where it is just and reasonable to do so.

[15] I came to the same conclusion in *Pacific Exploration & Production Corp., Re,* 2016 ONSC 5429, where at para. 26 I set out the following list of factors that courts have considered in deciding whether to extend a stay of proceedings to non-applicant third parties:

(a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

(b) extending the stay to the third party would help maintain stability and value during the CCAA process;

(c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party.

[16] Having considered these factors, I am satisfied that granting the requested stay of proceedings to the other defendants will allow JTIM to attempt to arrive at a collective solution with respect to the Quebec Class Action and the HCCR actions. If these actions continue to

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proceed against the other defendants but not JTIM there could be significant economic harm for all of JTIM's stakeholders.

[17] Accordingly, I have concluded that the balance of convenience favours exercising my discretion under the CCAA to grant a stay of proceedings to the other defendants.

**Should the Proposed Monitor be appointed as the Monitor?**

[18] I am satisfied that Deloitte Restructuring Inc. ("Deloitte") should be appointed the Monitor in these proceedings pursuant to s. 11.7 of the CCAA. Deloitte regularly acts as the Monitor in CCAA proceedings and it is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

**Should the requested charges be granted?**

*Administrative Charge*

[19] JTIM requests that I grant an administrative charge in favour of JTIM's counsel, the CRO, the Monitor and its legal counsel in the amount of $3 million.

[20] The Court has jurisdiction to grant an administrative charge pursuant to s. 11.52 of the CCAA. In *Canwest Global Publishing Inc.*, 2012 ONSC 633, Pepall J. set out the following list of factors the Court should consider when granting an administrative charge:

(a) the size and the complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[21] Having considered these factors, I am satisfied that the requested administration charge should be granted for the following reasons:

(a) JTIM's restructuring will require extensive involvement by the professional advisors who are subject to the administrative charge;

(b) the professionals subject to the administration charge have contributed, and will continue to contribute, to the restructuring of JTIM;

(c) there is no unwarranted duplication of roles so that the professional fees associated with these proceedings will be minimized;

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(d) the administrative charge will rank in priority to the directors' charge and the tax charge. The only secured creditors that will be affected by the administrative charge are JTIM's parent companies and certain other secured related party suppliers, each of which support the granting of the administrative charge; and

(e) the Proposed Monitor believes that the amount of the administration charge is reasonable

*Directors' Charge*

[22] I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of $4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

*Tax Charge*

[23] JTIM is also seeking a third-ranking super-priority charge in the amount of $127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

**Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?**

[24] In *Cinram International Inc., Re,* 2012 ONSC 3767 Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

(a) whether the goods and services were integral to the business of the applicants;

(b) the debtors' need for the uninterrupted supply of the goods or services;

(c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and

(d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[25] JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing

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obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

**Should Blue Tree Advisors be appointed as CRO?**

[26] According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and necessary skills to oversee and assist JTIM with its complex negotiations during the CCAA proceedings. With the assistance of the CRO, JTIM's management can focus on the company's operations which should maximize value for its stakeholders.

[27] I am satisfied that Mr. Aziz should be appointed as CRO pursuant to the terms of the CRO Engagement Letter which the Monitor supports.

[28] JTIM requests an order sealing the unredacted copy of the CRO Engagement Letter. Section 137(2) of the *Courts of Justice Act* gives the Court jurisdiction to order that a document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[29] The CRO Engagement Letter sets out the commercial terms of the CRO's engagement. This is commercially sensitive information. In my view JTIM's request for a sealing order meets the test set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 because it will protect a commercial interest and the salutary effects of sealing the CRO's Engagement Letter outweighs any deleterious effects since this is the type of information that a private company outside of a CCAA proceeding would treat as confidential.

**Should JTIM be authorized to continue its appeal to the Supreme Court of Canada?**

[30] At para. 75 of its Factum, JTIM submits as follows:

> 75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

[31] In my view, based on this submission it is reasonable to permit JTIM to continue its leave to appeal application to the Supreme Court of Canada.

**Conclusion**

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[32] For the reasons set out above the Application is granted.

HAINEY J.

**Date Released: March 12, 2019**

2019 ONSC 1625 (CanLII)

# TAB 15

Court File Number: CV-21-00658423-00CL

**Superior Court of Justice**
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# FILE/DIRECTION/ORDER

In the Matter of... Just Energy Group Inc et al
Plaintiff(s)

AND

Defendant(s)

Case Management ☑ Yes ☐ No by Judge: McEwen J.

| Counsel | Telephone No: | Facsimile No: |
|---|---|---|
| See participants list | attached | |
| | | |

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

The Applicants seek a Sales Process Approval Order. The Applicants are supported by the DIP Lenders, Credit Facility Lenders and Shell at the motion.

The Monitor also supports the relief sought.

While there is generally no opposition to the order sought

18 August 22
Date

Judge's Signature

☑ Additional Pages 29 in total

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## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

U.S. Class Counsel on behalf of the U.S Class Actions raise five discrete objections. They are supported by the Omarali Class Action, the Mass Tort Claims and Parivedal.

Given the extreme time sensitivity surrounding this CCAA matter I am releasing my reasons via this handwritten endorsement. I have reviewed all of the facta, filed affidavits, motion records and the Monitor's Eleventh Report.

In providing these reasons I do not propose to review all submissions made, but will focus on those submissions that I consider to be most germane. I have, however, reflected on all of the submissions made at the motion.



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1. All as defined in my June 21/22 endorsement.

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**Judges Endorsment Continued**

Before I analyse the five issues in dispute, I will review the overall structure of the Sales Process proposed by the Applicants, and then review the issues not in dispute that were raised at the motion.

Insofar as the Sales Process is concerned, the Applicants seek a sale and investment solicitation process ("SISP") which, amongst other things, seeks Court authorization, nunc pro tunc, to enter into a Stalking Horse Transaction Agreement between the Applicants and the Sponsor (as defined, essentially the related group of companies under the Pimco umbrella, in the Applicants' Factum).

The Applicants also, in this regard, seek approval of the SISP Support



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**Judges Endorsment Continued**

Agreement.

As noted, there is no general opposition; and I agree that subject to the determination of the five discrete disputes the SISP Support Agreement and SISP, which includes the Stalking Horse Transaction, ought to be approved.

The SISP Support Agreement is similar to the previous Plan Support Agreement that I previously approved before the Plan was terminated subsequent to my previous orders in June/22. Unlike the Plan Support Agreement, however, the SISP Support Agreement contains no restriction on the Applicants to solicit superior offers to the Stalking Horse Transaction.

I agree that s. 11 of the CCAA provides this Court with the authority



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**Judges Endorsment Continued**

to approve the SISP Support Agreement. I further agree that the SISP Support Agreement is a critical component of the Applicants' going concern restructuring to allow them to market their assets, obtain value and operate in the normal course in the meantime.

This Court has approved similar support agreements in prior cases: Re Stelco (2005) 78 OR (3d) 254 and U.S. Steel Canada Inc 2016 ONSC 7899.

With respect to the SISP, I accept the Applicants' submissions that the criteria as set out in Nortel Networks Corp (Re) (2009) 55 CBR (5th) (Ont SCJ) at para 48 have been met, insofar as they ought to be considered at this stage of the proceeding.



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**Judges Endorsment Continued**

Amongst other reasons is the fact that, at present, no other viable options have been presented; other superior proposals can be accepted; and the Stalking Horse Transaction sets a "floor price" and creates the certainty of a going concern sale.

I pause here to note that the Stalking Horse Transaction contemplates a Reverse Vesting Order ("RVO"). In this regard, however, it is important to note that at this stage I am not being asked to grant the RVO (which have been viewed as an extraordinary remedy - see Harte Gold Corp (Re) 2022 ONSC 653 at para 38), nor am I being asked to approve the Stalking Horse Transaction.

Approvals in this regard, if

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**Judges Endorsment Continued**

The Stalking Horse Transaction is the successful bid, will be dealt with at the conclusion of the SISP.

Turning now to the specific unopposed relief I grant the following relief: ✓

- The stay period is extended to Oct 31/22. There is sufficient liquidity. The Applicants are proceeding in good faith and the extension is fair and reasonable given the ongoing Sales Process. ✓
- The KERP is also approved. Previous KERPs have been approved by this Court. As set out in Mr Carter's affidavit (the CFO of Just Energy) the proposed KERP, for non-executive key employees, is justified as previously ordered payments will soon end and there is a genuine concern that non-



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**Judges Endorsment Continued**

executive key employees may resign at this important stage of the proceedings. This would prejudice not only the Applicants, but other stakeholders. The proposed amounts are fair and reasonable.

- The Monitor's Tenth and Eleventh Reports are approved as are the activities, conduct and decisions described therein.
- The Sealing Orders shall go with respect to the KERP order and the SISP Support Agreement which contains, amongst other things, the holding percentages of the various entities comprising the DIP Lenders' Claim.

In both instances the Sierra Club test, as recast in Sherman Estate, has been met. The orders are



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**Judges Endorsment Continued**

made on an interim basis. Prior sealing orders have been made concerning KERP Orders. This protects the personal information of the relevant employees.

The interim Sealing Order Concerning the SISP Support Agreement is also necessary given the ongoing Sales Process and the commercially sensitive material it contains.

I now turn to the five disputed issues:

① The first deals with the U.S. Class Actions allegation that the Sponsor will have "inside information" regarding other bids and other bidders' communications with the Applicants in the absence of the other bidders' consent. This could result in proprietary or competitive



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**Judges Endorsment Continued**

information going to the Sponsor. They argue that this would provide an unfair advantage and could chill the market.

The Applicants submit, as do the supporting stakeholders, that all they seek is an equal playing field.

The Stalking Horse Transaction Agreement has been finalized and disclosed to all potential bidders. The Sponsor, in particular, seeks the same information from other bidders prior to the auction.

At the motion the parties agreed that symmetrical information sharing was sensible and would assist in the Sales Process.

The only potential mischief concerned disclosure, ~~to potential~~ to competitors of proprietary or competitive information. It is frankly difficult to analyse this risk in the



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**Judges Endorsment Continued**

abstract.

It was agreed that the symmetrical bidding information should be exchanged. The Monitor agreed to stay involved in the information sharing process. Further, the Sponsor submits that it is not seeking proprietary information, but rather wants to see the exact type of information that it has provided.

In all of these circumstances I therefore order that the parties/ stakeholders engage in the fair, equitable and symmetrical sharing of information concerning bids. The Monitor will continue to engage and monitor the exchange of information to ensure no bidder, including the Sponsor, enjoys an advantage



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**Judges Endorsment Continued**

that is unfair and/or could chill the market.

(2) I now turn to the US Class Actions submission that the SISP should not automatically default to the proposed auction. They are currently working with a financier to attempt to present a plan of arrangement.

Counsel for the US Class Actions submit that the SISP should contain a provision that the matter return to Court, before an auction, to determine whether their Plan should be put to a vote of unsecured creditors (or any other plan that surfaces).

I do not agree and agree with the submissions of the Applicants wherein they submit that such



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an attendance is unnecessary and detrimental to the SISP process.

There is nothing preventing the US Class Actions from submitting their plan into the auction. No stakeholder disputes their right to do so.

In my view this is the preferred path and upon the conclusion of the auction[2] I will determine whether the successful bid ought to be approved.

At that time all relevant issues will be reviewed, including if necessary a proposed RVO.

In the usual way, the relevant issues concerning whether or not the successful bid ought to be approved, including why the successful bid is superior, or not, can be put forth.



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2. Assuming the SISP proceeds to auction.

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Parties are free to put forth all relevant, unfettered arguments. As stated by Monitor's Counsel, this Court is "not a rubber stamp" at the motion for approval.

This single track, as opposed to the motion proposed by counsel for the U.S. Class Action, is preferable and provides greater certainty in the marketplace. I am concerned that a return to Court before an auction could chill the sales process, as potential bidders would be concerned that their efforts may never make it to auction resulting in wasted time and expense.

(3) The third issue involves whether the evaluation of the US Class Action ought to be suspended.

TM



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**Judges Endorsment Continued**

The US Class Actions want to proceed as per my earlier order, that the Contingent Litigation Claims (which included the US Class Actions, the Omarati Class Action, the mass Tort Claims and the Pariveda claim[3]) ought to be evaluated, in advance of a meeting of creditors when the Meeting Order was sought. Subsequent to that Order being made the sponsor withdrew from the proposed plan and all parties, including the Contingent Litigation Claims agreed to suspend the evaluations to determine the validity and value of the claims.

A letter was provided to me by the Monitor in this regard.

Unbeknownst to me, later in July, the US Class Actions advised

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3. Pariveda was not part of the defined term but I ordered it be valued.

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the Monitor and others that it, again, wished to carry out the valuation. The matter did not return to me and no valuations were conducted.

At the motion, the Omnibus Class Action, the Mass Tort Claims and Pacheda also requested that their claims be valuated.

They all generally submit that in order to formulate and negotiate a plan they (the US Class Actions took the lead here) need to know the creditor pool for the purpose of voting.

The US Class Actions proposed a process by way of letter dated May 4/22 which proposes a very aggressive, approximate two week process that has either the Honourable D. O'Connor or I



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conduct the valuations (although they use the word "estimation"). This would now presumably involve valuation of all of the aforementioned claims.

The Applicants submit that such an exercise is wasteful, unnecessary and lacks utility. They further submit that the expedited schedule is unachievable, particularly where the additional claims would also need to be valued.

I agree with the Applicants. Currently, the only transaction before the Court is the Stalking Horse Transaction which would not result in any recoveries to general unsecured creditors. Further, I agree with the Applicants that the volatile nature of the



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industry and the Sales Process are placing a strain on resources and personal (as referenced above concerning the KERP).

I further accept the submissions of the Monitor that a valuation can be considered, if and when, a transaction is likely to provide recovery for secured creditors. Otherwise it is a costly distraction.

Insofar as the argument of counsel for the US Class Actions is concerned, that it is necessary to formulate and negotiate a plan, this may be of some assistance, but their presence is well known in this proceeding and this desire does not outweigh the above countervailing factors raised by the Applicants and supported by

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The Master,

Last, unlike the valuation ordered with respect to the abandoned plan, here we are dealing with a SISP which, in the ordinary course, should have some value determined before considering a valuation. I also note that the Omarali Class Action submitted that its claim has unique features that further warrant a valuation. Again, I do not accept that those features outweigh the concerns of the Applicants.

(4) The fourth issue concerns the break-up fee contained in the Stalking Horse Transaction, in the amount of US$14.66 million in favour of the Sponsor.

Counsel for the U.S. Class Actions submits that the break-up fee is



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anti-competitive and unfairly prejudices the unsecured creditors.

They add that the Sponsor has had its fees paid throughout these proceedings and the Sponsor is committed to purchasing the asset. Additionally, they argue that the Applicants/Sponsor have adduced no evidence to support the quantum sought and the breakup fee results in other bidder having to raise additional funds to compete.[4]

Insofar as the law is concerned, counsel for the US Class Actions point out that this Court has a gatekeeping function and ought not simply act as a "rubber stamp", or merely rely upon the business judgment rule and the seller's discretion.[5]

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4. See Mecachrome Canada Inc, Re, 2009 QCCS 6355
5. at para 64 for support of this submission
Boutique Euphoria Inc, Re 2007 QCCS 7129 at para 65

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Last, they submit that each case must be considered in the context of its own unique circumstances and the mere fact that the proposed break-up fee is within the range of reasonableness as determined in other cases does not mean it is reasonable in the given case.[6]

The Applicants/Sponsor argue that the stalking horse bid provides stability and a framework for competitive bidding. In this context break-up fees are almost always required in exchange for the stalking horse setting the floor, exposing its bid, providing other bidders access, and committing funding.

Further, they argue that the Stalking Horse is tying up a significant amount of capital (in the $200 million



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6. Quest University Canada (Re) 2020 BCSC 1845 at para 58; Leslie + Irene Dube Foundation Inc v P218 Enterprises Ltd 2014 BCSC 1855 at para 36

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range) and the resulting loss of opportunity cost must be taken into account.

The Sponsor particularly point out that the break-up fee is not anti-competitive, but rather allows the competitive bidding to occur to the benefit of all stakeholders, including the over 1000 employees and approximate 1,000,000 customers.

The Applicant/Sponsor further submit that the break-up fee is well within the accepted range (3.4%) and rely on the evidence of Mr. Carter (paras 60-63 of his affidavit) and their expert Mark Caiger. Mr. Caiger opines that the break-up fee is in-line with market terms, consistent with market practice and reasonable in the circumstances of



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this case.

Mr Caiger was engaged by Just Energy to advise and assist it. In his May 12/22 affidavit he thoroughly sets out the basis of his analysis (see paras 32-38).

Further, the Applicants point to the fact that the previously approved Termination Fee, in connection with the abandoned Plan, was in the same range and was not opposed.

In support of the Applicants, the Monitor also emphasizes that break-up fee is in no way a gratuitous offering but is part of a complicated arms length agreement, that resulted in the Stalking Horse Transaction. This transaction provides certainty to all stakeholders of a going concern transaction that can



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close in a timely fashion. The Monitor too is of the view that the break-up fee will not chill the market and its review also has found that it is consistent with break-up fees in similar sales transactions carried out under the CCAA and in the U.S.

I agree that the break up fee ought to be granted. It is a critical feature of the proposed transaction. The 3.4% is within the range of acceptibility.

Although the actual fee, at first glance may seem high, the SISP involves a significant, complicated process involving a complex and large scale business model with secured claims of approximately $1 billion.

The risks and stakes here are



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**Judges Endorsment Continued**

extremely high and the break-up fee is reasonable when one considers all the factors - including the price of stability.[7]

In the very unique and complex circumstances of this case I do not accept the US Class Actions' submission that no break-up fee is warranted - this is not realistic.

Rather the proposed break-up fee recognizes, amongst other things, the effort expended by the Sponsor, the capital committed and the benefits of the Stalking Horse Transaction within the SISP as set out in the record filed by the Applicants. Specifically, it also allows the transaction to proceed and attempt to attract other bidders.

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7. Green Growth Brands (Re) 2020 ONSC 3561 at pp 51-52.

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(5) The last issue involves the request of the U.S. Class Actions to extend the timeline under the SISP by three weeks.

They primarily submit that there are no liquidity issues and the existing timelines are very tight. For example the NOI is due Aug 25/22.

The Applicants, prior to the motion, maintained that the timelines were appropriate based on its unchallenged evidence, which includes the volatility of the market and effect on employees.

They also submit that the process commenced on Aug 4/22, not as of the date of the motion.

The Applicants conceded liquidity. At the hearing the Applicants met, off the record, with their key



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## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

secured stakeholder and advised that they would agree to a one week extension.

As I alluded to at the motion, I believe that a two week extension to the milestones is fair and reasonable. As a result of my previous orders the proposed Sales Process is proceeding essentially as proposed by the Applicants / Sponsor including the break-up fee.

Further, as the Applicants and their supporters have stated the Sales Process is extremely complex and involves significant debt and funding.

By allowing an extra week (over and above the concession at the motion) I see no prejudice



Judges Initials _____

Court File Number: _____

**Superior Court of Justice**
Commercial List

## FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

to the Applicants. The matter has been evolving for many months and it must be remembered that it took the Applicants some time to formulate the prior Plan.

The extra two weeks provides a clear, court ordered structure and path to a definitive auction date.

In my view, this provides a reasonably quick timetable, but allows some breathing room for other bidders. which is to be benefit of stakeholders.[8]

I coming to this conclusion I have not ignored the Applicants' prior marketing efforts.

A two week extension is granted

Orders shall go with respect to the foregoing reasons.

DM

Page 28 of 29

Judges Initials _____

8. see PCAS Patient Care Automation Services Inc. (Re) 2012 ONSC 2840 at paras 17, 18 for support of this proposition.

Court File Number: _____

**Superior Court of Justice**
Commercial List

# FILE/DIRECTION/ORDER

**Judges Endorsment Continued**

If problems arise with respect to the Issuance of the Sales Process Approval Order I can be spoken to.

McEwen



Judges Initials TM

| | | |
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# TAB 16

Court File No. CV-21-00658423-00CL

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

| | | |
|---|---|---|
| THE HONOURABLE MR. | ) | THURSDAY, THE 18TH |
| | ) | |
| JUSTICE MCEWEN | ) | DAY OF AUGUST, 2022 |

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant**", and collectively, the "**Applicants**")

**SISP APPROVAL ORDER**

**THIS MOTION**, made by the Applicants (together, the Applicants and the partnerships listed on **Schedule "A"** hereto, the "**Just Energy Entities**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an order, *inter alia*, approving the Sale and Investment Solicitation Process in respect of the Just Energy Entities attached hereto as **Schedule "B"** (the "**SISP**") and certain related relief, was heard on August 17, 2022 by judicial videoconference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

**ON READING** the affidavit of Michael Carter sworn August 4, 2022 and the Exhibits thereto (the "**Carter Affidavit**"), the Eleventh Report of FTI Consulting Canada Inc. (the "**Eleventh Report**"), in its capacity as monitor (the "**Monitor**"), dated August 13, 2022, and on hearing the submissions of counsel for the Just Energy Entities, the Monitor, the Sponsor (as hereinafter defined), and such other counsel who were present, no one else appearing although duly served as appears from the affidavits of service of Emily Paplawski sworn August 5, August 8, August 11 and August 16, 2022.

**SERVICE AND DEFINITIONS**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion was properly returned on August 17, 2022 and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP, the Second Amended and Restated Initial Order of this Court dated May 26, 2021 (the "**Second ARIO**"), the Claims Procedure Order of this Court dated September 15, 2021 (the "**Claims Procedure Order**"), or the Support Agreement attached as Exhibit "I" to the Carter Affidavit (the "**Support Agreement**"), as applicable.

**SALES AND INVESTMENT SOLICITATION PROCESS**

3. **THIS COURT ORDERS** that the SISP is hereby approved and the Just Energy Entities are hereby authorized to implement the SISP pursuant to the terms thereof. The Just Energy Entities, the Monitor and the Financial Advisor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder and as directed by the Court in this Order and the related endorsement dated August 18, 2022.

4. **THIS COURT ORDERS** that the Monitor and the Financial Advisor, and their respective affiliates, partners, directors, employees, and agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of the Monitor or Financial Advisor, as applicable, in performing their obligations under the SISP, as determined by this Court.

**SUPPORT AGREEMENT**

5. **THIS COURT ORDERS** that the Support Agreement is hereby approved and the Just Energy Entities are authorized and empowered to enter into the Support Agreement, *nunc pro tunc*, subject to such minor amendments as may be consented to by the Monitor and as may be acceptable to each of the parties thereto, and are authorized, empowered and directed to take all steps and actions in respect of, and to comply with all of their obligations pursuant to, the Support Agreement.

6. **THIS COURT ORDERS** that, notwithstanding the stay of proceedings imposed by the Second ARIO, a counterparty to the Support Agreement may exercise any termination right that may become available to such counterparty pursuant to the Support Agreement, provided that such termination right must be exercised pursuant to and in accordance with the Support Agreement.

**STALKING HORSE TRANSACTION AGREEMENT**

7. **THIS COURT ORDERS** that Just Energy Group Inc. ("**Just Energy**") is hereby authorized and empowered to enter into the stalking horse transaction agreement (the "**Stalking Horse Transaction Agreement**") dated as of August 4, 2022, between Just Energy and LVS III

SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP, and CBHT Energy I LLC (collectively, the "**Sponsor**") and attached as Exhibit "A" to the Carter Affidavit, *nunc pro tunc,* and such minor amendments as may be acceptable to each of the parties thereto, with the approval of the Monitor and subject to the terms of the Support Agreement; provided that, nothing herein approves the sale and the vesting of any Property to the Sponsor (or any of its designees) pursuant to the Stalking Horse Transaction Agreement and that the approval of any sale and vesting of any such Property shall be considered by this Court on a subsequent motion made to this Court if the Stalking Horse Transaction is the Successful Bid pursuant to the SISP.

8. **THIS COURT ORDERS** that, as soon as reasonably practicable following Just Energy (a) entering into any amendment to the Stalking Horse Transaction Agreement permitted pursuant to the terms of this Order; or (b) agreeing upon the final Implementation Steps (as defined in the Stalking Horse Transaction Agreement), the Just Energy Entities shall, in each such case, (i) file a copy thereof with this Court, (ii) serve a copy thereof on the Service List, and (iii) provide a copy thereof to each SISP Participant (as hereinafter defined), excluding from the public record any confidential information that Just Energy and the Sponsor, with the consent of the Monitor, agree should be redacted.

**BID PROTECTIONS**

9. **THIS COURT ORDERS** that the Break-Up Fee is hereby approved and Just Energy is hereby authorized and directed to pay the Break-Up Fee to the Sponsor (or as it may direct) in the manner and circumstances described in the Stalking Horse Transaction Agreement.

10. **THIS COURT ORDERS** that the Sponsor shall be entitled to the benefit of and is hereby granted a charge (the "**Bid Protections Charge**") on the Property, which charge shall not exceed

US$14,660,000, as security for payment of the Break-Up Fee in the manner and circumstances described in the Stalking Horse Transaction Agreement.

11. **THIS COURT ORDERS** that Paragraphs 53, 54 and 56 of the Second ARIO shall be, and are hereby, amended in the manner detailed below:

(a) Paragraph 53 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that the priorities of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge, the Cash Management Charge and the Bid Protections Charge (as defined in the Order in these proceedings dated August 18, 2022), as among them, shall be as follows:
>
> > First – Administration Charge and FA Charge (to the maximum amount of C$3,000,000 and C$8,600,000, respectively), on a *pari passu* basis;
> >
> > Second – Directors' Charge (to the maximum amount of C$44,100,000);
> >
> > Third – KERP Charge (to the maximum amounts of C$2,012,100 and US$3,876,024);
> >
> > Fourth – DIP Lenders' Charge (to the maximum amount of the Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time) and the Priority Commodity/ISO Charge, on a *pari passu* basis; ~~and~~
> >
> > Fifth – Cash Management Charge; and~~.~~
> >
> > Sixth – Bid Protections Charge (in the amount of US$14,660,000).

(b) Paragraph 54 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge the Cash Management Charge, or the Bid Protections Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

(c) Paragraph 56 of the Second ARIO shall be amended as follows:

> **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court on notice to parties in interest, the Just Energy Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Just Energy Entities also obtain the prior written consent of the Monitor, the DIP Agent on behalf of the DIP Lenders and the beneficiaries of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the Priority Commodity/ISO Charge, the Cash Management Charge and the Bid Protections Charge or further Order of this Court.

**PIPEDA**

12. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Monitor, the Just Energy Entities and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants (each, a "**SISP Participant**") and their advisors personal information of identifiable individuals but only to the extent desirable or required to negotiate or attempt to complete a transaction pursuant to the SISP (a "**Transaction**"). Each SISP Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation for the purpose of effecting a Transaction, and if it does not complete a Transaction, shall return all such information to the Monitor or the Just Energy Entities, or in the alternative destroy all such information and provide confirmation of its destruction if requested by the Monitor or the Just Energy Entities. Any Successful Party shall maintain and protect the privacy of such information and, upon closing of the Transaction(s) contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Just Energy Entities, and shall return all other personal information to the Monitor or the Just Energy Entities, or ensure

that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor or the Just Energy Entities.

**THIRD KEY EMPLOYEE RETENTION PLAN**

13. **THIS COURT ORDERS** that the Third KERP, as described in the Carter Affidavit and attached as Confidential Exhibit "L" thereto, is hereby approved and the Just Energy Entities are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the Third KERP.

14. **THIS COURT ORDERS** that the Just Energy Entities, in consultation with the Monitor, are authorized and empowered to reallocate funds under the Third KERP originally allocated to Key Employees who have resigned, or will resign, from their employment with the Just Energy Entities, or who have declined, or will decline, to receive payments(s) under the Third KERP, to remaining Key Employees or other employees of the Just Energy Entities that the Just Energy Entities, in consultation with the Monitor, identify as critical to their ongoing business.

15. **THIS COURT ORDERS** that the KERP Charge established at paragraph 24 of the Second ARIO shall apply equally to, and secure, any remaining payments under the KERP and the Second KERP (as defined in the Order of this Court dated November 10, 2021) to the Key Employees and the payments contemplated to the Key Employees referred to in the Third KERP.

**STAY EXTENSION**

16. **THIS COURT ORDERS** that the Stay Period is hereby extended until and including October 31, 2022.

**APPROVAL OF MONITOR'S REPORTS**

17. **THIS COURT ORDERS** that the activities and conduct of the Monitor prior to the date hereof in relation to the Just Energy Entities and these CCAA proceedings are hereby ratified and approved.

18. **THIS COURT ORDERS** that each of the Tenth Report of the Monitor dated May 18, 2022, the Supplement to the Tenth Report of the Monitor dated June 1, 2022, and the Eleventh Report be and are hereby approved.

19. **THIS COURT ORDERS** that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way the approvals set forth in paragraphs 17 and 18 of this Order.

**CLAIMS PROCEDURE**

20. **THIS COURT ORDERS** that the ongoing claims review, claims determination and dispute resolution processes under (a) the Claims Procedure Order; (b) the Order of this Court dated March 3, 2022, among other things, appointing the Honourable Justice Dennis O'Connor as Claims Officer for the purposes set forth therein; and (c) the Endorsement of this Court dated June 10, 2022, shall be suspended pending further Order of this Court; provided that, for certainty, (x) where (i) a Claimant has not submitted a Proof of Claim or D&O Proof of Claim by the applicable Bar Date, (ii) a Negative Notice Claimant has not submitted a Notice of Dispute of Claim by the applicable Bar Date, or (iii) a Claim or D&O Claim has already been disallowed or revised in accordance with the Claims Procedure Order and the applicable period of time to dispute such revision or disallowance has expired without the Claimant submitting a Notice of Dispute of Revision or Disallowance, such Claimant will continue to be barred from pursuing such Claim or

D&O Claim pursuant to the relevant provisions of the Claims Procedure Order and (y) this Order does not impact the acceptance of any Claims or other final determination or agreement in respect of Claims made pursuant to the Claims Procedure Order prior to the date of this Order; provided further that, notwithstanding anything to the contrary herein, the Just Energy Entities shall be permitted, with the consent of the Monitor, to refer any Claim to a Claims Officer or this Court for adjudication for the purposes of determining entitlement to proceeds to be distributed in accordance with a transaction completed pursuant to the SISP.

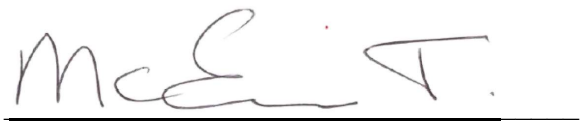
**GENERAL**

21. **THIS COURT ORDERS** that Confidential Exhibits "J" and "L" to the Carter Affidavit shall be and is hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

22. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal and regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, including the United States Bankruptcy Court for the Southern District of Texas overseeing the Just Energy Entities' proceedings under Chapter 15 of the Bankruptcy Code in Case No. 21-30823 (MI), or in any other foreign jurisdiction, to give effect to this Order and to assist the Just Energy Entities, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Just Energy Entities and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order

or to assist the Just Energy Entities and the Monitor and their respective agents in carrying out the terms of this Order.



**SCHEDULE "A"**
**PARTNERSHIPS**

- JUST ENERGY ONTARIO L.P.
- JUST ENERGY MANITOBA L.P.
- JUST ENERGY (B.C.) LIMITED PARTNERSHIP
- JUST ENERGY QUÉBEC L.P.
- JUST ENERGY TRADING L.P.
- JUST ENERGY ALBERTA L.P.
- JUST GREEN L.P.
- JUST ENERGY PRAIRIES L.P.
- JEBPO SERVICES LLP
- JUST ENERGY TEXAS LP

# SCHEDULE "B"
# SALE AND INVESTMENT SOLICITATION PROCESS

1. On August 18, 2022, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted an order (the "**SISP Order**") that, among other things, (a) authorized Just Energy (as defined below) to implement a sale and investment solicitation process ("**SISP**") in accordance with the terms hereof, (b) approved the Support Agreement, (c) authorized and directed Just Energy Group Inc. to enter into the Stalking Horse Transaction Agreement, (d) approved the Break-Up Fee, and (e) granted the Bid Protections Charge. Capitalized terms that are not defined herein have the meanings ascribed thereto in the Second Amended & Restated Initial Order granted by the Court in Just Energy's proceedings under the *Companies' Creditors Arrangement Act* on May 26, 2021, as amended, restated or supplemented from time to time or the SISP Order, as applicable.

2. This SISP sets out the manner in which (i) binding bids for executable transaction alternatives that are superior to the sale transaction to be provided for in the Stalking Horse Transaction Agreement involving the shares and/or the business and assets of Just Energy Group Inc. and its direct and indirect subsidiaries (collectively, "**Just Energy**") will be solicited from interested parties, (ii) any such bids received will be addressed, (iii) any Successful Bid (as defined below) will be selected, and (iv) Court (as defined below) approval of any Successful Bid will be sought. Such transaction alternatives may include, among other things, a sale of some or all of Just Energy's shares, assets and/or business and/or an investment in Just Energy, each of which shall be subject to all terms set forth in this SISP.

3. The SISP shall be conducted by Just Energy under the oversight of FTI Consulting Canada Inc., in its capacity as court-appointed monitor (the "**Monitor**"), with the assistance of BMO Capital Markets (the "**Financial Advisor**").

4. Parties who wish to have their bids considered shall be expected to participate in the SISP as conducted by Just Energy and the Financial Advisor.

5. The SISP will be conducted such that Just Energy and the Financial Advisor will (under the oversight of the Monitor):

    a) prepare marketing materials and a process letter;
    b) prepare and provide applicable parties with access to a data room containing diligence information;
    c) solicit interest from parties to enter into non-disclosure agreements (parties shall only obtain access to the data room and be permitted to participate in the SISP if they execute a non-disclosure agreement that is in form and substance satisfactory to Just Energy); and
    d) request that such parties (other than the Sponsor or its designee) submit (i) a notice of intent to bid that identifies the potential purchaser and a general description of the assets and/or business(es) of the Just Energy Entities that would be the subject of the bid and that reflects a reasonably likely prospect of culminating in a Qualified Bid (as defined below), as determined by the Just Energy Entities in consultation with the Monitor and the Credit Facility Agent (subject to the confidentiality requirements set forth in Section 15 below) (a "**NOI**") by the NOI Deadline (as defined below) and, if applicable, (ii) a binding offer meeting at least the requirements set forth in Section 7 below, as determined by the Just Energy Entities in consultation with the Monitor (a "**Qualified Bid**") by the Qualified Bid Deadline (as defined below).

6. The SISP shall be conducted subject to the terms hereof and the following key milestones:

    a) Just Energy to commence solicitation process on the date of service of the motion for approval of the SISP – August 4, 2022;[1]
    b) Court approval of SISP and authorizing Just Energy to enter into the Stalking Horse Transaction Agreement – August 18, 2022;
    c) Deadline to submit NOI – 11:59 p.m. Eastern Daylight Time on September 8, 2022 (the "**NOI Deadline**");
    d) Deadline to submit a Qualified Bid – 11:59 p.m. Eastern Daylight Time on October 13, 2022 (the "**Qualified Bid Deadline**");
    e) Deadline to determine whether a bid is a Qualified Bid and, if applicable, to notify those parties who submitted a Qualified Bid of the Auction (as defined below) – 5:00 p.m. Eastern Daylight Time on October 20, 2022;
    f) Just Energy to hold Auction (if applicable) – 10:00 a.m. Eastern Daylight Time on October 22, 2022; and
    g) Implementation Order (as defined below) hearing:
        - (if no NOI is submitted) – by no later than September 16, 2022, subject to Court availability.
        - (if there is no Auction) – by no later than October 29, 2022, subject to Court availability.
        - (if there is an Auction) – by no later than twelve (12) days after completion of the Auction, subject to Court availability.

7. In order to constitute a Qualified Bid, a bid must comply with the following:

    a. it provides for (i) the payment in full in cash on closing of the BP Commodity/ISO Services Claim (as defined in the Support Agreement), unless otherwise agreed to by the holder of such claim in its sole discretion; (ii) the payment in full in cash on closing of the Credit Facility Claims, unless otherwise agreed to by the Credit Facility Agent in its sole discretion; (iii) the payment in full in cash on closing of any claims ranking in priority to the claims set forth in subparagraphs (i) or (ii) including any claims secured by Court-ordered charges, unless otherwise agreed to by the applicable holders thereof in their sole discretion (iv) the return of all outstanding letters of credit and release of all Credit Facility LC Claims or arrangements satisfactory to the applicable Credit Facility Lenders in their discretion to secure with cash collateral or otherwise any Credit Facility LC Claims not released, and (v) the payment in full in cash on closing of any outstanding Cash Management Obligations or arrangements satisfactory to the applicable Credit Facility Lenders or their affiliates to secure with cash collateral or otherwise any outstanding Cash Management Obligations.
    b. it provides a detailed sources and uses schedule that identifies, with specificity, the amount of cash consideration (the "**Cash Consideration Value**") and any assumptions that could reduce the net consideration payable. At a minimum, the Cash Consideration Value plus Just Energy's cash on hand must be sufficient for payment in full of the items contemplated in Sections 7(a)(i) and 7(a)(ii) herein, 3.2 of the Stalking Horse Transaction Agreement and the Break-Up Fee, plus USD$1,000,000, on closing, which Cash Consideration Value is estimated to be USD$460,000,000 as of December 31, 2022.

[1] To the extent any dates would fall on a non-business day, to be the first business day thereafter.

c. it is reasonably capable of being consummated by 90 days after completion of the Auction if selected as the Successful Bid;
d. it contains:
    i. duly executed binding transaction document(s);
    ii. the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, and the name(s) of its controlling equityholder(s);
    iii. a redline to the form of transaction document(s) provided by Just Energy, if applicable;
    iv. evidence of authorization and approval from the bidder's board of directors (or comparable governing body) and, if necessary to complete the transaction, the bidder's equityholder(s);
    v. disclosure of any connections or agreements with Just Energy or any of its affiliates, any known, potential, prospective bidder, or any officer, manager, director, or known equity security holder of Just Energy or any of its affiliates; and
    vi. such other information reasonably requested by Just Energy or the Monitor;
e. it includes a letter stating that the bid is submitted in good faith, is binding and is irrevocable until the selection of the Successful Bid; provided, however, that if such bid is selected as the Successful Bid, it shall remain irrevocable until the closing of the Successful Bid;
f. it provides written evidence of a bidder's ability to fully fund and consummate the transaction and satisfy its obligations under the transaction documents, including binding equity/debt commitment letters and/or guarantees covering the full value of all cash consideration and the additional items (in scope and amount) covered by the guarantees provided by affiliates of the Purchaser in connection with the Transaction Agreement;
g. it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;
h. it is not conditional upon:
    i. approval from the bidder's board of directors (or comparable governing body) or equityholder(s);
    ii. the outcome of any due diligence by the bidder; or
    iii. the bidder obtaining financing;
i. it includes an acknowledgment and representation that the bidder has had an opportunity to conduct any and all required due diligence prior to making its bid;
j. it specifies any regulatory or other third-party approvals the party anticipates would be required to complete the transaction (including the anticipated timing necessary to obtain such approvals) and, in connection therewith, specifies whether the bidder or any of its affiliates is involved in any part of the energy sector, including an electric utility, retail service provider, a company with a tariff on file with the Federal Energy Regulatory Commission, or any intermediate holding company;
k. it includes full details of the bidder's intended treatment of Just Energy's employees under the proposed bid;
l. it is accompanied by a cash deposit (the "**Deposit**") by wire transfer of immediately available funds equal to 10% of the Cash Consideration Value, which Deposit shall be retained by the Monitor in a non-interest bearing trust account in accordance with this SISP;
m. a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and
n. it is received by the Qualified Bid Deadline.

8. The Qualified Bid Deadline may be extended by (i) Just Energy for up to no longer than seven days with the consent of the Monitor, the Credit Facility Agent and the Sponsor, acting reasonably, or (ii) further order of the Court. In such circumstances, the milestones contained in Subsections 6(f) and (g) shall be extended by the same amount of time.

9. Just Energy, in consultation with the Monitor, may waive compliance with any one or more of the requirements specified in Section 7 above and deem a non-compliant bid to be a Qualified Bid, provided that Just Energy shall not waive compliance with the requirements specified in Subsections 7(a), (b), (d), (e), (f), (g), (i) or (l) without the prior written consent of the Sponsor and Credit Facility Agent, each acting reasonably.

10. Notwithstanding the requirements specified in Section 7 above, the transactions contemplated by the Stalking Horse Transaction Agreement (the "**Stalking Horse Transaction**"), is deemed to be a Qualified Bid, provided that, for greater certainty, no Deposit shall be required to be submitted in connection with the Stalking Horse Transaction.

11. If one or more Qualified Bids (other than the Stalking Horse Transaction) has been received by Just Energy on or before the Qualified Bid Deadline, Just Energy shall proceed with an auction process to determine the successful bid(s) (the "**Auction**"), which Auction shall be administered in accordance with Schedule "A" hereto. The successful bid(s) selected within the Auction shall constitute the "**Successful Bid**". Forthwith upon determining to proceed with an Auction, Just Energy shall provide written notice to each party that submitted a Qualified Bid (including the Stalking Horse Transaction), along with copies of all Qualified Bids and a statement by Just Energy specifying which Qualified Bid is the leading bid.

12. If, by the NOI Deadline no NOI has been received, then the SISP shall be deemed to be terminated and the Stalking Horse Transaction shall be the Successful Bid and shall be consummated in accordance with and subject to the terms of the Support Agreement and the Stalking Horse Transaction Agreement. If no Qualified Bid (other than the Stalking Horse Transaction) has been received by Just Energy on or before the Qualified Bid Deadline, then the Stalking Horse Transaction shall be the Successful Bid and shall be consummated in accordance with and subject to the terms of the Support Agreement and the Stalking Horse Transaction Agreement.

13. Following selection of a Successful Bid, Just Energy, with the assistance of its advisors, shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bid in accordance with the key milestones set out in Section 6. Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by Just Energy, in consultation with the Monitor, Just Energy shall apply to the Court for an order or orders approving such Successful Bid and/or the mechanics to authorize Just Energy to complete the transactions contemplated thereby, as applicable, and authorizing Just Energy to (i) enter into any and all necessary agreements and related documentation with respect to the Successful Bid, (ii) undertake such other actions as may be necessary to give effect to such Successful Bid, and (iii) implement the transaction(s) contemplated in such Successful Bid (each, an "**Implementation Order**").

14. All Deposits shall be retained by the Monitor in a non-interest bearing trust account. If a Successful Bid is selected and an Implementation Order authorizing the consummation of the transaction contemplated thereunder is granted, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Qualified Bid that is not selected as a Successful Bid, will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten

(10) business days) after the date upon which the Successful Bid is approved pursuant to an Implementation Order or such earlier date as may be determined by Just Energy, in consultation with the Monitor.

15. Just Energy shall provide information in respect of the SISP to the DIP Lenders, the holder of the BP Commodity/ISO Services Claim and the Supporting Secured CF Lenders on a confidential basis, including (A) copies (or if not provided to the Just Energy Entities in writing, a detailed description) of any NOI and any bid received, including any Qualified Bid, no later than one (1) calendar day following receipt thereof by the Just Energy Entities or their advisors and (B) such other information as reasonably requested by the DIP Lenders', the holder of the BP Commodity/ISO Services Claim or the Supporting Secured CF Lenders' respective legal counsel or financial advisors or as necessary to keep the DIP Lenders, the holder of the BP Commodity/ISO Services Claim or the Supporting Secured CF Lenders informed no later than one (1) calendar day after any such request or any material change to the proposed terms of any bid received, including any Qualified Bid, as to the terms of any bid, including any Qualified Bid, (including any changes to the proposed terms thereof) and the status and substance of discussions related thereto. Just Energy shall be permitted, in its discretion, to provide general updates and information in respect of the SISP to counsel to any unsecured creditor of Just Energy (a "**General Unsecured Creditor**") on a confidential basis, upon: (i) the irrevocable confirmation in writing from such counsel that the applicable General Unsecured Creditor will not submit any NOI or bid in the SISP, and (ii) counsel to such General Unsecured Creditor executing confidentiality agreements with Just Energy, in form and substance satisfactory to Just Energy and the Monitor.

16. Any amendments to this SISP may only be made by Just Energy with the written consent of the Monitor and after consultation with the Credit Facility Agent, or by further order of the Court, provided that Just Energy shall not amend Subsections 7(a), (b), (d), (e), (f), (g), (i) or (l) or Section 14 without the prior written consent of the Sponsor and the Credit Facility Agent.

# SCHEDULE "A": AUCTION PROCEDURES

1. **Auction**. If Just Energy receives at least one Qualified Bid (other than the Stalking Horse Transaction), Just Energy will conduct and administer the Auction in accordance with the terms of the SISP. Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.

2. **Participation**. Only parties that provided a Qualified Bid by the Qualified Bid Deadline, including the Stalking Horse Transaction (collectively, the "**Qualified Parties**"), shall be eligible to participate in the Auction. No later than 5:00 p.m. Eastern Daylight Time on the day prior to the Auction, each Qualified Party (other than the Sponsor) must inform Just Energy whether it intends to participate in the Auction. Just Energy will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party provides such expression of intent, the Stalking Horse Transaction shall be the Successful Bid.

3. **Auction Procedures**. The Auction shall be governed by the following procedures:

   (a) **Attendance.** Only Just Energy, the other counterparties to the Support Agreement, the Qualified Parties, the Monitor and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any subsequent Overbids (as defined below) at the Auction;

   (b) **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (i) it has not engaged in any collusion with respect to the Auction and the bid process; and (ii) its bid is a good-faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bid (as defined below);

   (c) **Minimum Overbid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by Just Energy, in consultation with the Monitor (the "**Initial Bid**"), and any bid made at the Auction by a Qualified Party subsequent to Just Energy's announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional cash increments of USD$1,000,000;

   (d) **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video-conference, on an open basis, and all Qualified Parties will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each subsequent bid will be fully disclosed to all other Qualified Parties throughout the entire Auction; provided, however, that Just Energy, in its discretion, may establish separate video conference rooms to permit interim discussions between Just Energy and individual Qualified Parties with the understanding that all formal bids will be delivered in one group video conference, on an open basis;

   (e) **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit one or more additional bids with full knowledge and written confirmation of the then-existing highest bid(s); and

(f) **No Post-Auction Bids**. No bids will be considered for any purpose after the Auction has concluded.

**Selection of Successful Bid**

4. **Selection**. Before the conclusion of the Auction, Just Energy, in consultation with the Monitor, will: (a) review each Qualified Bid, considering the factors set out in Section 7 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in prong (i) above; (iii) the likelihood of the Qualified Party's ability to close a transaction by 90 days after completion of the Auction and the timing thereof (including factors such as the transaction structure and execution risk, including conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to Just Energy and (vi) any other factors Just Energy may, consistent with its fiduciary duties, reasonably deem relevant; and (b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").

5. **Acknowledgement**. The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by Just Energy in its sole discretion, subject to the milestones set forth in Section 6 of the SISP.

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

Court File No: CV-21-00658423-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., et al.

***Ontario***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

Proceeding commenced at Toronto

**SISP APPROVAL ORDER**

**OSLER, HOSKIN & HARCOURT LLP**
P.O. Box 50, 1 First Canadian Place
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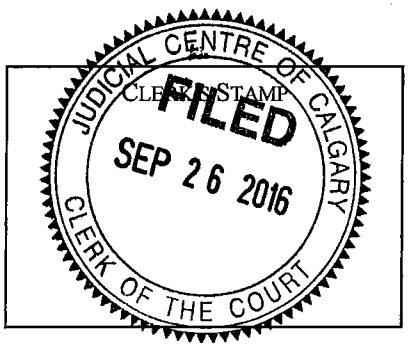
Fax: (416) 862-6666

Lawyers for the Just Energy Entities

# TAB 17

I hereby certify this to be a true copy of
the original Order
Dated this 26 day of Sept, 2016
for Clerk of the Court

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|---|---|
| COURT FILE NUMBER | 1601 – 12571 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended<br><br>AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 1863360 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP |
| APPLICANTS | LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD AND 1863360 ALBERTA LTD |
| PARTIES IN INTEREST | LTS RESOURCES PARTNERSHIP AND BAKKEN RESOURCES PARTNERSHIP |
| DOCUMENT | **ORDER (EXTEND TIME FOR ANNUAL GENERAL MEETING)** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **BLAKE, CASSELS & GRAYDON LLP**<br>Barristers and Solicitors<br>3500 Bankers Hall East<br>855 – 2nd Street SW<br>Calgary, Alberta T2P 4J8<br>Attention: Kelly Bourassa / Milly Chow<br>Telephone No.: 403-260-9697/416-863-2594<br>Email: kelly.bourassa@blakes.com / milly.chow@blakes.com<br>Fax No.: 403-260-9700<br>File: 89691/8 |

**DATE ON WHICH ORDER WAS PRONOUNCED:** September 26, 2016

**NAME OF JUDGE WHO MADE THIS ORDER:** The Honourable Mr. Justice A.D. Macleod

**LOCATION OF HEARING:** Calgary, Alberta

**UPON THE APPLICATION** of Lightstream Resources Ltd. ("**LTS**"), 1863359 Alberta Ltd. and 1863360 Alberta Ltd. (collectively, the "**Applicants**") for an order providing relief to LTS from its obligation to hold an annual general meeting (the "**AGM**") by September 30, 2016 pursuant to section 132 of the *Business Corporations Act,* RSC 1985, c C-44, as amended (the "**ABCA**"); **AND UPON** reading the Application, the Affidavit of Peter D. Scott sworn September [**23**], 2016, and the Interim Order (the "**Interim Order**") of the Honourable Justice C.M. Jones in Court of Queen's Bench of Alberta Action Number 1601-08725, **AND UPON** hearing from counsel for LTS and any other interested parties present;

**IT IS HEREBY ORDERED AND DECLARED THAT:**

1. The time for service of the notice of Application for this Order is hereby abridged and deemed good and sufficient and this Application is properly returnable today.

2. LTS is relieved until March 31, 2017 from its obligation under section 132 of the ABCA and the Interim Order to hold an AGM by September 30, 2016.

3. Leave is hereby granted to any person, entity or party affected by this Order to apply to this Court for a further Order vacating, substituting, modifying or varying the terms of this Order, with such application to be brought on notice to the Applicants and any other affected party in accordance with the Alberta *Rules of Court.*

J.C. C.Q.B.A.

# TAB 18

SUPERIOR COURT OF JUSTICE

# COUNSEL/ENDORSEMENT SLIP

**COURT FILE NO.:** **CV-23-00696017-00CL** **DATE:** **20 March 2023**

**NO. ON LIST:** **2**

**TITLE OF PROCEEDING:** **LOYALTYONE, CO.**

**BEFORE MADAM JUSTICE:** **Conway**

## PARTICIPANT INFORMATION

**For Plaintiff, Applicant, Moving Party, Crown:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| Jane Dietrich | LoyaltyOne, Co. | jdietrich@cassels.com |
| Natalie Levine | LoyaltyOne, Co. | nlevine@cassels.com |
| | | |
| | | |

**For Defendant, Respondent, Responding Party, Defence:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

**For Other, Self-Represented:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| Heather Meredith | Reserve Trustee | hmeredith@mccarthy.ca |
| Mike Noel | Bank of Montreal | mnoel@torys.com |
| David Bish | Bank of Montreal | dbish@torys.com |
| Thomas Gray | Ad Hoc Group of Term B Lenders | grayt@bennettjones.com |
| Jesse Mighton | Ad Hoc Group of Term B Lenders | mightonj@bennettjones.com |
| Kevin Zych | Ad Hoc Group of Term B Lenders | zychk@bennettjones.com |
| Alex MacFarlane | Bank of America | amacfarlane@blg.com |
| Brendan O'Neill | Monitor (KSV) | boneill@goodmans.ca |

**ENDORSEMENT OF MADAM JUSTICE CONWAY**

**All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of LoyaltyOne, Co. dated March 17, 2023**.

[1] On March 10, 2023, the Applicant was granted protection under the CCAA pursuant to the Initial Order, which provides for a Stay of Proceedings up to March 20, 2023. This is the comeback motion. The Applicant seeks two orders today with a wide variety of relief.

[2] The first is the Amended and Restated Initial Order that, among other things, authorizes the DIP Financing Facility and the DIP Lender's Charge, authorizes the Applicant to enter into the Transaction Support Agreement *nunc pro tunc* and approves that agreement, extends the Stay of Proceedings to May 18, 2023, increases the Administration Charge and the Directors' Charge to the maximum of $3 million and $15.408 million, respectively, approves the Employee Retention Plans and grants the related charge to the maximum of $5.35 million, and approves the retention of the Financial Advisor and grants the Financial Advisor Charge to a maximum of US$6 million to secure the Transaction Fee.

[3] The second is the SISP Approval Order that authorizes the Applicant to enter into the Stalking Horse Purchase Agreement, approves the Bid Protections and related charge to the maximum of $US 4 million, and authorizes the Applicant to conduct the SISP along with the Financial Advisor and the Monitor.

[4] All of the relief sought is supported by BMO, the Consenting Stakeholders representing over 66-2/3% of the Credit Agreement Lenders by value, the Monitor, and is otherwise unopposed.

[5] With respect to the DIP Financing Facility of US$70 million, I have considered the interests of all of the Applicant's stakeholders and specifically the factors in s. 11.2(4) of the CCAA. The financing will provide sufficient financing to support the Applicant throughout the proposed SISP. The Applicant otherwise lacks the liquidity required to continue the business as a going concern during the sales process. It will permit the Applicant to pursue a going concern transaction for the business. No creditor will be materially prejudiced as a result of the charge given that it will rank behind the Reserve Account established for Collectors and, as noted, it has been consented to by the Consenting Stakeholders whose interests would be directly affected by the DIP Financing Facility. The Monitor considers the cash flow statement to be reasonable and is supportive of the financing.

[6] The DIP Financing Facility contemplates the making of the Intercompany DIP Loan from the Applicant to LVI of up to US$30 million. This will enable LVI to continue to provide the Intercompany Services to Applicant and provide LVI with liquidity to pursue the U.S. Proceedings, including the establishment of a liquidating trust and a claim against Bread and others, which is expected to yield further recovery for stakeholders. Subject to the granting of an order in the U.S. Proceedings, the Intercompany DIP Loan will be secured by a charge in the U.S. Proceedings over LVI's current and future assets.

[7] I am approving the DIP Financing Facility.

[8] The Transaction Support Agreement between the Applicant and the Consenting Stakeholders is designed to support the Applicant in its efforts to find a going-concern solution. The Monitor supports the agreement. It will provide stability and certainty to the Applicant's stakeholders as it pursues the going concern solution. I approve it under s. 11 of the CCAA.

[9] The Employee Retention Plans (both the retention plan for approximately 500 employees and the KERP for 20 key executives and employees) were developed with the assistance of the Monitor. They will ensure that the Applicant has the continued services of those required to continue the business while these CCAA proceedings unfold. I approve those plans and the related Employee Retention Plan Charge.

[10] The Stay of Proceedings to May 18, 2023 is designed to tie into the milestones in the SISP. I am satisfied that the Applicant is acting in good faith and with due diligence and that the extension should be granted under s. 11 and 11.02 of the CCAA. In addition, I am staying any setoff of pre-filing against post-filing obligations subject to further court order.

[11] The increased Administration Charge and Directors Charge have been developed in consultation with the Monitor and are reasonable. I approve same.

[12] The Financial Advisor engagement and related charge for the Transaction Fee are approved in light of the complexity of the restructuring.

[13] The Stalking Horse Agreement and the Bid Protections Charge are acceptable to me. The agreement is designed to provide a floor for an acquisition transaction while the Applicant runs the SISP. The quantum of the Bid Protections are, according to the Monitor, well within the reasonable range, 2.5% of the purchase price. I note that the Applicant is NOT seeking approval of any transaction at this time.

[14] The SISP is approved. The milestones and timelines are reasonable. The process seeks to maximize the recovery for the Applicant and its stakeholders. It satisfies the requirements of s. 36 of the CCAA.

[15] Orders to go as signed by me and attached to this Endorsement. These orders are effective from today's date and are enforceable without the need for entry and filing.

# TAB 19

Court File No. CV-23-00696017-00CL

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

| | | |
|---|---|---|
| THE HONOURABLE | ) | MONDAY, THE 20th |
| | ) | |
| JUSTICE CONWAY | ) | DAY OF MARCH, 2023 |

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 LOYALTYONE, CO.

(the "**Applicant**")

## SISP APPROVAL ORDER

**THIS MOTION**, made by the Applicant pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an order, *inter alia*, approving the Sale and Investment Solicitation Process in respect of the business and assets of the Applicant and its affiliate, LoyaltyOne Travel Services Co./Cie Des Voyages LoyaltyOne, in the form attached hereto as **Schedule "A"** (the "**SISP**") and certain related relief, was heard this day by judicial videoconference via Zoom in Toronto, Ontario.

**ON READING** the affidavit of Shawn Stewart sworn March 10, 2023 and the Exhibits thereto (the "**Stewart Affidavit**"), the pre-filing report of KSV Restructuring Inc. ("**KSV**") as the proposed Monitor dated March 10, 2023, the affidavit of Shawn Stewart sworn March 13, 2023 and the Exhibits thereto (the "**Second Stewart Affidavit**"), the first report of KSV as the Court-appointed monitor of the Applicant (in such capacity, the "**Monitor**") dated March 16, 2023 and the affidavit of Alec Hoy sworn March 18, 2023 and the Exhibits thereto, and on being advised that the secured creditors who are likely to be affected by the charge created herein were given notice, and on hearing the submissions of counsel for the Applicant, the Monitor, Bank of Montreal (the "**Stalking Horse Purchaser**"), and the other parties listed on the counsel slip, no one appearing for any other party although duly served as appears from the affidavits of service of Alec Hoy sworn March 10, March 13, March 17 and March 18, 2023,

**SERVICE AND DEFINITIONS**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP, the Amended and Restated Initial Order of this Court dated March 20, 2023 (the "**ARIO**"), the Stewart Affidavit or the Second Stewart Affidavit, as applicable.

**SALE AND INVESTMENT SOLICITATION PROCESS**

3. **THIS COURT ORDERS** that the SISP is hereby approved and the Applicant is hereby authorized and directed to implement the SISP pursuant to the terms thereof. The Applicant, the Monitor and the Financial Advisor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder, subject to prior approval of the Court being obtained before completion of any transaction(s) under the SISP.

4. **THIS COURT ORDERS** that the Applicant, the Monitor and the Financial Advisor and their respective affiliates, partners, directors, officers, employees, legal advisors, representatives, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of the Applicant, the Monitor or the Financial Advisor, as applicable, in performing their obligations under the SISP, as determined by this Court in a final order that is not subject to appeal or other review.

5. **THIS COURT ORDERS** that in overseeing the SISP, the Monitor shall have all of the benefits and protections granted to it under the CCAA, the ARIO and any other Order of this Court in the within proceeding.

**STALKING HORSE PURCHASE AGREEMENT**

6. **THIS COURT ORDERS** that the Applicant is hereby authorized and empowered to enter into the purchase agreement dated March 9, 2023 (the "**Stalking Horse Purchase Agreement**") between the Applicant and the Stalking Horse Purchaser attached as Exhibit "O" to the Stewart Affidavit, *nunc pro tunc,* and such minor amendments as may be acceptable to each of the parties thereto, in consultation with the Consenting Stakeholders (solely in the case of the Applicant) and with the approval of the Monitor; provided that, nothing herein approves the sale and the vesting of any Property to the Stalking Horse Purchaser (or any of its designees) pursuant to the Stalking Horse Purchase Agreement and that the approval of any sale and vesting of any such Property shall be considered by this Court on a subsequent motion made to this Court if the transaction set out in the Stalking Horse Purchase Agreement is the Successful Bid pursuant to the SISP.

7. **THIS COURT ORDERS** that, as soon as reasonably practicable following the Applicant and the Stalking Horse Purchaser agreeing to any amendment to the Stalking Horse Purchase Agreement permitted pursuant to the terms of this Order, the Applicant shall: (a) file a copy thereof with this Court; (b) serve a copy thereof on the Service List; and (c) provide a copy thereof to each SISP Participant (as hereinafter defined), excluding from the public record any confidential information that the Applicant and the Stalking Horse Purchaser, with the consent of the Monitor, agree should be redacted.

**BID PROTECTONS**

8. **THIS COURT ORDERS** that the Bid Protections are hereby approved and the Applicant is hereby authorized and directed to pay the Bid Protections to the Stalking Horse Purchaser (or

to such other person as it may direct) in the manner and circumstances described in the Stalking Horse Purchase Agreement.

9. **THIS COURT ORDERS** that the Stalking Horse Purchaser shall be entitled to the benefit of and is hereby granted a charge (the "**Bid Protections Charge**") on the Property, which charge shall not exceed US$4,000,000, as security for payment of the Bid Protections in the manner and circumstances described in the Stalking Horse Purchase Agreement.

10. **THIS COURT ORDERS** that the filing, registration or perfection of the Bid Protections Charge shall not be required, and that the Bid Protections Charge shall be valid and enforceable for all purposes, including against any right, title or interest filed, registered, recorded or perfected subsequent to the Bid Protections Charge, notwithstanding any such failure to file, register, record or perfect.

11. **THIS COURT ORDERS** that the Bid Protections Charge shall constitute a charge on the Property and the Bid Protections Charge shall rank in priority to all other Encumbrances in favour of any Person notwithstanding the order of perfection or attachment, other than (i) any Person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable legislation; (ii) the Reserve Trustee in respect of the Reserve Security; and (iii) the Charges.

12. **THIS COURT ORDERS** that except for the Charges or as may be approved by this Court on notice to parties in interest, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Bid Protections Charge, unless the Applicant also obtains the prior written consent of the Monitor and the Stalking Horse Purchaser, or further Order of this Court.

13. **THIS COURT ORDERS** that the Bid Protections Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Stalking Horse Purchaser shall not otherwise

be limited or impaired in any way by: (i) the pendency of these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) or receivership order(s) issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") or otherwise, or any bankruptcy order or receivership order made pursuant to such applications; (iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (iv) the provisions of any federal or provincial statutes; or (v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Bid Protections Charge nor the execution, delivery, perfection, registration or performance of the Stalking Horse Purchase Agreement shall create, cause or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;

(b) the Stalking Horse Purchaser shall not have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Bid Protections Charge or the execution, delivery or performance of the Stalking Horse Purchase Agreement; and

(c) the payments made by the Applicant pursuant to this Order, the Stalking Horse Purchase Agreement and the granting of the Bid Protections Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

14. **THIS COURT ORDERS** that the Bid Protections Charge created by this Order over leases of real property in Canada shall only be a charge in the Applicant's interest in such real property lease.

15. **THIS COURT ORDERS AND DECLARES** that the Stalking Horse Purchaser, with respect to the Bid Protections Charge only, shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the BIA.

**PIPEDA**

16. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 and any similar legislation in any other applicable jurisdictions the Monitor, the Applicant, the Financial Advisor and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants that are party to a non-disclosure agreement with the Applicant (each, a "**SISP Participant**") and their respective advisors personal information of identifiable individuals, but only to the extent required to negotiate or attempt to complete a transaction pursuant to the SISP (a "**Transaction**"). Each SISP Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation for the purpose of effecting a Transaction, and, if it does not complete a Transaction, shall return all such information to the Monitor, the Financial Advisor or the Applicant, or, in the alternative, destroy all such information and provide confirmation of its destruction if requested by the Monitor, the Financial Advisor or the Applicant. Any bidder with a Successful Bid shall maintain and protect the privacy of such information and, upon closing of the Transaction(s) contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Applicant, and shall return

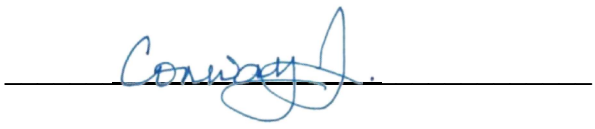
all other personal information to the Monitor, the Financial Advisor or the Applicant, or ensure that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor, the Financial Advisor or the Applicant.

**GENERAL**

17. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

18. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal and regulatory or administrative bodies, having jurisdiction in Canada or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicant, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

19. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Eastern Time) on the date of this Order without the need for entry or filing.



# SCHEDULE "A"
# SALE AND INVESTMENT SOLICITATION PROCESS

# Sale and Investment Solicitation Process

1. On March 10, 2023, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted an order (the "**Initial Order**"), among other things, granting LoyaltyOne, Co. (the "**Applicant**") relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

2. On March 20, 2023, the Court granted (i) an order amending and restating the Initial Order (the "**ARIO**"), and (ii) an order (the "**SISP Approval Order**") that, among other things: (a) authorized the Applicant to implement a sale and investment solicitation process ("**SISP**") in accordance with the terms hereof; (b) authorized and empowered the Applicant to enter into the Stalking Horse Purchase Agreement; (c) approved the Bid Protections; and (d) granted the Bid Protections Charge. Capitalized terms that are not otherwise defined herein have the meanings ascribed to them in the ARIO or the SISP Approval Order, as applicable. Copies of the ARIO and the SISP Approval Order can be found at https://www.ksvadvisory.com/experience/case/loyaltyone.

3. This SISP sets out the manner in which: (a) binding bids for executable transaction alternatives that are superior to the sale transaction contemplated by the Stalking Horse Purchase Agreement involving the business and assets of the Applicant and its subsidiary, LoyaltyOne Travel Services Co./Cie Des Voyages (together with the Applicant, the "**LoyaltyOne Entities**"), will be solicited from interested parties; (b) any such bids received will be addressed; (c) any Successful Bid (as defined below) will be selected; and (d) Court approval of any Successful Bid will be sought. Such transaction alternatives may include, among other things, a sale of some or all of the Applicant's assets and/or business and/or an investment in the Applicant, each of which shall be subject to all terms set forth herein.

4. The SISP shall be conducted by the Applicant with the assistance of PJT Partners LP (the "**Financial Advisor**") under the oversight of KSV Restructuring Inc., in its capacity as Court-appointed monitor (the "**Monitor**") of the Applicant and the Monitor shall be entitled to receive all information in relation to the SISP.

5. Parties who wish to have their bids considered must participate in the SISP as conducted by the Applicant with the assistance of the Financial Advisor.

6. The SISP will be conducted such that the Applicant and the Financial Advisor will (under the oversight of the Monitor):

    a) disseminate marketing materials and a process letter to potentially interested parties identified by the Applicant and the Financial Advisor;
    b) solicit interest from parties with a view to such interested parties entering into non-disclosure agreements (parties shall only obtain access to the data room and be permitted to participate in the SISP if they execute a non-disclosure agreement and agree to the additional measures that are required by the Applicant to protect competitively sensitive information, in form and substance satisfactory to the Applicant);
    c) provide applicable parties with access to a data room containing diligence information; and
    d) request that such parties (other than the Stalking Horse Purchaser or its designee) submit a binding offer meeting at least the requirements set forth in Section 8

below, as determined by the Applicant in consultation with the Monitor (a "**Qualified Bid**"), by the Qualified Bid Deadline (as defined below).

7. The SISP shall be conducted subject to the terms hereof and the following key milestones:

   a) the Court issues the SISP Approval Order approving the: (i) SISP and (ii) the Stalking Horse Purchase Agreement as the stalking horse in the SISP and the Applicant entering into same – by no later than March 20, 2023;[1]
   b) the Applicant to commence solicitation process by no later than March 23, 2023;
   c) deadline to submit a Qualified Bid – 5:00 p.m. Eastern Time on April 27, 2023 (the "**Qualified Bid Deadline**");
   d) deadline to determine whether a bid is a Qualified Bid and, if applicable, to notify those parties who submitted a Qualified Bid of the Auction (as defined below) – by no later than 5:00 p.m. Eastern Time on May 1, 2023;
   e) the Applicant to hold an Auction (if applicable) and select a Successful Bid – by no later than 10:00 a.m. Eastern Time on May 4, 2023;
   f) Approval and Vesting Order (as defined below) hearing:
      - (if there is no Auction) – by no later than May 15, 2023, subject to Court availability; or
      - (if there is an Auction) – by no later than May 18, 2023, subject to Court availability; and
   g) closing of the Successful Bid as soon thereafter as possible and, in any event, by not later than June 30, 2023, provided that such date shall be extended by up to 90 days where regulatory approvals are the only material remaining conditions to closing (the "**Outside Date**").

8. In order to constitute a Qualified Bid, a bid must comply with the following:

   a) it provides for aggregate consideration, payable in full on closing, in an amount equal to or greater than US$165 million (the "**Consideration Value**"), and provides a detailed sources schedule that identifies, with specificity, the composition of the Consideration Value and any assumptions that could reduce the net consideration payable including details of any material liabilities that are being assumed or being excluded;
   b) it includes an assumption of all obligations of the Applicant: (i) to consumers enrolled in the AIR MILES® Reward Program; and (ii) pursuant to the terms of that certain Amended and Restated Redemption Reserve Agreement dated December 31, 2001 and that certain Amended and Restated Security Agreement dated as of December 31, 2001, each such agreement between Loyalty Management Group Canada Inc. and Royal Trust Corporation of Canada;
   c) as part of the Consideration Value, it provides cash consideration sufficient to pay: (i) all outstanding obligations under the DIP Term Sheet; (ii) any obligations in priority to amounts owing under the DIP Term Sheet, including any applicable charges granted by the Court in the Applicant's CCAA proceeding; (iii) an amount of US$5 million to fund a wind-up of the Applicant's CCAA proceeding and any further proceedings or wind-up costs; and (iv) an amount of US$4 million to satisfy the Bid Protections;

[1] To the extent any dates would fall on a non-business day, they shall be deemed to be the first business day thereafter.

d) closing of the transaction by not later than the Outside Date;
e) it contains:
    i. duly executed binding transaction document(s);
    ii. the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, and the name(s) of its controlling equityholder(s);
    iii. a redline to the Stalking Horse Purchase Agreement;
    iv. evidence of authorization and approval from the bidder's board of directors (or comparable governing body) and, if necessary to complete the transaction, the bidder's equityholder(s);
    v. disclosure of any connections or agreements with the LoyaltyOne Entities or any of their affiliates, any known, potential, prospective bidder, or any officer, manager, director, member or known equity security holder of the LoyaltyOne Entities or any of their affiliates; and
    vi. such other information reasonably requested by the Applicant or the Monitor;
f) it includes a letter stating that the bid is submitted in good faith, is binding and is irrevocable until closing of the Successful Bid; provided, that if such bid is not selected as the Successful Bid or as the next-highest or otherwise best Qualified Bid as compared to the Successful Bid (such bid, the "**Back-Up Bid**") it shall only remain irrevocable until selection of the Successful Bid;
g) it provides that the bid will serve as a Back-Up Bid if it is not selected as the Successful Bid and if selected as the Back-Up Bid it will remain irrevocable until the earlier of (i) closing of the Successful Bid or (ii) closing of the Back-Up Bid;
h) it provides written evidence of a bidder's ability to fully fund and consummate the transaction (including financing required, if any, prior to the closing of the transaction to finance the proceedings) and satisfy its obligations under the transaction documents, including binding equity/debt commitment letters and/or guarantees covering the full value of all cash consideration and the additional items (in scope and amount) covered by the guarantees provided by affiliates of the bidder in connection with the Successful Bid;
i) it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;
j) it is not conditional upon:
    i. approval from the bidder's board of directors (or comparable governing body) or equityholder(s);
    ii. the outcome of any due diligence by the bidder; or
    iii. the bidder obtaining financing;
k) it includes an acknowledgment and representation that the bidder (i) has had an opportunity to conduct any and all required due diligence prior to making its bid, and has relied solely upon its own independent review, investigation and inspection in making its bid, (ii) is not relying upon any written or oral statements, representations, promises, warranties, conditions, or guaranties whatsoever, whether express or implied (by operation of law or otherwise), made by any person or party, including the Applicant, the Financial Advisor, the Monitor and their respective employees, officers, directors, agents, advisors and other representatives, regarding the proposed transactions, this SISP, or any information (or the completeness of any information) provided in connection therewith, except as expressly stated in the proposed transaction documents; (iii) is making its bid on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Applicant, the Financial

Advisor, the Monitor or any of their respective employees, officers, directors, agents, advisors and other representatives, except to the extent set forth in the proposed transactions documents (iv) is bound by this SISP and the SISP Approval Order, and (v) is subject to the exclusive jurisdiction of the Court with respect to any disputes or other controversies arising under or in connection with the SISP or its bid;

l) it specifies any regulatory or other third-party approvals the party anticipates would be required to complete the transaction (including the anticipated timing necessary to obtain such approvals);

m) it includes full details of the bidder's intended treatment of the LoyaltyOne Entities' employees under the proposed bid;

n) it is accompanied by a cash deposit (the "**Deposit**") by wire transfer of immediately available funds equal to 10% of the Consideration Value, which Deposit shall be retained by the Monitor in an interest bearing trust account in accordance with the terms hereof;

o) it includes a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and

p) it is received by the Applicant, with a copy to the Financial Advisor and the Monitor, by the Qualified Bid Deadline at the email addresses specified on Schedule "B" hereto.

9. The Qualified Bid Deadline may be extended by: (a) the Applicant for up to no longer than seven days with the consent of the Monitor; or (b) further order of the Court. In such circumstances, the milestones contained in Subsections 7 (d) to (f) shall be extended by the same amount of time.

10. The Applicant, in consultation with the Monitor, may waive compliance with any one or more of the requirements specified in Section 8 above and deem a non-compliant bid to be a Qualified Bid, provided that the Applicant shall not waive compliance with the requirements specified in Subsections 8 (a), (b), (c), (d), (e)(i), (e)(ii), (e)(iv), (f), (k) or (n) without the prior written consent of the Stalking Horse Purchaser, acting reasonably.

11. Notwithstanding the requirements specified in Section 8 above, the transaction contemplated by the Stalking Horse Purchase Agreement (the "**Stalking Horse Bid**"), is deemed to be a Qualified Bid, provided that, for greater certainty: (i) no Deposit shall be required to be submitted in connection with the Stalking Horse Bid; and (ii) the Stalking Horse Bid shall not serve as a Back-Up Bid.

12. If one or more Qualified Bids (other than the Stalking Horse Bid) has been received by the Applicant on or before the Qualified Bid Deadline, the Applicant shall proceed with an auction process to determine the successful bid(s) (the "**Auction**"), which Auction shall be administered in accordance with Schedule "A" hereto. The successful bid(s) selected pursuant to the Auction shall constitute the "**Successful Bid**". Forthwith upon determining to proceed with an Auction, the Applicant shall provide written notice to each party that submitted a Qualified Bid (including the Stalking Horse Bid) of which Qualified Bid is the highest or otherwise best bid (as determined by the Applicant, in consultation with the Monitor) along with a copy of such bid.

13. If by the Qualified Bid Deadline, no Qualified Bid (other than the Stalking Horse Bid) has been received by the Applicant, then the Stalking Horse Bid shall be deemed the Successful Bid and shall be consummated in accordance with and subject to the terms of the Stalking Horse Purchase Agreement.

14. Following selection of a Successful Bid, the Applicant, with the assistance of its advisors, shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bid in accordance with the milestones set out in Section 7. Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by the Applicant, in consultation with the Monitor, the Applicant shall apply to the Court for an order or orders approving such Successful Bid and/or the mechanics to authorize the Applicant to complete the transactions contemplated thereby, as applicable, and authorizing the Applicant to: (a) enter into any and all necessary agreements and related documentation with respect to the Successful Bid; (b) undertake such other actions as may be necessary to give effect to such Successful Bid; and (c) implement the transaction(s) contemplated in such Successful Bid (each, an "**Approval and Vesting Order**"). If the Successful Bid is not consummated in accordance with its terms, the Applicant shall be authorized, but not required, to elect that the Back-Up Bid (if any) is the Successful Bid.

15. If a Successful Bid is selected and an Approval and Vesting Order authorizing the consummation of the transaction contemplated thereunder is granted by the Court, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Qualified Bid that is not selected as a Successful Bid will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten (10) business days) after the date upon which the Successful Bid is approved pursuant to an Approval and Vesting Order or such earlier date as may be determined by the Applicant, in consultation with the Monitor; provided, the Deposit in respect of the Back-Up Bid shall not be returned to the applicable bidder until the closing of the Successful Bid.

16. The Applicant shall provide information in respect of the SISP to consenting stakeholders who are party to support agreements with the Applicant (the "**Consenting Stakeholders**") on a confidential basis and who have agreed to not submit a bid in connection with the SISP, including (A) access to the data room, (B) copies (or if not provided to the Applicant in writing, a description) of any Qualified Bid, no later than one (1) calendar day following receipt thereof by the Applicant or its advisors and (C) such other information as reasonably requested by the Consenting Stakeholders or their respective legal counsel or financial advisors (including Piper Sandler Corp. and FTI Consulting Canada Inc. (collectively, the "**Lender FAs**")) or as necessary to keep the Consenting Stakeholders informed no later than one (1) calendar day after any such request or any material change to the proposed terms of any bid received, including any Qualified Bid, as to the terms of any bid, including any Qualified Bid, (including any changes to the proposed terms thereof) and the status and substance of discussions related thereto. The Financial Advisor shall consult with the Lender FAs in respect of the Applicant's conduct of the SISP and prior to the Applicant making decisions in respect of the SISP (and during an Auction include the Lender FAs in discussions with Qualified Bidders, where practicable).

17. The Applicant shall be permitted, in its discretion, to provide general updates and information in respect of the SISP to counsel to any creditor (each a "**Creditor**") on a confidential basis, upon: (a) the irrevocable confirmation in writing from such counsel that the applicable Creditor will not submit any bid in the SISP; and (b) counsel to such Creditor executing confidentiality agreements with the Applicant, in form and substance satisfactory to the Applicant and the Monitor.

18. Any amendments to this SISP may only be made by the Applicant with the written consent of the Monitor, or by further order of the Court, provided that the Applicant shall not amend the requirements specified in Subsections 8(a), (b), (c), (d), (e)(i), (e)(ii), (e)(iv), (f), (k) or (n) without the prior written consent of the Stalking Horse Purchaser, acting reasonably.

## SCHEDULE "A": AUCTION PROCEDURES

**1. Auction.** If the Applicant receives at least one Qualified Bid (other than the Stalking Horse Bid), the Applicant will conduct and administer the Auction in accordance with the terms of the SISP. Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.

**2. Participation.** Only parties that provided a Qualified Bid by the Qualified Bid Deadline, including, for greater certainty, the Stalking Horse Bid (collectively, the "**Qualified Parties**" and each a "**Qualified Party**"), shall be eligible to participate in the Auction. No later than 5:00 p.m. Eastern Time on the day prior to the Auction, each Qualified Party must inform the Applicant and the Monitor in writing whether it intends to participate in the Auction. The Applicant will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party (including the Stalking Horse Purchaser) provides such expression of intent, the highest or otherwise best Qualified Bid as determined by the Applicant, in consultation with the Monitor, shall be designated as the Successful Bid (as defined below).

**3. Auction Procedures.** The Auction shall be governed by the following procedures:

a. **Attendance.** Only the Applicant, the Qualified Parties, the Monitor, and Consenting Stakeholders, and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any Overbids (as defined below) at the Auction;

b. **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (a) it has not engaged in any collusion with respect to the Auction and the bid process; and (b) its bid is a good-faith *bona fide* offer, it is irrevocable and it intends to consummate the proposed transaction if selected as the Successful Party (as defined below);

c. **Minimum Overbid and Back-Up Bid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by the Applicant, in consultation with the Monitor (the "**Initial Bid**"), and any bid made at the Auction by a Qualified Party subsequent to the Applicant's announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional cash increments of US$1,000,000, and all such Overbids shall be irrevocable until closing of the Successful Bid; provided, that if such Overbid is not selected as the Successful Bid or as the Back-Up Bid (if any) it shall only remain irrevocable until selection of the Successful Bid;

d. **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video-conference, on an open basis, and all Qualified Parties will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each

subsequent Qualified Bid will be fully disclosed to all other Qualified Parties throughout the entire Auction; provided, however, that the Applicant, in its discretion, may establish separate video conference rooms to permit interim discussions among the Applicant, the Monitor and individual Qualified Parties with the understanding that all formal bids will be delivered in one group video conference, on an open basis;

e. **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit an Overbid with full knowledge and confirmation of the then-existing highest or otherwise best bid and no Qualified Party submits an Overbid; and

f. **No Post-Auction Bids**. No bids will be considered for any purpose after the Successful Bid has been designated, and therefore the Auction has concluded.

## Selection of Successful Bid

**4. Selection.** During the Auction, the Applicant, in consultation with the Monitor, will: (a) review each subsequent Qualified Bid, considering the factors set out in Section 8 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in (i) above, (iii) the likelihood of the Qualified Party's ability to close a transaction by not later than the Outside Date (including factors such as: the transaction structure and execution risk; conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to the Applicant and its stakeholders and (vi) any other factors the directors or officers of Applicant may, consistent with their fiduciary duties, reasonably deem relevant; and (b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").

**5. Acknowledgement.** The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by the Applicant in its sole discretion, subject to the milestones set forth in Section 7 of the SISP.

## SCHEDULE "B": E-MAIL ADDRESSES FOR DELIVERY OF BIDS

To the counsel for the Applicant:

rjacobs@cassels.com; jdietrich@cassels.com; jroy@cassels.com; cground@cassels.com; jbornstein@cassels.com; pdublin@akingump.com; skuhn@akingump.com; emcgrady@akingump.com; mlahaie@akingump.com; alaves@akingump.com

with a copy to the Financial Advisor:

baird@pjtpartners.com; daniel.degosztonyi@pjtpartners.com

and with a copy to the Monitor and counsel to the Monitor:

dsieradzki@ksvadvisory.com; ngoldstein@ksvadvisory.com; boneill@goodmans.ca; carmstrong@goodmans.ca

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 LOYALTYONE, CO.

Court File No. CV-23-00696017-00CL

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

PROCEEDING COMMENCED AT
TORONTO

**SISP APPROVAL ORDER**

**Cassels Brock & Blackwell LLP**
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Lawyers for the Applicant

# TAB 20

**CITATION:** Lydian International Limited (Re), 2019 ONSC 7473
**COURT FILE NO.:** CV-19-00633392-00CL
**DATE:** 2019-12-24

2019 ONSC 7473 (CanLII)

**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 ARRANGMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED**

**Applicants**

**BEFORE:** Chief Justice Geoffrey B. Morawetz

**COUNSEL:** *Elizabeth Pillon, Sanja Sopic,* and *Nicholas Avis*, for the Applicants

*Pamela Huff,* for Resource Capital Fund VI L.P.

*Alan Merskey*, for OSISKO Bermuda Limited

*D.J. Miller*, for Alvarez & Marsal Canada Inc. proposed Monitor

*David Bish*, for ORION Capital Management

*Bruce Darlington*, for ING Bank N.V./ABS Svensk Exportkrerdit (publ)

**HEARD and DETERMINED:** December 23, 2019

**REASONS RELEASED:** December 24, 2019

## ENDORSEMENT

### Introduction

[1] Lydian International Limited ("Lydian International"), Lydian Canada Ventures Corporation ("Lydian Canada") and Lydian UK Corporation Limited ("Lydian UK", and collectively, the "Applicants") apply for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

[2] The Applicants are part of a gold exploration and development business in south central Armenia (the "Amulsar Project"). The Amulsar Project is directly owned and operated by Lydian Armenia CJSC ("Lydian Armenia"), a wholly-owned subsidiary of the Applicants.

[3] As set out in the affidavit of Edward A. Sellers sworn December 22, 2019 (the "Sellers Affidavit"), the Applicants have been experiencing and continue to experience liquidity issues due to blockades of the Amulsar Project and other external factors. The Sellers Affidavit details such activities and Mr. Sellers deposes that these activities have prevented Lydian Armenia and its employees, contractors and suppliers from accessing, constructing and ultimately operating the Amulsar Project.

[4] Mr. Sellers states that the lack of progress at the Amulsar Project has prevented the Lydian Group (as that term is defined below) from generating any positive cash flow and has also triggered defaults on certain of the Lydian Group's obligations to its lenders which, if enforced, the Lydian Group would be unable to satisfy.

[5] The Lydian Group has operated under forbearance agreements in respect of these defaults since October 2018, but the most recent forbearance agreement expired on December 20, 2019.

[6] The Applicants contend that they now require immediate protection under the CCAA for the breathing room they require to pursue remedial steps on a time sensitive basis.

[7] The Applicants intend to continue discussions with their lenders and other stakeholders, including the Government of Armenia ("GOA"). The Applicants also intend to continue evaluating potential financing and/or sale options, all with a view to achieving a viable path forward.

**The Applicants**

[8] Lydian International is a corporation continued under the laws of the Bailiwick of Jersey, Channel Islands, from the Province of Alberta pursuant to the *Companies (Jersey) Law 1991*. Lydian International was originally incorporated under the *Business Corporations Act*, R.S.A. 2000, c. B-9 (Alberta) on February 14, 2006 as "Dawson Creek Capital Corp.", and subsequently became Lydian International on December 12, 2007.

[9] Lydian International's registered office is located in Jersey. On June 12, 2019, Lydian International shareholders approved its continuance under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, but this continuance has yet to be implemented.

[10] Lydian International has two types of securities listed on the Toronto Stock exchange: (1) ordinary shares and (2) warrants that expired in 2017.

[11] Lydian Canada is a direct, wholly owned subsidiary of Lydian International. Lydian Canada is incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57 (British Columbia) and has a registered head office in Toronto. Its registered and records office is located in British Columbia.

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[12] Lydian UK is a corporation incorporated in the United Kingdom and is a direct, wholly-owned subsidiary of Lydian Canada with a head office located in the United Kingdom. Lydian UK has no material assets in the UK.

[13] Lydian International and Lydian UK have assets in Canada in the form of deposits with the Bank of Nova Scotia in Toronto.

[14] The Applicants are part of a corporate group (the "Lydian Group") with a number of other subsidiaries ultimately owned by Lydian International. Other than the Applicants, certain of the Lydian Group's subsidiaries are Lydian U.S. Corporation ("Lydian US"), Lydian International Holdings Limited ("Lydian Holdings"), Lydian Resources Armenia Limited ("Lydian Resources") and Lydian Armenia, a corporation incorporated under the laws of the Republic of Armenia. Together, Lydian U.S., Lydian Holdings, Lydian Resources and Lydian Armenia are the "Non-Applicant" parties.

[15] The Applicants submit that due to the complete integration of the business and operations of the Lydian Group, an extension of the stay of proceedings over the Non-Applicant parties is appropriate.

[16] The Applicants contend that the Lydian Group is highly integrated and its business and affairs are directed primarily out of Canada. Substantially all of its strategic business affairs, including key decision-making, are conducted in Toronto and Vancouver.

[17] Further, all the Applicants and Non-Applicant Parties are borrowers or guarantors of the Lydian Group's secured indebtedness. The Lydian Group's loan agreements are governed primarily by the laws of Ontario.

[18] Finally, the Lydian Group's forbearance and restructuring efforts have been directed out of Toronto.

[19] The Lydian Group is focused on constructing the Amulsar Project, its wholly-owned development stage gold mine in Armenia. The Amulsar Project was funded by a combination of equity and debt capital and stream financing. The debt and stream financing arrangements are secured over substantially all the assets of Lydian Armenia and Lydian International in the shares of various groups of the Lydian Group.

[20] The Applicants contend that time is of the essence given the Applicants' minimal cash position and negative cash flow.

**Issues**

[21] The issues for consideration are whether:

(a) the Applicants meet the criteria for protection under the CCAA;

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(b) the CCAA stay should be extended to the Non-Applicant Parties;

(c) the proposed monitor, Alvarez & Marsal Canada Inc. ("A&M") should be appointed as monitor;

(d) Ontario is the appropriate venue for this proceeding;

(e) this court should issue a letter of request of the Royal Court of Jersey;

(f) this Court should exercise its discretion to grant the Administration Charge and the D & O Charge (as defined below); and

(g) it is appropriate to grant a stay extension immediately following the issuance of the Initial Order.

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**Law and Analysis**

[22] Pursuant to section 11.02(1) of the CCAA, a court may make an order staying all proceedings in respect of a debtor company for a period of not more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.

[23] Section 11.02(1) of the CCAA was recently amended and the maximum stay period permitted in an initial application was reduced from 30 days to 10 days. Section 11.001 which came into force at the same time as the amendment to s. 11.02(1), limits initial orders to "ordinary course" relief.

[24] Section 11.001 provides:

> 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[25] The News Release issued by Innovation, Science and Economic Development Canada specifically states that these amendments "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."

[26] In my view, the intent of s. 11.001 is clear. Absent exceptional circumstances, the relief to be granted in the initial hearing "shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that

period". The period being no more than 10 days, and whenever possible, the *status quo* should be maintained during that period.

[27] Following the granting of the initial order, a number of developments can occur, including:

(a) notification to all stakeholders of the CCAA application;

(b) stabilization of the operation of debtor companies;

(c) ongoing negotiations with key stakeholders who were consulted prior to the CCAA filing;

(d) commencement of negotiations with stakeholders who were not consulted prior to the CCAA filing;

(e) negotiations of DIP facilities and DIP Charges;

(f) negotiations of Administration Charges;

(g) negotiation of Key Employee Incentives Programs;

(h) negotiation of Key Employee Retention Programs;

(i) consultation with regulators;

(j) consultation with tax authorities;

(k) consideration as to whether representativecounsel is required; and

(l) consultation and negotiation with key suppliers.

[28] This list is not intended to be exhaustive. It is merely illustrative of the many issues that can arise in a CCAA proceeding.

[29] Prior to the recent amendments, it was not uncommon for an initial order to include provisions that would affect some or all of the aforementioned issues and parties. The previous s. 11.02 provided that the initial stay period could be for a period of up to 30 days. After the initial stay, a "comeback" hearing was scheduled and, in theory, parties could request that certain provisions addressed in the initial order could be reconsidered.

[30] The practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments. The intent of the amendments is to limit the relief granted on the first day. The ensuing 10-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.

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[31] In my view, this is consistent with the objectives of the amendments which include the requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players". It may also result in more meaningful comeback hearings.

[32] It is against this backdrop that the requested relief at the initial hearing should be scrutinized so as to ensure that it is restricted to what is reasonably necessary for the continued operations of the debtor company during the initial stay period.

[33] For the reasons that follow, I conclude that it is appropriate to grant a s. 11.02 order in respect of the Applicants.

[34] I am satisfied that Lydian Canada meets the CCAA definition of "company" and is eligible for CCAA protection.

[35] I have also considered whether the foreign incorporated companies are "companies" pursuant to the CCAA. Such entities must satisfy the disjunctive test of being an "incorporated company" either "having assets or doing business in Canada".

[36] In *Cinram International Inc., (Re)*, 2012 ONSC 3767, 91 C.B.R. (5th) 46, I stated that the threshold for having assets in Canada is low and that holding funds in a Canadian bank account brings a foreign corporation within the definition of "company" under the CCAA.

[37] In this case, both Lydian International and Lydian UK meet the definition of "company" because both corporations have assets in and do business in Canada.

[38] In my view the Applicants are each "debtor companies" under the CCAA. The Applicants are insolvent and have liabilities in excess of $5 million. I am satisfied that the Applicants are eligible for CCAA protection.

[39] The Applicants seek to extend the stay to Lydian Armenia, Lydian Holdings, Lydian Resources Armenia Limited and Lydian US. I am satisfied that, in the circumstances, it is appropriate to grant an order that extends the stay to the Non-Applicant Parties. The stay is intended to stabilize operations in the Lydian Group. This finding is consistent with CCAA jurisprudence: see e.g., *Sino-Forest Corporation (Re)*, 2012 ONSC 2063, at paras. 5, 18, and 31; *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.); and *Target Canada Co. (Re)*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 49-50.

[40] I am also satisfied that is appropriate to appoint A & M as monitor pursuant to the provisions of s. 11.7 of the CCAA.

[41] With respect to whether Ontario is the appropriate venue for this proceeding, Lydian Canada's registered head office is located in Toronto and its registered and records offices are located in Vancouver. In my view, Ontario has jurisdiction over Lydian Canada. The registered head offices for Lydian International and Lydian UK are in Jersey and the UK respectively, however, both entities have assets in Ontario, those being funds on deposit with the Bank of Nova Scotia in Toronto. Further, it seems to me that both Lydian International and Lydian UK

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have a strong nexus to Ontario and accordingly I am satisfied that Ontario is the appropriate jurisdiction to hear this application.

[42] I am also satisfied that, in these circumstances, it is appropriate for this court to issue to the Royal Court of Jersey a letter of request as referenced in the application record.

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**Administration Charge**

[43] The Applicants seek a charge on their assets in the maximum amount of US $350,000 to secure the fees and disbursements incurred in connection with services rendered by counsel to the Applicants, A & M and A & M's counsel, in respect of the CCAA proceedings (the "Administration Charge").

[44] Section 11.52 of the CCAA provides the ability for the court to grant the Administration Charge.

[45] The recently enacted s. 11.001 of the CCAA limits the requested relief on this motion, including the Administration Charge, to what is reasonably necessary for the continued operation of the Applicants during the Initial Stay Period. The Sellers Affidavit outlines the complex issues facing the Applicants.

[46] In *Canwest Publishing Inc.*, (Re), 2010 ONSC 222, 63 C.B.R.(5th) 115, Pepall J. (as she then was) identified six non-exhaustive factors that the court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge. These factors include:

(a) the size and complexity of business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[47] It seems to me that the proposed restructuring will require extensive input from the professional advisors and there is an immediate need for such advice. The requested relief is supported by A & M.

[48] I am satisfied that the Administration Charge in the limited amount of US $350,000 is appropriate in the circumstances and is reasonably necessary for the continued operation of the business at this time.

**D & O Charge**

[49] The Applicants also seek a charge over the property in favour of their former and current directors in the limited amount of $200,000 (the "D & O Charge").

[50] The Applicants maintain Directors' and Officers' liability insurance (the "D & O Insurance") which provides a total of $10 million in coverage.

[51] The D & O Insurance is set to expire on December 31, 2019.

[52] Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the D & O charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected.

[53] In *Jaguar Mining Inc., (Re),* 2014 ONSC 494, 12 C.B.R. (6th) 290, I set out a number of factors to be considered in determining whether to grant a directors' and officers' charge:

> (a) whether notice has been given to the secured creditors likely to be affected by the charge;
>
> (b) whether the amount is appropriate;
>
> (c) whether the Applicant could obtain adequate indemnification insurance for the director at a reasonable cost; and
>
> (d) whether the charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct.

[54] Having reviewed the Sellers Affidavit, it seems to me that the granting of the D & O charge is necessary in the circumstances. In arriving at this conclusion, I have also taken into account that the D & O Insurance will lapse shortly; having directors involved in the process is desirable; that the secured creditors likely to be affected do not object; and that A & M has advised that it is supportive of the D & O Charge. Further, the requested amount is one that I consider to be reasonably necessary for the continued operation of the Applicants.

**Extension of the Stay of Proceedings**

[55] The Applicants have requested that, if the initial order is granted, I should immediately entertain and grant an order extending the Stay Period until and including January 17, 2020 which will provide the Applicants and all stakeholders with enough time to adequately prepare for a comeback hearing.

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[56] The Applicants submit that I am authorized to grant a stay extension immediately after granting the initial order because section 11.02(2) of the CCAA does not provide a minimum waiting time before an applicant can seek a stay extension. The Applicants reference recent decisions where courts have scheduled hearings within two or three days after the granting of an initial order. Reference is made to *Clover Leaf Holdings Company (Re)*, 2019 ONSC 6966 and *Re Wayland group Corp. et al.* (2 December 2019), Toronto CV–19–00632079-00CL. In *Clover Leaf*, the stay extension for 36 days and additional relief including authorization for DIP financing was granted three days after the initial order and in *Wayland*, the stay extension was granted two days after the initial order.

[57] I acknowledge that, in this case, it may be challenging for the Applicants to return to court at or near the end of the 10-day initial stay period due to the year-end holidays. I also acknowledge that the offices of many of the parties involved in these proceedings may not be open during the holidays.

[58] However, the statutory maximum 10-day stay as referenced in s. 11.02(1) expires on January 2, 2020 and the courts are open on that day.

[59] As noted above, absent exceptional circumstances, I do not believe that it is desirable to entertain motions for supplementary relief in the period immediately following the granting of an initial order.

[60] It could very well be that circumstances existed in both *Clover Leaf* and *Wayland* that justified the stay extension and the ancillary relief being granted shortly after the initial order.

[61] However, in this case, I have not been persuaded on the evidence that it is necessary for the stay extension to be addressed prior to January 2, 2020 and I decline to do so.

**Disposition**

[62] The initial order is granted with a Stay Period in effect until January 2, 2020. In view of the holiday schedules of many parties, the following procedures are put in place. The Applicants can file a motion returnable on January 2, 2020, requesting that the stay be extended to January 23, 2020. Any party that wishes to oppose the extension of the stay to January 23, 2020 is required to notify the Applicant, A & M and the Commercial List Office of their intention to do so no later than 2:00 p.m. on December 30, 2019. In the event that the requested stay extension is unopposed, there will be no need for counsel to attend on the return of the motion. I will consider the motion based on the materials filed.

[63] If any objections are received by 2:00 p.m. on December 30, 2019, the hearing on January 2, 2020 will address the opposed extension request. Any further relief will be considered at the Comeback Motion on January 23, 2020.

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Chief Justice Geoffrey B. Morawetz

**Date:** December 24, 2019

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# TAB 21

**CITATION:** Nordstrom Canada Retail, Inc., 2023 ONSC 1422
**COURT FILE NO.:** CV-23-00695619-00CL
**DATE:** 2023-03-03

**SUPERIOR COURT OF JUSTICE – ONTARIO2023-03-01**

**RE:** 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 NORDSTROM CANADA RETAIL INC., NORDSTROM CANADA HOLDINGS INC., LLC AND NORDSTROM CANADA HOLDINGS II, LLC

**BEFORE:** Chief Justice G.B. Morawetz

**COUNSEL:** *Jeremy Dacks, Tracy Sandler, Martino Calvaruso and Marleigh Dick*, for the Applicants

*Susan Ursel, Karen Ensslen*, for the Proposed Employee Representative Counsel

*Brendan O'Neill and Brad Wiffen*, for the Proposed Monitor

*George Benchetrit*, for the Directors and Officers of the Nordstrom Canada Entities

*Aubrey Kauffman*, for Nordstrom, Inc. (U.S.)

**HEARD and DETERMINED:** March 2, 2023

**REASONS:** March 3, 2023

## ENDORSEMENT

### Background

[1] At the conclusion of the hearing on March 2, 2023, I granted the requested relief, with reasons to follows. These are the reasons.

[2] Nordstrom Canada Retail, Inc. ("Nordstrom Canada"), together with the other applicants listed above (collectively, the "Applicants"), seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Applicants seek a stay of proceedings (the "Stay") for the initial ten-day period (the "Initial Stay Period") under section 11.02(2) of the CCAA, together with related relief necessary to preserve the Applicants' business and stakeholder value during the Initial Stay Period. The Applicants also seek to extend the stay of proceedings to Nordstrom Canada Leasing LP ("Canada Leasing LP") and, for limited purposes, to Nordstrom,

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Inc. ("Nordstrom US"). The Applicants and Canada Leasing LP are referred to collectively below as the "Nordstrom Canada Entities."

[3] Nordstrom Canada is a retailer which acts as the Canadian operating subsidiary of Nordstrom US. Nordstrom Canada entered the Canadian marketplace in September 2014 and currently operates 13 retail stores in Ontario, Alberta and British Columbia. Nordstrom Canada has experienced losses each year. Nordstrom Canada has only been able to sustain operations due to the financial support of Nordstrom US, which has provided Nordstrom Canada with approximately USD$775 million in net funding through various means since inception. Nordstrom US also provides various other ongoing strategic support, and administrative services.

[4] Given Nordstrom Canada's financial performance and after considering available options, Nordstrom US has determined that it is in the best interest of its stakeholders to discontinue further financial and operational support for Nordstrom Canada in order to focus on its core business in the US. Nordstrom US has terminated its support and IP licensing arrangements with the Nordstrom Canadian Entities and replaced them with a Wind-Down Agreement (described further below).

[5] The Applicants contend that without support from Nordstrom US, the Nordstrom Canada Entities are insolvent and require the flexibility of the CCAA in order to effect an orderly, responsible and controlled wind-down of operations.

[6] The Applicants further contend that the requested relief is urgent, as the Nordstrom Canada Entities cannot operate without Nordstrom US's support, and continued support during the wind-down process is conditional on obtaining protection under the CCAA.

[7] The requested relief includes the approval of the Employee Trust, the appointment of Employee Representative Counsel, Court-ordered Administration and D&O charges in an amount required for the Initial Stay Period, as well as a Co-tenancy Stay of proceedings (the "Co-tenancy Stay") and a stay in favour of Nordstrom US.

[8] At the Comeback Hearing, the Applicants anticipate seeking certain additional relief, including the approval of an Employee Retention Plan. Additionally, the Applicants, in consultation with Alvarez & Marsal Canada Inc. (the "Proposed Monitor"), also plan to solicit bids from a number of professional third-party liquidators and to seek court approval in the near term to engage the successful liquidator bidder and to conduct an orderly realization process.

[9] The facts have been set out in an affidavit of Misti Heckel, President of Nordstrom Canada Retail, Inc., and President and Treasurer of Nordstrom Canada Holdings, LLC and Nordstrom Canada Holdings II LLC. In addition, the Proposed Monitor has filed a pre-filing report.

[10] The Proposed Monitor supports the position of the Applicants.

**The Nordstrom Canada Entities**

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[11] Nordstrom Canada is incorporated pursuant to the laws of British Columbia. It is a wholly-owned subsidiary of Nordstrom International Limited ("NIL"). NIL is a wholly-owned subsidiary of Nordstrom US, a publicly traded company on the New York Stock Exchange. Nordstrom Canada serves as the Canadian retail sales operating entity.

[12] As of January 28, 2023, Nordstrom Canada employed approximately 1925 full-time and 575 part-time employees. Of these, 2,047 are full-line store and 310 are Rack store employees.

[13] Nordstrom Canada Holdings, LLC ("NCH") is a US single member limited liability company wholly-owned by NIL. NCH, as general partner, owns 99.9% of Canada Leasing LP, the Canadian leasing entity. Nordstrom Canada Holdings II, LLC ("NCHII") is a US holding company that owns 0.1% of Canada Leasing LP, as its limited partner.

[14] Canada Leasing LP is an Alberta limited partnership responsible for the Canadian real estate activities, such as leasing retail space from the Landlords, and subleasing the retail space to Nordstrom Canada.

**Business of the Applicants**

[15] Nordstrom Canada currently operates six Nordstrom-branded full-line stores and seven off-price Nordstrom Rack stores in Ontario, Alberta and British Columbia. These retail operations are conducted in facilities which are leased to Canada Leasing LP, as lessee, by third-party landlords (the "Landlords") pursuant to leases (the "Leases") and sublet by Canada Leasing LP to Nordstrom Canada pursuant to subleases (the "Subleases").

[16] Ms. Heckel contends that Nordstrom Canada Entities' business is dependent on Nordstrom US for administrative and business support services, including legal, finance, accounting, bill processing, payroll, human resources, merchandising, strategy, and information technology project support (the "Shared Services"). Nordstrom US formerly provided these Shared Services under an inter-affiliate licence and services agreement, effective as of February 3, 2019, between Nordstrom US and Nordstrom Canada (the "Licence and Services Agreement").

[17] On March 1, 2023, Nordstrom US notified Nordstrom Canada that it would be terminating the Licence and Services Agreement in accordance with its terms, as well as the other agreements referenced above to which it is a party. Subsequently, the Nordstrom Canada Entities agreed to have the termination become effective immediately. Nordstrom US and the Nordstrom Canada Entities have entered into a new administrative services agreement effective March 1, 2023 (the "Wind-Down Agreement") for Nordstrom US to continue providing Shared Services, as well as a license to use the essential IP, for the sole purpose of an orderly wind down under the CCAA.

**Financial Position of the Nordstrom Canada Entities**

[18] As of January 28, 2023, the Nordstrom Canada Entities had combined total assets with a book value of approximately $500,784,000 and total liabilities of approximately $561,024,000.

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[19] Since 2014, Nordstrom Canada has experienced yearly losses across the majority of its 13 Canadian locations. For the year ended January 28, 2023, Nordstrom Canada generated revenue of $515,046,000. As a result of its high occupancy and other operating costs, its EBITDA for the year ending January 28, 2023, was negative $34,563,000, prior to taking into account intercompany payments.

[20] Most of the Nordstrom Canada Entities' losses have been absorbed by Nordstrom US through intercompany payments. However, Nordstrom US has resolved to discontinue this support, without which Nordstrom Canada cannot continue operating.

[21] The Nordstrom Canada Entities do not owe any secured indebtedness. Prior to the commencement of this proceeding, by virtue of amendments agreed upon by parties to a revolving Credit Agreement among Nordstrom US (as Borrower), Wells Fargo Bank, National Association, and certain other lenders, Nordstrom Canada was released from its guarantee obligations in relation to this indebtedness. The corresponding security interest granted by Nordstrom Canada was also released. Nordstrom Canada does not have any commitments under and has not granted any security in relation to the remaining debt agreements of Nordstrom US.

[22] Ms. Heckel states that since 2014, Nordstrom US has provided the Nordstrom Canada Entities with approximately USD $950 million. Taking into account the distributions of USD $175.6 million made by Nordstrom Canada to Nordstrom US, Nordstrom US has provided net funding to Nordstrom Canada of USD $775 million.

[23] Nordstrom US, with the support of its advisors, has decided in its business judgment that it is in the best interests of Nordstrom US to discontinue its support of the Canadian operations. The Applicants contend that due to its operational and financial dependence on Nordstrom US, Nordstrom Canada cannot continue operations without the full support of Nordstrom US, including a licence to use Nordstrom US's IP.

[24] The Nordstrom Canada Entities believe that these CCAA proceedings are the only practical means of ensuring a fair and orderly wind-down. Additionally, Nordstrom US has indicated that it is only willing to continue providing the Shared Services and to permit use of the IP if the wind-down is supervised by this Court under the CCAA.

**Requested Relief**

[25] Having reviewed the record and hearing submissions, I am satisfied that the Applicants are all affiliated debtor companies with total claims against them in excess of $5 million. I am also satisfied that Nordstrom Canada and the other Applicants are each a "company" for the purposes of s. 2 of the CCAA because they do business in or have assets in Canada.

[26] I accept that without the ongoing support of Nordstrom US, the realizable value of the Nordstrom Canada Entities' assets will be insufficient to satisfy all of their obligations to their creditors. I am satisfied that the Applicants in these proceedings are either currently insolvent under the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.

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B-3 ("BIA") or the expanded concept of insolvency adopted by this Court in *Stelco Inc., Re*, 2004 CanLII 24933 (Ont. Sup. Ct.).

[27] I am also satisfied that this Court has jurisdiction over the proceedings. The chief place of business of the Nordstrom Canada Entities is Ontario: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled $220 million, compared to $148 million in British Columbia and $77 million in Alberta .

[28] There are a number of examples of CCAA proceedings that have been commenced for the purpose of winding down a business. Recent examples include *Target Canada Co. (Re)*, 2015 ONSC 303, *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014, and *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1230.

[29] Section 11.02(1) of the CCAA permits the Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. Under section 11.001, other relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period." In my view, the relief requested in this first-day application meets these criteria.

[30] Where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. (See: *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 42 and 43; *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37; *Just Energy Corp. (Re)*, 2021 ONSC 1793 at para. 116; *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014, at para. 28).

[31] The Applicants submit that it is appropriate to extend the Stay to Canada Leasing LP. As the lessor of Nordstrom Canada's retail premises, its business and operations are fully intertwined with those of the Nordstrom Canadian Entities, and any proceedings commenced against Canada Leasing LP would necessarily involve key personnel of the Applicants, who collectively hold a 100% interest in Canada Leasing LP. As counterparty to the store Leases, Canada Leasing LP is also insolvent and needs the breathing space provided by the stay to prevent the exercise of Landlord remedies during the pendency of the proposed liquidation sale.

[32] I accept this submission. In my view, the proposed extension of the Stay is appropriate in the circumstances.

[33] Many retail leases provide that other tenants within the same shopping centre have certain rights against the Landlords upon an anchor tenant's (such as Nordstrom Canada's) insolvency or cessation of operations. In order to alleviate potential prejudice, the Applicants request that the Court extend the Stay to all rights of third-party tenants against the Landlords, owners, operators or managers of the commercial properties where the Nordstrom Canada's stores, offices or

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warehouses are located that arise as a result of the Applicants' insolvency, or as a result of any steps taken by the Applicants pursuant to the proposed Initial Order.

[34] The Court's authority to grant the Co-tenancy Stay flows from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that may impose." The Applicants submit that a Co-tenancy Stay is justified on the basis that, if tenants were permitted to exercise these "co-tenancy" rights during the Initial Stay Period (and beyond), the claims of the landlords against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company and that such claims would result in a multiplicity of proceedings which would be detrimental to an efficient and orderly wind-down.

[35] I have been persuaded that the Co-tenancy Stay should be granted in the circumstances.

[36] The Applicants also request that the Stay be extended (subject to certain exceptions related to the Cash Management System) to Nordstrom US in relation to claims that are derivative of the primary liability of or related to the Nordstrom Canada Entities (the "Parent Stay"). The Applicants submit that, among others, the Parent Stay would affect contractual counterparties with contracts or purchase orders involving Nordstrom Canada merchandise and concession operations entered into or issued by Nordstrom US on behalf of, or jointly with, Nordstrom Canada. The Parent Stay would also affect claims that arise out of or in connection with any indemnity, guarantee or surety relating the Leases. The proposed Initial Order further provides that any Landlord claim pursuant to an indemnity or guarantee in relation to either Canada Leasing LP or the Applicants shall not be released or affected in any way in any Plan filed by the Applicants under the CCAA, or any proposal under the BIA.

[37] The Parent Stay is being requested as a temporary measure designed to preserve the *status quo* and create breathing space during the Initial Stay Period, in particular to engage in good faith discussions with the Landlords. It is intended to prevent a multitude of proceedings being commenced in several different jurisdictions against Nordstrom US during this initial period with possibly inconsistent outcomes.

[38] The Court recently granted similar relief during the initial stay period in *Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014. I note that it is the Applicants' intention to request a continuation of the Parent Stay for a reasonable period beyond the Initial Stay Period at the Comeback Hearing.

[39] I note that the Applicants submit that section 11.04 of the CCAA does not prohibit this relief. Firstly, the Indemnities are not "guarantees." Secondly, even if the Indemnities could be characterized as "guarantees", the opening words of section. 11.04 do not oust the Court's jurisdiction under section 11 to grant a third party stay in favour of a guarantor in appropriate circumstances.

[40] The Applicant submits that the Court has jurisdiction under section 11 to grant a third party stay and references *Target Canada* at para. 50, *McEwan Enterprises Inc.,* 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury* 2021 ONSC 659 at paras. 30–33 and *Lydian*

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*International Limited*, 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the Court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen's Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

[41] This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

[42] There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicants and the various landlords, I am prepared to grant the Parent Stay for the initial 10-day period prior to the comeback hearing.

[43] Ms. Heckel states that it is expected that the vast majority of Nordstrom Canada's employees will be provided with working notice of termination on, or shortly after, the commencement of these CCAA proceedings.

[44] Nordstrom Canada is seeking this Court's approval of the Employee Trust, which is to be funded by Nordstrom US. The Employee Trust is intended to provide Nordstrom Canada employees with a measure of financial security during the wind-down process.

[45] The Applicants submit that the Court in *Target Canada* exercised its CCAA jurisdiction to sanction the establishment of an employee trust established by the debtor company's parent for similar purposes.

[46] The Applicants submit that the Employee Trust is intended to ensure that these employees receive the full amount of termination and severance pay owing to them pursuant to employment standards legislation in a timely manner. Nordstrom US has a right of subrogation against Nordstrom Canada in respect of amounts paid pursuant to the Employee Trust.

[47] I am satisfied that the creation of an Employee Trust is fair and appropriate in the circumstances. The Employee Trust is approved.

[48] The Applicants seek the appointment of Ursel Phillips Fellows Hopkinson LLP as Employee Representative Counsel, to represent Nordstrom Canada's store-level employees and all non-KERP eligible non-store employees. Among other things, Employee Representative Counsel will assist with questions regarding Eligible Employee Claims and other issues with respect to the Employee Trust.

[49] I am satisfied that the appointment of Employee Representative Counsel is appropriate in these circumstances. Employees who do not wish to be represented by Ursel Phillips will have the right to opt out.

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[50] The Applicants also seek authorization, with the consent of the Monitor, to make payments of pre-filing amounts owing to certain suppliers, including: (i) logistics or supply chain providers; (ii) providers of information, internet, telecommunications and other technology; and (iii) providers of payment, credit, debit and gift card processing related services. The Applicants believe that categories of suppliers are fundamental to continuing operations and the proposed liquidation sale and any disruptions of their services could jeopardize the orderly wind down, given the expedited timelines for the proposed Realization Process.

[51] For third-party suppliers or service providers other than those listed above, the Initial Order proposes permitting payments in respect of pre-filing amounts up to a maximum aggregate amount of $1,000,000 with the consent of the Monitor, if, in the opinion of the Nordstrom Canada Entities, the supplier is critical to the orderly wind down of Nordstrom Canada's business.

[52] The Applicants submit that the Court has exercised its jurisdiction on multiple occasions to grant similar relief (See: *Target Canada* at paras. 62-65; *Just Energy*, at para. 99; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753, at paras. 72-74; *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802, at paras. 20-22). The Court in *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 at para. 31 outlined the factors that courts have considered in determining whether to grant such authorization, including (a) whether the goods and services are integral to the business of the applicants; (b) the applicants' dependency on the uninterrupted supply of the goods or services; (c) the fact that no payments will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments.

[53] In my view, a consideration of these factors leads to the conclusion that this requested relief should be granted.

[54] Pursuant to section 11.52 of the CCAA, the Applicants are requesting an Administration Charge in favour of the Proposed Monitor, along with its counsel, counsel to the Nordstrom Canada Entities, counsel to the directors and officers of the Nordstrom Canada Entities, and Employee Representative Counsel, as security for their respective fees and disbursements up to a maximum of $750,000 (the "Administration Charge"), which amount covers the time period until the comeback hearing. The Applicants anticipate requesting an increase to $1.5 million at the Comeback Hearing. The Administration Charge was sized in consultation with the Proposed Monitor and is proposed to have first priority over all other charges and security interests.

[55] In my view, the requested Charge satisfies the well-accepted factors originally established by Pepall J. (as she then was) in *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 222, at para. 39. Among other factors, the requested amount is fair and reasonable, and appropriate to the size and complexity of the businesses being restructured. In addition, the initial amount requested is tailored only to the needs within the Initial Stay Period. This relief is granted.

[56] In accordance with section 11.51 of the CCAA, the Applicants also seek a directors and officers charge (the "Directors' Charge") in the amount of $10.75 million until the Comeback Hearing. The Applicants anticipate requesting an increase to $13.25 million at the Comeback

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Hearing. The Applicants submit that the quantum of the Director's Charge was arrived at in consultation with the Proposed Monitor and is proposed to be secured by the property of the Nordstrom Canada Entities and to rank behind the Administration Charge. The Directors' Charge would act as security for the Nordstrom Canada Entities' indemnification obligations for director and officer liabilities that may be incurred after the commencement of the CCAA proceeding. This charge would only be relied upon to the extent liabilities are not covered by existing insurance.

[57] In light of the potential liabilities, the continued service and involvement of the director and officers in this proceeding is conditional upon the granting of an Order which includes the Directors' Charge. I am satisfied that the Directors' Charge is necessary in the circumstances.

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**Disposition**

[58] In summary, the Applicants' request for the relief set out in the proposed Order is granted and Alvarez & Marsal Canada Inc. is appointed as Monitor. The Comeback Hearing is scheduled for March 10, 2023.

Chief Justice G.B. Morawetz

**Date:** March 3, 2023

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# TAB 22

**COURT FILE NO.: 09-CL-7950**
**DATE: 20090723**

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

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**RE:** **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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION**

**APPLICANTS**

**APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**BEFORE:** **MORAWETZ J.**

**COUNSEL:** **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

**Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited**

**J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor**

**M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF**

**S. Philpott, for the Former Employees**

**K. Zych, for Noteholders**

**Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.**

**David Ward, for UK Pension Protection Fund**

**Leanne Williams, for Flextronics Inc.**

**Alex MacFarlane, for the Official Committee of Unsecured Creditors**

**Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)**

**Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited**

**A. Kauffman, for Export Development Canada**

**D. Ullman, for Verizon Communications Inc.**

**G. Benchetrit, for IBM**

**HEARD &**
**DECIDED: JUNE 29, 2009**

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## E N D O R S E M E N T

### INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[4] The following are my reasons for granting these orders.

[5] The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

[6] The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

[7] The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

**BACKGROUND**

[8] The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

[9] At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

[10] The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

[11] In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

[12] On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

[13] In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

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(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

[14] Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

[16] In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

[17] The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

[18] The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

[19] The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

[20] The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

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[21] Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

[23] The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

**ISSUES AND DISCUSSION**

[24] The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

[25] The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

[26] Counsel to the Applicants submitted a detailed factum which covered both issues.

[27] Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

[28] The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*. (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

[30] The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

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(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras. 43-52.

[31] However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

[32] In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc*. (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

[33] Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

[34] Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc*. (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co*. (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

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*Financial Services Ltd. v. Hardrock Paving Co*. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

[36] In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> …we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

[37] Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

[38] Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

[39] In *Re Stelco Inc*., *supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not

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> feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

[40] I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc*. (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc*. (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale…be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*. (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

[43] In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

[44] I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

[46] At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

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Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"…Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged…

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary…

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

2009 CanLII 39492 (ON SC)

[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(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?

(d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

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[52] The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

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**DISPOSITION**

[54] The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

[55] Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

[56] I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[57] Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

[58] In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

[59] Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

**MORAWETZ J.**

**Heard and Decided: June 29, 2009**

**Reasons Released: July 23, 2009**

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# TAB 23

Unofficial English Translation



2015 QCCS 4227 (CanLII)

# SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-049320-159

DATE: SEPTEMBER 14, 2015

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**THE HONOURABLE MARTIN CASTONGUAY, J.S.C., PRESIDING**

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**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. (1985), c. C-36, AS AMENDED, AND:**

**PASCAN AVIATION INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**LES STRUCTURES & COMPOSANTES AVTECH INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**3939421 CANADA INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**8039879 CANADA INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**PASCAN EXPRESS INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**8039895 CANADA INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

- and -

**LES CARBURANTS AVTECH INC.**, a legal person having its principal place of business at 6200 route de l'Aéroport, Longueuil (Borough of Saint-Hubert), Province of Quebec, J3Y 8Y9

Debtors

- and -

**BUSINESS DEVELOPMENT BANK OF CANADA**, a legal person having a place of business at 5 Place Ville-Marie, Montreal, Province of Quebec, H3B 5E7

- and -

**INVESTISSEMENT QUÉBEC**, a legal person having a place of business at 413 Saint-Jacques Street, Suite 500, Montreal, Province of Quebec, H2Y 1N9

Petitioners

- and -

**PRICE WATERHOUSE COOPERS INC.**, a legal person having a place of business at 1250 René-Lévesque Boulevard, Suite 3500, Montreal, Province of Quebec, H3B 2G4

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Impleaded party / Monitor

- and -

**ROYAL BANK OF CANADA**, a chartered bank
having a place of business at 1 Place Ville-Marie, Ground Floor,
Montreal, Province of Quebec, H3C 3B5

Impleaded party

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**JUDGMENT**

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[1] On August 31, 2015, the Business Development Bank of Canada and Investissement Québec (hereinafter the "Petitioners") asked the Court to make an initial order under the terms of sections 4, 5 and 11 of the *Companies' Creditors Arrangement Act* (hereinafter "the Act")[1] with regard to the following debtors:

- Pascan Aviation Inc.
- Pascan Express Inc.
- 8039879 Canada Inc.
- 3939421 Canada Inc.
- Les Structures & Composantes Avtech Inc.
- 8039895 Canada Inc.
- Les Carburants Avtech Inc.

(hereinafter the "Pascan Group")

[2] The motion for an initial order also sought to set up interim financing of $1,000,000.00, the funds coming from the Petitioners themselves, the whole accompanied by the related fees.

[3] The Petitioners also asked that Dominic Deveaux (hereinafter "Deveaux") be appointed Chief Restructuring Officer (hereinafter "CRO") of the Pascan Group. The Court sees fit to reproduce the allegations in the motion dealing with this point.

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[TRANSLATION]

Appointment of the CRO

129. The Petitioners propose that the Court appoint Dominic Deveaux to act as Chief Restructuring Officer of the Pascan Group;

130. The appointment of the CRO is necessary because the Petitioners have lost confidence in the current management and administration of the Pascan Group;

131. The appointment of the CRO is an essential condition for granting the interim financing offered by the Petitioners;

132. The CRO is already familiar with the operations of the Pascan Group given his involvement in recent months, and he, along with the key employees of the Pascan Group, will make it possible to continue its operations.

133. The Petitioners therefore request that the CRO be appointed by the Court to act as Chief Restructuring Officer of the Pascan Group under the terms of an offer of management services made to the Pascan Group and filed as Exhibit **R-24;**

134. The Petitioners further propose that the CRO have all the powers described in the draft initial order and that he enjoy the protections required to maintain the operations of the Pascan Group;

[4] As is usual for such a motion in view of an initial order, a draft order was attached, providing, *inter alia*, the following concerning the powers of the CRO:

[TRANSLATION]

30. - Declares that the CRO may exercise, without the intervention of the directors, all the powers described in the service proposal that are not incompatible with the following powers.

[5] The service proposal was the one prepared by Deveaux.[2] In addition to his emoluments, set at $40,000.00 a month, this document set out the powers and objectives of the CRO. The Court sees fit to reproduce them in their entirety.

[TRANSLATION]

**POWERS**

In the context of his role referred to hereinabove and in view of promoting the achievement of the objectives described hereinbelow, the Manager shall have all the powers necessary to:

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- Conduct, manage, operate and oversee the company, commercial operations and financial affairs of the CLIENT and perform any and all acts in this regard or in connection with the restructuring of the CLIENT.

- Take all measures to maintain control over the receipts and disbursements of the CLIENT including, without limiting the generality of the foregoing, all measures to control and use all the bank accounts of the CLIENT.

- Maintain or terminate, dismiss or lay off, temporarily or permanently, the employees of the CLIENT or of its agents or consultants and take any and all other measures for human resources management and any other administrative decision related thereto.

- Represent the CLIENT in all negotiations with any person whomsoever.

- Communicate with and provide information to the Monitor concerning the business of the CLIENT.

- Take any and all measures, sign any and all documents or agreements and incur any and all expenses and obligations necessary or incident to the powers of the Manager.

**OBJECTIVES**

The strategic objectives pursued by the Manager are as follows:

1. **Financial restructuring**

   a. File and obtain approval of a plan of arrangement under the *Companies' Creditors Arrangement Act* for the unsecured creditors of the CLIENT.

2. **Operating performance**

   a. Improve the financial performance and profitability of the CLIENT so that the CLIENT can meet its current obligations, provide for the engine reserve and investments in maintenance required for the operating fleet and pay the interest specified in the loan agreements.

   b. Set up a management team to reduce and eventually terminate the Manager's mandate on a monthly basis.

3. **Sale/recapitalization of operating entities**

a. Solicit offers for the operating assets and activities of the CLIENT and interest potential purchasers, partners or investors such that the loans on the operating assets are assumed or repaid to the satisfaction of the lenders.

4. **Sale/disposition of surplus assets**

Solicit offers in order to proceed with the sale of the surplus assets of the CLIENT such that these offers meet the minimum conditions established by the lenders according to the agreements in place with the CLIENT.

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[6] The Pascan Group, while theoretically in agreement with an initial order, filed a written opposition in the record with four specific points, although only two were debated before the Court. They were as follows:

- Identity and compensation of the CRO

- Powers of the CRO

[7] For a full understanding of the grounds for the opposition, some background is essential.

[8] The Pascan Group operates in passenger air transportation services, charter freight and certain airport services. Two directors look after its management, namely Serge Charron (hereinafter “Charron”) and Denis Charest (hereinafter “Charest”).

[9] Until very recently, the Pascan Group operated a fleet of twenty-one airplanes and one helicopter, serving some fifteen destinations (Rouyn-Noranda, Val-d'Or, Gatineau, Montreal, Quebec City, Bagotville, Mont-Joli, Bonaventure, Baie-Comeau, Sept-Îles, Havre-Saint-Pierre and the Magdalen Islands), Newfoundland and Labrador (Wabush and Goose Bay) and New Brunswick (Bathurst).[3]

[10] The Pascan Group had experienced a decline of some 50% in its sales in the past two years and as a result has sustained significant losses which it attributes to the following factors:

(a) The slowdown in the Plan Nord which began in May of 2011;

(b) The economic difficulties that have adversely affected companies working in Quebec’s mining industry;

(c) The volatility of oil and iron ore prices in the past two years;

(d) The austerity measures brought in by the Quebec government;

(e) The loss of a number of contracts because of increased competition; and

(f) The erosion of certain sectors of the Quebec economy, more specifically in the north of the province.[4]

[11] Until February of 2015, the Pascan Group had a $1,500,000.00 credit line from Royal Bank of Canada.

[12] Because of the Pascan Group's financial difficulties and following a breakdown in negotiations, Royal Bank of Canada withdrew its financial support from the Pascan Group, and as a result the Pascan Group no longer has the credit line.

[13] In fact, the only institutional creditors are the Petitioners, which have granted credit for the financing of assets and for part of the working capital in the amount of $21,069,903.00 as at August 17, 2015.

[14] The difficulties encountered by the Pascan Group led the Petitioners to designate specialized managers on their staff to take charge of problem accounts, namely Dany Couillard (hereinafter "Couillard").

[15] Couillard testified that during meetings with the Pascan Group in the winter of 2015, Pascan saw only one possible solution to its liquidity problem, and that was to obtain government assistance.

[16] In the spring of 2015, when it became clear that the Pascan Group could not meet its obligations vis-à-vis the Petitioners, the Petitioners required the Pascan Group to retain the services of restructuring consultants, namely PricewaterhouseCoopers (hereinafter "PwC") and Evology Management Inc. (Deveaux).[5]

[17] The uncontradicted evidence reveals that from the very start the Pascan Group was against the level of compensation for Deveaux, which it considered too costly in light of its financial situation.

[18] In any case, as often occurs in such situations, the Pascan Group nonetheless gave Deveaux a mandate.

[19] On arriving at the Pascan Group, Deveaux ordered an evaluation of the airplanes operated by the Pascan Group. The evaluation showed that they had declined considerably in value because of two factors.

- Absence or major deficit in the engine reserve[6]

- Cannibalization of certain aircraft[7]

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[20] Naturally, the Petitioners were very dismayed when the situation was revealed to them.

[21] At the same time, beyond the difficulties the Pascan Group was having in meeting its obligations to the Petitioners, it was also late in paying its landing fees at some of the airports it served.

[22] What is more, lawsuits had arisen concerning the aircraft leased and operated by the Pascan Group.

[23] In particular, two lawsuits existed between the Pascan Group and two lessors of the airplanes currently operated or in the possession of the Pascan Group. These involved:

Coast to Coast Helicopter Inc.

and

Danish Air Transport Leasing

This is an important detail in the decision the Court must make.

[24] In short, the situation was catastrophic.

[25] Deveaux, together with Charron and Charest, the directors of the Pascan Group, came up with a program to rationalize the air routes, such that the Pascan Group needed only eight airplanes to operate, with the fourteen others to be sold.

[26] At the same time, Deveaux and the Pascan Group directors were negotiating with some of the Pascan Group's suppliers to spread out the payment of its debts.

[27] After Deveaux's arrival and until the end of May, the parties held discussions and tried to establish debt tolerance conditions that would be acceptable to the Petitioners.

[28] The parties could not come to an agreement, and the fact that Charest, the main spokesman for the Pascan Group, left for two weeks to look after other matters was the straw that broke the camel's back.

[29] In June 2015, tired of fighting, the Petitioners sent a notice to the Pascan Group under section 244 of the BIA[8] indicating that they intended to realize on their security.

[30] On June 12, 2015, the expiry date of the notice under section 244 BIA, the Pascan Group terminated Deveaux's mandate.

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[31] On July 19, 2015, Deveaux, without the knowledge of the Pascan Group, gave the Petitioners, PwC and Lavery, counsel for the Petitioners, a document entitled "Memorandum". This document laid out several strategies including having the entities holding the airplanes declare bankruptcy as well as [TRANSLATION] "having the lenders take control of the three (3) entities (the Pascan Group "2.0").

[32] It was not until later that the directors found out about the existence of this "Memorandum".

[33] In spite of the notice under section 244 BIA, the parties continued to talk to each other and at the beginning of July 2015, the Pascan Group submitted a business plan showing a possible return to profitability. Even so, a cash injection of $1,000,000.00 was necessary for this purpose.

[34] Discussions therefore began on this basis between the Petitioners and the directors, including Charest.

[35] It should be mentioned that of the two Pascan Group directors, Charest was the only one who had the financial capacity to inject funds.

[36] Right away, Charest indicated that he had no intention of injecting any new funds and so the solution would be a loan from the Petitioners, and the discussion started moving in that direction.

[37] Thus the Petitioners, persuaded that there was a chance that the Pascan Group could be turned around, were ready to advance $1,000,000.00 on an interim basis, subject to certain conditions, including the involvement of Deveaux and the disengagement of the current directors, who for all intents and purposes would be stripped of their powers. Couillard, an account and restructuring manager at the BDC, invoked the following elements to justify this approach.

- Loss of confidence.

- Management team unable to manage the crisis, notably the Pascan Group's inability to sell five (5) airplanes since January 2014.

- Threats of lawsuits.

[38] While Charron was willing to sign the agreement suggested by the Petitioners, Charest refused.

[39] At that point, the situation began to deteriorate.

[40] The motion for an initial order was served and filed on August 26, 2015.

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[41] Part of the motion was addressed on August 31, 2015, such that an initial order was issued without dealing with the issue of appointing a CRO. Here is why.

[42] As we have seen, the Petitioners suggested Deveaux, while the Pascan Group suggested another candidate in its written opposition, namely Hélène Zakaib (hereinafter "Zakaib"), a lawyer by training, former Member of the National Assembly and Deputy Finance Minister responsible for industrial policy and the Banque de développement économique du Québec.

[43] Because of the oppositions from both sides, the Court conducted a brief review of the credentials of Deveaux and Zakaib to find that neither had worked in a highly regulated environment such as civil aviation whether for purposes of restructuring or any other purpose.

[44] Furthermore, in his much talked-about *Memorandum* dated July 19, 2015, Deveaux made a remark, which, although it appears innocuous at first glance , has serious consequences.

> [TRANSLATION]
>
> Transport Canada authorities have already been questioning the Pascan Group officers' compliance with regulations and are closely monitoring the situation.

[45] In addition, the emoluments requested by both, namely $40,000.00 a month for Deveaux and $30,000.00 a month for Zakaib, seem excessive under the circumstances.

[46] In view of the candidates proposed by both sides, who have never worked in such a highly regulated industry and are asking for significant fees, the Court can and must intervene.

[47] The Court therefore suggested to the parties that they try to agree on a candidate with the necessary credentials to carry out a restructuring in the civil aviation industry, as that such a candidate would certainly reassure Transport Canada. The Court also asked the parties to consider a more realistic form of compensation given the circumstances.

[48] This having been done, all that remained for the Court was to determine the scope of the powers to be given to the CRO.

[49] Unfortunately, once again, the parties were unable to agree on the choice of candidate. This disagreement revolved more around the independence that a CRO should have in the performance of his duties.

[50] The Court must make a short digression here. Despite the law, we are all human.

[51] Clearly there is no trust between Charest, who represents the Pascan Group, and Couillard, who acts on behalf of the Petitioners.

[52] Charest has testified twice before the Court. He is an intelligent and accomplished businessman but, above all, he has a strong character.

[53] As a result, chances are that his choice of candidates for the CRO position are people over whom, rightly or wrongly, he thinks he could wield some influence.

[54] On the other hand, the Petitioners are attempting to avoid this problem by asking that the Court confer on the CRO powers that are exceptional for such a position.

[55] Indeed, a spade is a spade even if you call it a pitchfork. The scope of the powers sought by the Petitioners for the CRO is more like the powers of a receiver than those normally vested in a CRO.

[56] Before tackling the profile of the best candidate for the CRO position, it is important to review the Court's basic guiding principles.

[57] The author Janis Sarra perfectly summarizes the circumstances that lead to the appointment of a CRO:

> In the past two decades, there has been the growing use of chief restructuring officers (CRO) in CCAA workouts, frequently appointed in the initial stay order. This development is a governance response to creditor concerns that directors and officers that may have skills appropriate to oversight of financially healthy corporations may not have the skills or expertise to deal with a turnaround situation.

[58] This is the most important criterion that should guide the Court. The existing directors, who are quite knowledgeable about their industry, are normally the best qualified to carry out the restructuring. That being said, however, even the best directors can be overwhelmed by a crisis situation.

[59] In the present case, although Charron and Charest knew how to run their business during the profitable years, the evidence shows that they lost control in a crisis situation. The following points demonstrate this:

- Five unsold airplanes even though they had been declared surplus since January 2014

- Cannibalization of certain aircraft.

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- Lack of engine reserve.

[60] Nevertheless, the directors of the Pascan Group showed that with adequate guidance, they were able to make good decisions.

[61] In this particular case, the appointment of a CRO, uncontested the Pascan Group, is advisable.

[62] A court-appointed CRO for a restructuring under the Act is nothing new in law.

[63] It is necessary, however, to recall, if not define the objectives sought when a court-appointed CRO is required.

[64] It goes without saying that the situation or powers of a CRO when a company is being wound up are quite different from those of a CRO who will be involved in working out a plan of arrangement.[9]

[65] In the present case, representations were made to the Court that a plan of arrangement would in fact ultimately be filed, with the result that negotiations have already been initiated with certain creditors.

[66] In such a case, to fulfil his or her mandate, the CRO must identify the action to be taken for the financial turnaround of the company; namely the disposal of assets or the creation of a new business plan, or both. The CRO must then, together with the Monitor and the Board of Directors, prepare a viable plan of arrangement that will be acceptable to all the parties involved, whether they are shareholders or secured or unsecured creditors, and ultimately see to its implementation and completion. Moreover, since the CRO is court-appointed, he or she must report to the Court.

[67] Even though the appointment of a CRO can be reassuring to all stakeholders, the aim of such an appointment is not to look out for the interests of a single category of stakeholders.

[68] Certain qualities are therefore required, including independence vis-à-vis these same parties, in addition to a solid reputation and expertise in the civil aviation industry as well as in restructuring.

[69] Selecting the best possible CRO is vital to a company's restructuring process. When a CRO is court-appointed because of differences between the parties, the guiding criteria are the following:

- A good knowledge of the industry in which the company operates so that the CRO's presence is reassuring to all the industry stakeholders, namely, the creditors, clients and competent authorities.

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- Independence.[10]

- Experience in restructuring.

- Reasonable cost.

[70] These criteria are not cumulative, but their analysis can lead to the identification of the ideal candidate from among those proposed.

[71] Now that the selection criteria have been established, what should be determined with respect to the powers requested by the Petitioners?

[72] To justify the powers requested, the Petitioners refer to the breach of trust without taking into consideration that a Monitor has already been appointed.

[73] The Petitioners also cite the order issued by Schrager J. of the Quebec Superior Court, as he then was, in *Aveos Fleet Performance*,[11] by which all the powers of administration were conferred on the CRO, to the exclusion of the existing directors.

[74] There are no reasons provided for this order, as is generally the case for emergency orders issued under the Act.

[75] Counsel for the Pascan Group, judicial officers well informed about the Aveos case, told the Court that the scope of powers conferred on the CRO was prompted by the resignation or absence of Aveos directors.

[76] This same order specifies the degree of collaboration to be shown by shareholders and directors. The Court deems it useful to reproduce it here.

> **ORDER** that the Petitioners and their shareholders, direct and indirect subsidiaries, former and current officers, directors, employees, servants, agents and representatives (the "**Company Persons**") shall cooperate fully with the CRO in the exercise of his powers and the discharge of his obligations. Without limiting the generality of the foregoing, the Company Persons shall provide the CRO with such access to the Petitioners' and their direct and indirect subsidiaries' books, records, assets and premise as the CRO requires to exercise his powers and perform his obligations under this Order.

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[77] The Court is of the opinion that, at this stage, collaboration is required, not coercion, especially since the Court will ensure the independence of the candidate selected.

[78] The Court does not challenge the Petitioners' decision to use the mechanisms provided by the Act, especially since the Petitioners firmly believe in the Pascan Group's capacity for financial rehabilitation.

[79] This being the case, the Petitioners must live with the consequences of their choices; stripping the directors of their powers in favour of a CRO, however, is not the standard applied by the courts.

[80] This decision is not set in stone and may be reviewed by the Court if it becomes obvious that the directors are not cooperating with the CRO. In such a scenario, the Court would not hesitate to consent to increased powers for the CRO, as in the form used by Schrager J. in *Aveos*.

[81] Let us now look at the candidates. Each one has filed a résumé, and Messrs. Deveaux, Nice and Simard have testified about their past experiences.

[82] The Court would like to point out that this exercise does not make a value judgment with regard to the candidates not selected but rather consists of the application of the criteria presented earlier.

[83] Deveaux has a great deal of experience in restructuring, but none in the civil aviation industry.

[84] Moreover, his "Memorandum" dated July 19, 2015, which was transmitted to the Petitioners, PwC and counsel for the Petitioners while his fees were being paid by the Pascan Group, raises questions for the Court about his independence. In addition, as a result of the animosity which ensued, the relationship between Deveaux and the directors of the Pascan Group would be dysfunctional.

[85] Therefore, Deveaux cannot be considered for the appointment.

[86] Zakaib also cannot be considered for the position.

[87] Despite impressive academic credentials and a remarkable professional career, Zakaib has no knowledge of the aviation industry and her knowledge of restructuring is quite limited.

[88] Simard's application will also be rejected.

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[89] Although his knowledge of the civil aviation industry is impressive, he has never participated in any restructuring under the Act.

[90] What is more, scarcely even a few months ago, he started up a company headed by the same person who is the driving force behind Coast to Coast Helicopters Inc., which is currently involved in a dispute with the Pascan Group. Under the circumstances, the criterion of independence or the appearance of independence is not met.

[91] Derek Nice is selected to perform the duties of CRO for the following reasons:

- Solid experience in civil aviation.

- Participation in restructurings under the Act in the civil aviation industry.

- More than reasonable cost under the circumstances.

[92] Regarding the last point, the Court can only suggest that managers involved in restructurings should show more creativity in their choice of consultants.

[93] The costs related to such external consultants are similar to legal costs much decried by litigants.

[94] In this case, a CRO at almost half the cost[12] of that proposed in the initial motion would have been selected simply through competition.

[95] The Petitioners and the Monitor have ask the Court that it be the Monitor that controls, and not just oversees, the Pascan Group's receipts and disbursements.

[96] Once again, the Court does not see the need for such a measure since no evidence of misappropriation, negligence or incompetence in regard thereto has been presented to the Court.

[97] In closing, the evidence shows that Charron has lost interest in his role as director, giving complete leeway to Charest. Charest, however, may need to be absent because of his other obligations. Therefore, if Charest's absences end up amounting to a lack of collaboration on his part, a motion may be filed with the Court to review the powers of the CRO.

**FOR THESE REASONS, THE COURT:**

**ALLOWS** the component regarding the appointment of the Chief Restructuring Officer in the motion for the issue of an initial order dated August 26, 2015.

**APPOINTS** Derek Nice as Chief Restructuring Officer for all the entities of the Pascan Group on the terms and conditions in his offer dated September 10, 2015, to PricewaterhouseCoopers, reflecting the undertakings to which Nice subscribed during his testimony.

**ORDERS** the Debtors and their shareholders, directors, employees and/or representatives to collaborate fully with the Chief Restructuring Officer in the performance of his duties and in the exercise of his powers, notably by providing him access to all the books of account and/or financial information as well as to all premises and equipment currently operated and used by the Debtors.

**DECLARES** that the CRO may exercise all the powers described in the service proposal, the whole subject to the agreement of the director of the Debtors and of the Monitor for any decision or act that may have a major impact on the Debtors, namely:

(a) Represent the Debtors in all negotiations with the parties concerned (whether creditors, suppliers, investors, etc.);

(b) Ensure the transition of the role of accountable executive between Serge Charron and Julian Roberts;

(c) Ensure the proper maintenance of aircraft and passenger security;

(d) Find new clients, maintain relationships with existing clients and promote the services of the Debtors;

(e) Make decisions regarding employee retention, including the continued employment of key employees;

(f) Streamline the operations of one or more operating units of the Debtors, including the sale of the surplus fleet;

(g) Terminate or repudiate any contract, agreement or arrangement pursuant to CCAA terms and conditions;

(h) Communicate with and provide information concerning the Debtors to the Monitor at the request of the latter in the performance of its duties; and

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(i) Any other power, responsibility or duty that the CRO may agree to exercise, discharge or perform at the request of the Debtors following an order from this Court.

**DECLARES** that all the powers exercised by the CRO pursuant to this order and the service proposal shall be deemed to have been exercised by the CRO for and on behalf of the Debtors, and not by the CRO in his own personal capacity.

**ORDERS** that the CRO shall, in the exercise of his powers, consult and report to the Debtors and their director.

**DECLARES** that the CRO shall benefit from the indemnification obligation provided for in paragraph 25 of the initial order and from the directors' charge as security for this indemnification obligation with regard to the obligations and liabilities that the CRO may incur when acting in such capacity as of the date of this order.

**ORDERS** the Debtors to pay the reasonable fees and disbursements of the CRO directly related to these proceedings, the plan and the restructuring that he incurred after the date of this order.

**DECLARES** that, as security for the professional fees and disbursements of the CRO incurred after the date of this order with regard to these proceedings, the plan and the restructuring, the same shall benefit from the administrative charge determined in paragraph 39 of the initial order in order of the priority determined in paragraphs 40 and 41 of the initial order.

**ORDERS** that no person shall institute or continue proceedings nor cause proceedings to be instituted against the CRO, in relation to the business or property of the Debtors, without first obtaining the prior permission of the Court by way of a prior written notice of five (5) days to counsel for the Debtors and to all those mentioned in this paragraph who are proposed to be named in these proceedings.

**ORDERS** that this order and all the provisions thereof take effect at or after 00:01 a.m., Montreal time, Province of Quebec, on the date of this order.

[98] **THE WHOLE,** without costs.

_____
Martin Castonguay, J.S.C.

Mtre Jean Legault
Mtre Mathieu Thibault
**LAVERY, DE BILLY**
Counsel for Business Development Bank of Canada and Investissement Québec

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Mtre Guy P. Martel
Mtre Joseph Reynaud
**STIKEMAN ELLIOTT**
Counsel for the Pascan Group

Mtre Alain Tardif
**McCARTHY TÉTRAULT**
Counsel for Fiducie Denis Charest

Mtre Martin Desrosiers
**OSLER, HOSKIN & HARCOURT**
Counsel for the Monitor, PricewaterhouseCoopers

Date of hearing: September 9, 2015

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[1] *An Act to facilitate compromises and arrangements between companies and their creditors*, R.S.C., 1985, c. C-36.
[2] Exhibit R-24.
[3] Paragraph 22 of the motion.
[4] Paragraph 26 of the written opposition.
[5] Even if the mandate is signed by the Pascan Group and Evology Management Inc./Gestion Evologie inc., because it is a mandate *intuitu personae,* the Court will refer only to Mr. Deveaux.
[6] An engine reserve is required from the lenders and consists of a certain sum of money set aside for every hour of flight time to constitute a reserve that will be used to recondition the engine or engines when their regulatory life has expired.
[7] Cannibalization consists of removing operating parts from one aircraft without replacing them and installing them in another aircraft.
[8] *Bankruptcy and Insolvency Act*, R.S.C. (1985) c. B-3.
[9] Janis Sarra: Rescue: *The Companies' Creditors Arrangement Act* (Thomson Carswell) at 160-161.
[10] Janis Sarra: Rescue: *The Companies' Creditors Arrangement Act,* "If the CRO is court-appointed, arguably it has obligations to the court and must act neutrally with respect to stakeholders," at 161.
[11] *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à*) (20 March 2012) 500-11-042345-120.
[12] Fees of Mr. Nice set at $23,000.00 a month, excluding the addition of certain resource persons and expenses, whereas Mr. Deveaux required $40,000.00 a month, as presented in the initial motion. It should be noted that in the evidence adduced with regard to the choice of CRO, Mr. Deveaux agreed to reduce his emoluments to $32,000.00 a month.

# TAB 24

**CITATION:** Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re) 2019 ONSC 1215
**COURT FILE NO.:** CV-19-00614629-00CL
**DATE:** 20190220

**RE: SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)**

**RE:** **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 PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.**

**Applicants**

**BEFORE:** Regional Senior Justice G. B. Morawetz

**COUNSEL:** *J. Dietrich and S. Kukulowicz and R. Jacobs,* for the Applicants

*S. Zweig and A. Nelms,* for FTI Consulting Canada Inc., Proposed Monitor

*S. Brotman and D. Chochla,* for the Ad Hoc Group of Term Lenders

*S. Kour,* for Term Loan Agent, Cortland Products Corp.

*T. Reyes* for Wells Fargo, ABL Agent

**HEARD AND ENDORSED:** February 19, 2019

**REASONS:** February 20, 2019

## ENDORSEMENT

## OVERVIEW

[1] At the conclusion of argument, the record was endorsed as follows:

> CCAA application has been brought by Applicants. Initial Order granted. Order signed. Applicants will serve parties today and return to court for further directions on Thursday, February 21, 2019 at 9:30 a.m. Reasons will follow.

[2] These are the Reasons.

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[3] This application is brought by Payless ShoeSource Canada Inc. ("Payless Canada Inc.") and Payless ShoeSource Canada GP Inc. ("Payless Canada GP") for relief under the Companies' Creditors Arrangement Act ("CCAA"), including an initial stay of proceedings. The Applicants also seek to have the stay of proceedings and the other benefits of the Initial Order extended to Payless ShoeSource Canada LP ("Payless Canada LP", together with the Applicants, the "Payless Canada Entities"), a limited partnership which carries on substantially all of the operations of the Payless Canada Entities. The requested relief is not opposed.

[4] The evidence provided in the affidavit of Stephen Marotta, Managing Director at Ankura Consulting Group LLC, the Chief Restructuring Organization ("CRO") establishes that each of the Payless Canada Entities is insolvent and unable to meet its liabilities as they become due. The Applicants seek relief provided by the proposed Initial Order under the CCAA in order to provide a stable environment for the Payless Canada Entities to undertake the Canadian Liquidation.

[5] On February 18, 2019, a number of Payless Entities in the United States (the "U.S. Debtors") (including the Payless Canada Entities) commenced cases under chapter 11 of title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri (the "U.S. Bankruptcy Court") (the "U.S. Proceedings"). The U.S. Debtors' "First Day Motions" are scheduled to be heard by the U.S. Bankruptcy Court on February 19, 2019.

[6] Counsel to the Applicants advises that the orders to be sought by the U.S. Debtors from the U.S. Bankruptcy Court at the First Day Motions contain language providing that if there are inconsistencies between any order made in the U.S. Proceedings and in this court, the orders of this court will govern with respect to the Payless Canada Entities and their business.

**FACTS**

[7] The Applicants are indirect wholly owned subsidiaries of a U.S. Debtor, Payless Holdings LLC. Both Payless Canada Inc. and Payless Canada GP are governed by the *Canada Business Corporations Act* (the "CBCA").

[8] Payless Canada LP is a limited partnership organized under the laws of Ontario. The general partner and limited partner of Payless Canada LP are Payless Canada GP and Payless Canada Inc., respectively. Payless Canada LP is the primary vehicle conducting the business operations of the Payless Canada Entities.

[9] The Payless Canada Entities operate 248 retail stores in 10 provinces throughout Canada. The retail locations are leased from commercial landlords.

[10] The Payless Canada Entities also have a corporate office at leased premises located in Toronto, Ontario.

[11] There are approximately 2,400 employees in Canada of which 12 are corporate office employees. The remainder work at the retail locations.

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[12] The Payless Canada Entities rely on the infrastructure of the U.S. Debtors for substantially all head office functions. These services are provided by certain U.S. Debtors pursuant to intercompany agreements.

[13] The assets of the Payless Canada Entities primarily consist of inventory and an intercompany promissory note receivable which was reported on the balance sheet in the amount of approximately USD $110 million. Given that the issuer of the note is a U.S. Debtor, the Applicants advise that it is doubtful that the full value can be realized.

[14] The liabilities of the consolidated Payless Canada Entities include, among other things, outstanding gift cards, leased payments, trade and other accounts payable, taxes, accrued salary benefits, long term liabilities, and intercompany service payables.

[15] The Payless Canada Entities are also guarantors under two credit facilities, the ABL Credit Facility and the Term Loan Credit Facility. There is approximately USD $156.7 million outstanding under the ABL Credit Facility and USD $277.2 million outstanding under the Term Loan Credit Facility.

[16] The total amount of liabilities of the Payless Canada Entities inclusive of obligations under the guarantees of the ABL Credit Facility and the Term Loan Credit Facility is in excess of USD $500 million.

[17] In December 2018, Payless engaged an investment bank, PJ Solomon L.P., to review strategic alternatives. In consultation with its advisers, the Payless Canada Entities decided to take steps to monetize or preserve its Latin America business and liquidate its North American operations.

[18] The Payless Canada Entities have determined that there is no practical way for the company to operate on a standalone basis. The Payless Canada Entities have decided that it was in their best interest and in the best interest of their stakeholders to complete the Canadian Liquidation.

**ISSUES**

[19] Counsel to the Payless Canada Entities state that the issues to be determined on this application are as follows:

(a) Whether the CCAA applies in respect of the Applicants;

(b) Whether a stay of proceedings is appropriate;

(c) Whether the Monitor should be appointed;

(d) Whether the CRO should be appointed;

(e) Whether the Administration Charge should be approved;

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(f) Whether the Directors' Charge should be approved;

(g) Whether the Cross-Border Protocol should be approved.

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**LAW**

[20] The CCAA applies to a company where the aggregate claims against it or its affiliated debtor companies are more than five million dollars. I am satisfied that both of the Applicants meet the definition of a "company" under section 2(1) of the CCAA.

[21] The evidence is such that I am able to conclude that the Payless Canada Entities have failed to pay their February rent for a number of Canadian stores. In addition, defaults have occurred under the ABL Credit Facility and the Term Loan Credit Facility, and the ABL Agent has issued a Cash Dominion Direction.

[22] It has been demonstrated that the Payless Canada Entities have insufficient assets to discharge their liabilities and insufficient cash flow to meet their obligations as they come due.

[23] Accordingly, I find that the Applicants are insolvent debtor companies under the CCAA.

[24] Counsel for the Applicants submits that the Payless Canada Entities require a stay of proceedings in order to prevent enforcement actions by various creditors including landlords and other contractual counterparties. I accept this submission and in my view, it is appropriate to grant the requested stay of proceedings.

[25] I am also of the view that it is appropriate that the stay of proceedings apply not only in respect of the Applicants' themselves, but that it extend to the partnership Payless Canada LP.

[26] Although the definition of "debtor company" in the CCAA does not include partnerships, this court has previously held that where a limited partnership is significantly interrelated to the business of the applicants and forms an integral part of its operations, the CCAA Court may extend the stay of proceedings accordingly. (See: *Re Lehndorff General Partner Ltd.*, (1993) 9 BLR (2d) 975 (Ont. S.C); *Re Priszm Income Fund*, 2011 ONSC 2061; *Re Urbancorp Toronto Management Inc.*, 2016 ONSC 3288; and *Re Target Canada Co.*, 2015 ONSC 303).

[27] In these circumstances, and in order to ensure that the objectives of the CCAA are achieved, I am satisfied that it is appropriate to grant the requested stay of proceedings to Payless Canada LP.

[28] In addition, the Payless Canada Entities also seek a stay of proceedings against the Directors and Officers. I am satisfied that the stay against to the Directors and Officers is

appropriate as it will allow such parties to focus their time and energies on maximizing recoveries for the benefit of stakeholders.

[29] The Applicants propose FTI Consulting Canada Inc. as Monitor. I am satisfied that FTI is qualified to act as Monitor in these proceedings.

[30] The proposed Initial Order also provides for the appointment of Ankura as CRO. Counsel to the Applicants submits that the proposed CRO is necessary to assist with the Canadian liquidation and is particularly critical given the number of departures by senior management.

[31] The Proposed CRO Engagement Letter has been heavily negotiated and no parties, including the ABL agent and the term lenders, voice objection to the Engagement Letter.

[32] I am satisfied that the CRO should be appointed and the CRO Engagement Letter should be approved.

[33] I am also satisfied that it is appropriate to grant a charge on the Property in priority to all other charges to protect the CRO, Proposed Monitor, counsel to the Proposed Monitor, and Canadian counsel to the Payless Canada Entities, up to a maximum amount of USD $2 million (the "Administration Charge"). In arriving at this conclusion, I have taken into account the provisions of section 11.52 of the CCAA and the appropriate considerations which include:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[34] I am also of the view that the requested Directors' Charge is appropriate in the circumstances and it is approved in the maximum amount of USD $4 million that will reduce to USD $2 million after March 21, 2019. It is noted that the Directors' Charge only applies with respect to amounts not otherwise covered under the Payless Canada Entities directors' and officers' liability insurance policies.

[35] In order to facilitate the orderly administration of the Payless Canada Entities and in recognition of their reliance upon the U.S. Debtors, the Applicants propose that these proceedings be coordinated with the U.S. Proceedings and accordingly the proposed Initial Order includes the approval of a cross-border protocol.

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[36] I am satisfied that the proposed cross-border protocol establishes appropriate principles for dealing with international jurisdictional issues and procedures to file materials and conduct joint hearings. It is my understanding that the U.S. Debtors will also be seeking the approval of the proposed protocol by the U.S. Bankruptcy Court as part of their First Day Motions.

[37] Counsel advises that the form of the Cross-Border Protocol is consistent with this court's decision in *Re Aralez* (25 October 2018), Toronto CV-18-603054-00CL (Ont. S.C) which is based on the Judicial Insolvency Network ("JIN Guidelines"). As stated on the JIN website:

> The JIN held its inaugural conference in Singapore on 10 and 11 October 2016 which concluded with the issuance of a set of guidelines titled "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" also known as the JIN Guidelines…The JIN Guidelines address key aspects and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs.

[38] The JIN Guidelines have been endorsed by the Commercial List Users' Committee of this court.

[39] I also note that the JIN Guidelines have been recognized in a number of jurisdictions globally, including the United Kingdom, United States (New York, Delaware and Florida), Singapore, Bermuda, Australia (New South Wales), Korea (Seoul Bankruptcy Court), and the Cayman Islands.

[40] The JIN Guidelines have received international recognition and acceptance. As noted, the aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs, an objective that all parties should strive to achieve in every insolvency proceeding.

[41] Counsel to the Applicants advised that this application will be served on a number of interested parties, including the landlords of the leased premises.

[42] It is both necessary and appropriate to schedule a Comeback Hearing in order to provide affected parties with the opportunity to respond to this application. Counsel to the Applicants propose that the Comeback Hearing be held on Thursday, February 21, 2019.

[43] It is expected that the following will be considered at the Comeback Hearing:

(a) Whether the Liquidation Consulting Agreement and Sale Guidelines should be approved; and

(b) Whether an extension of the stay of proceedings is appropriate.

[44] I am not certain as to whether this schedule will provide interested parties with adequate time to respond to the issues raised in this application. The Comeback Hearing will proceed on

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February 21, 2019 on the understanding that certain matters may not be addressed at that time, if it is determined that parties have not had adequate time to respond to the issues raised in the application.

[45] The Initial Order has been signed by me.

Morawetz R.S.J.

**Date:** February 20, 2019

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# TAB 25

**CITATION:** Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
**COURT FILE NO.:** CV-13-10228-00CL
**DATE:** 20130828

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

2013 ONSC 5461 (CanLII)

| | |
|---|---|
| **BETWEEN:** | |
| IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED<br><br>AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP. | S. Richard Orzy, Derek J. Bell and Sean H. Zweig, for the Applicants<br><br>Robert J. Chadwick and Logan Willis, for Duff & Phelps Canada Restructuring Inc., the proposed Monitor<br><br>Joseph Bellissimo, for Renvest Mercantile Bankcorp Inc.<br><br>**HEARD:** August 23, 2013 |

**NEWBOULD J.**

[1] The applicants applied on August 23, 2013 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

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**Tamerlane business**

[2] At the time of the application, Tamerlane Ventures Inc. (“Tamerlane”) was a publicly traded company whose shares were listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "Tamerlane Group"), including Pine Point Holding Corp. (“Tamerlane Pine Point”), Tamerlane Ventures USA Inc. ("Tamerlane USA") and Tamerlane Ventures Peru SAC ("Tamerlane Peru") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.

[3] The applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. It at one time was an operating mine. The applicants firmly believe that there is substantial value in the Pine Point Property and have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The project has been determined to be feasible and licences have been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, power lines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The applicants only need to raise the financing necessary to be able to exploit the value of the project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

[4] The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

[5] The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices, it is now viewed as being even more valuable.

[6] The exploration and development activities have been generally carried out by employees of Tamerlane USA. The applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the applicants.

[7] As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of $24,814,433. The assets included consolidated current assets of $2,007,406, and consolidated non-current assets with a net book value of $22,807,027. Non-current assets included primarily the investment in the Pine Point property of $20,729,551 and the Los Pinos property of $1,314,936.

[8] Tamerlane has obtained valuations of Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of $12 to $15 million using a 0.3% copper cut-off grade, or $17 to $21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of $30 to $56 million based on market comparables, with a value as high as $229 million considering precedent transactions.

**Secured and unsecured debt**

[9] Pursuant to a credit agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. (“Global Resource Fund” or "secured lender") made as of December 16, 2010, as amended by a first amending agreement dated June 30, 2011 and a second amending agreement dated July 29, 2011, Tamerlane became indebted to the Secured Lender for USD $10,000,000 . The secured indebtedness under the credit agreement is

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guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the secured lender in respect of the secured debt.

[10] The only other secured creditors are the applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each.

[11] The applicants' unsecured creditors are principally trade creditors. Collectively, the applicants' accounts payable were approximately CAD $850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the secured debt and this proceeding.

**Events leading to filing**

[12] Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

[13] It was contemplated when the credit agreement with Global Resource Fund was entered into that the take-out financing would be in the form of construction financing for Pine Point. However Tamerlane was unsuccessful in arranging that. Tamerlane was successful in late 2012 in arranging a small flow-through financing from a director and in early 2013 a share issuance for $1.7 million dollars. Negotiations with various parties for to raise more funds by debt or asset sales have so far been unsuccessful.

[14] As a result of liquidity constraints facing Tamerlane in the fall of 2012, it failed to make regularly scheduled monthly interest payments in respect of the secured debt beginning on September 25, 2012 and failed to repay the principal balance on the maturity date of October 16, 2012, each of which was an event of default under the credit agreement with the secured lender Global Resource Fund.

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[15] Tamerlane and Global Resource Fund then entered into a forbearance agreement made as of December 31, 2012 in which Tamerlane agreed to make certain payments to Global Resource Fund, including a $1,500,000 principal repayment on March 31, 2013. As a result of liquidity constraints, Tamerlane was unable to make the March 31 payment, an event of default under the credit and forbearance agreements. On May 24, 2013, Tamerlane failed to make the May interest payment, and on May 29, 2013, the applicants received a letter from Global Resource Fund's counsel enclosing a NITES notice under the BIA and a notice of intention to dispose of collateral pursuant to section 63 of the PPSA. The total secured debt was $11,631,948.90.

[16] On June 10, 2013, Global Resource Fund and Tamerlane entered into an amendment to the forbearance agreement pursuant to which Global Resource Fund withdrew its statutory notices and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Global Resource Fund that were capitalized and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment. Tamerlane was unable to make the July 25 payment, which resulted in an event of default under the credit and forbearance amendment agreements.

[17] On July 26, 2013, Global Resource Fund served a new NITES notice and a notice of intention to dispose of collateral pursuant to section 63 the PPSA, at which time the total of the secured debt was $12,100,254.26.

[18] Thereafter the parties negotiated a consensual CCAA filing, under which Global Resource Fund has agreed to provide DIP financing and to forbear from exercising its rights until January 7, 2014. The terms of the stay of proceedings and DIP financing are unusual, to be discussed.

**Discussion**

[19] There is no doubt that the applicants are insolvent and qualify for filing under the CCAA and obtaining a stay of proceedings. I am satisfied from the record, including the report from the

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proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made.

[20] The applicants request that the stay apply to Tamerlane USA and Tamerlane Peru, non-parties to this application. The business operations of the applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the request to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru is to maintain stability and value during the CCAA process.

[21] Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Re Lehndorff* (1993), 9 B.L.R. (2d) 275 and Pepall J. (as she then was) in *Re Canwest Publishing Inc*. (2010), 63 C.B.R. (5th) 115. Recently Morawetz J. has made such orders in *Cinram International Inc. (Re.),* 2012 ONSC 3767, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 and *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500. I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.

[22] Under the Initial Order, PricewaterhouseCoopers Corporate Finance Inc. is to be appointed a financial advisor. PWC is under the oversight of the Monitor to implement a Sale and Solicitation Process, under which PWC will seek to identify one or more financiers or purchasers of, and/or investors in, the key entities that comprise the Tamerlane Group. The SISP will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing to repay the secured debt, an investment in the applicants' business and/or a purchase of some or all of the applicants' assets. The proposed Monitor supports the SIST and is of the view that it is in the interests of the applicants' stakeholders. The SISP and its terms are appropriate and it is approved.

[23] The Initial Order contains provisions for an administration charge for the Monitor, its counsel and for counsel to the applicants in the amount of $300,000, a financial advisor charge of

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$300,000, a directors' charge of $45,000 to the extent the directors are not covered under their D&O policy and a subordinated administration charge subordinated to the secured loans and the proposed DIP charge for expenses not covered by the administration and financial advisor charges. These charges appear reasonable and the proposed Monitor is of the same view. They are approved.

**DIP facility and charge**

[24] The applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the applicants, office related expenses, and professional fees and disbursements in connection with these *CCAA* proceedings. The applicants will require additional borrowing to do this. It is apparent that given the lack of alternate financing, any restructuring will not be possible without DIP financing.

[25] The DIP lender is Global Resource Fund, the secured lender to the applicants. The DIP loan is for a net $1,017,500 with simple 12% interest. It is to mature on January 7, 2014, by which time it is anticipated that the SISP process will have resulted in a successful raising of funds to repay the secured loan and the DIP facility.

[26] Section 11.2(4) of the CCAA lists factors, among other things, that the court is to consider when a request for a DIP financing charge is made. A review of those factors in this case supports the DIP facility and charge. The facility is required to continue during the CCAA process, the assets are sufficient to support the charge, the secured lender supports the applicants' management remaining in possession of the business, albeit with PWC being engaged to run the SISP, the loan is a fraction of the applicants' total assets and the proposed Monitor is of the view that the DIP facility and charge are fair and reasonable. The one factor that gives me pause is the first listed in section 11.2(4), being the period during which the applicants are expected to be subject to the CCAA proceedings. That involves the sunset clause, to which I now turn.

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**Sunset clause**

[27] During the negotiations leading to this consensual CCAA application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any CCAA initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the CCAA proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and (ii) a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.

[28] The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the CCAA proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.

[29] Ms. Kent, the executive chair and CFO of Tamerlane, has sworn in her affidavit that Global Resource Fund insisted on these terms and that given the financial circumstances of the applicants, there were significant cost-savings and other benefits to them and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the applicants exercised their business judgment to agree to the terms. The proposed Monitor states its understanding as well is that the consent of Global Resource Fund to these CCAA proceedings is conditional on these terms.

[30] Section 11 of the CCAA authorizes a court to make any order “that it considers appropriate in the circumstances.” In considering what may be appropriate, Deschamps J. stated in *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379:

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> 70. …Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] There is no doubt that CCAA proceedings can be terminated when the prospects of a restructuring are at an end. In *Century Services*, Deschamps J. recognized this in stating:

> 71. It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.

[32] The fact that the board of directors of the applicants exercised their business judgment in agreeing to the terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account, with the caution that in the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). The court may consider, but not defer to or be fettered by, the recommendation of the board. See *Re Crystallex International Corp.* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para 85.

[33] It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to

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any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.

[34] What is unusual in the proposed Initial Order is that the discretion of the court on January 7, 2014 to do what it considers appropriate is removed. Counsel have been unable to provide any case in which such an order has been made. I did not think it appropriate for such an order to be made. At my direction, the parties agreed to add a clause that the order was subject in all respects to the discretion of the Court. With that change, I approved the Initial Order.

Newbould J.

**Released:** August 28, 2013

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**CITATION:** Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
**COURT FILE NO.:** CV-13-10228-00CL
**DATE:** 20130828

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

**BETWEEN:**

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 TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.

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**REASONS FOR JUDGMENT**

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Newbould J.

**Released:** August 28, 2013

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# TAB 26

**CITATION:** Target Canada Co. (Re), 2015 ONSC 303
**COURT FILE NO.:** CV-15-10832-00CL
**DATE:** 2015-01-16

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** 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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

**BEFORE:** Regional Senior Justice Morawetz

**COUNSEL:** *Tracy Sandler* and *Jeremy Dacks*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

*Jay Swartz*, for the Target Corporation

*Alan Mark*, *Melaney Wagner*, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

*Terry O'Sullivan*, for The Honourable J. Ground, Trustee of the Proposed Employee Trust

*Susan Philpott*, for the Proposed Employee Representative Counsel for employees of the Applicants

**HEARD and ENDORSED:** January 15, 2015

**REASONS:** January 16, 2015

## ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

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proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

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employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

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[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

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[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

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[25] On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

   a) Should the stay be extended to the Partnerships?

   b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

   c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

   d) Should the Court approve protections for employees?

   e) Is it appropriate to allow payment of certain pre-filing amounts?

   f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

   g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

   h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

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[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 ("*Canwest Global*").

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[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

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[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

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could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

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[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

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potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

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[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R ($4^{th}$) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

**Date:** January 16, 2015

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# TAB 27

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

SEP 23 2020

ENTERED

**No. S-208894**
**Vancouver Registry**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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 AND ARRANGEMENT OF URTHECAST CORP., URTHECAST INTERNATIONAL CORP., URTHECAST USA INC., 1185729 B.C. LTD. AND THOSE OTHER PETITIONERS SET OUT ON THE ATTACHED SCHEDULE "A"

**ORDER MADE AFTER APPLICATION**

**(Revised Amended and Restated Initial Order)**

| | | |
|---|---|---|
| BEFORE THE HONOURABLE<br>MADAM JUSTICE SHARMA | )<br>)<br>) | September 23, 2020 |

THE APPLICATION of the Petitioners coming on for hearing by telephone at Vancouver, British Columbia, on the 23rd day of September, 2020; AND ON HEARING David E. Gruber, counsel for the Petitioners and those other counsel listed on **Schedule "B"** hereto; AND UPON READING the material filed, including the Affidavits of Sai Chu filed in these proceedings and the Second Report of Ernst & Young, Inc. ("**EY**") in its capacity as Monitor; AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended (the "**CCAA**"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court; and further to the Initial Order pronounced by this Court on the 4th day of September, 2020 (the "**Order Date**");

THIS COURT ORDERS AND DECLARES THAT:

1. This Revised Amended and Restated Initial Order amends and restates the Order (the "**Amended and Restated Initial Order**") of this Court made in these proceedings on September 14, 2020.

**SERVICE**

2. The time for service of the Notice of Application dated September 22, 2020 herein be and is hereby abridged such that the Notice of Application is properly returnable today and service thereof on any interested party is hereby dispensed with.

**JURISDICTION**

3. The Petitioners are companies to which the CCAA applies. For greater certainty, the companies set out in Schedule "A" to this Order shall enjoy the benefits of the protections provided herein, and shall be subject to the same restrictions hereunder.

**PLAN OF ARRANGEMENT**

4. Subject to the Hale Commitment Letter (as defined below), the Petitioners shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

**POSSESSION OF PROPERTY AND OPERATIONS**

5. Subject to the Hale Commitment Letter, this Order and any further Order of this Court, the Petitioners shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"), and continue to carry on their business (the "**Business**") in the ordinary course and in a manner consistent with the preservation of the Business and the Property. The Petitioners shall be authorized and empowered to continue to retain and employ

the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deems reasonably necessary or desirable in the ordinary course of business or for carrying out the terms of this Order.

6. THIS COURT ORDERS that the Petitioners shall be entitled to continue to utilize the cash management system currently in place as described in the Affidavit of Sai Chu sworn September 3, 2020 or replace it with another substantially similar cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Petitioners of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Petitioners, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. Subject to the Hale Commitment Letter, the Petitioners shall be entitled, but not required, to pay the following expenses which may have been incurred prior to the Order Date:

(a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred (collectively "**Wages**"); and

(b) the fees and disbursements of any Assistants retained or employed by the Petitioners which are related to the Petitioners' restructuring, at their standard

rates and charges, including payment of the fees and disbursements of legal counsel retained by the Petitioners, whenever and wherever incurred, in respect of:

(i) these proceedings or any other similar proceedings in other jurisdictions in which the Petitioners or any subsidiaries or affiliated companies of the Petitioners are domiciled;

(ii) any litigation in which the Petitioners are named as a party or is otherwise involved, whether commenced before or after the Order Date; and

(iii) any related corporate matters.

8. Except as otherwise provided herein and subject to the Hale Commitment Letter, the Petitioners shall be entitled to pay all expenses reasonably incurred by the Petitioners in carrying on the Business in the ordinary course following the Order Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably incurred and which are necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services, provided that any capital expenditure exceeding $75,000 shall be approved by the Monitor;

(b) all obligations incurred by the Petitioners after the Order Date, including without limitation, with respect to goods and services actually supplied to the Petitioners following the Order Date (including those under purchase orders outstanding at the Order Date but excluding any interest on the Petitioners' obligations incurred prior to the Order Date); and

(c) fees and disbursements of the kind referred to in paragraph 7(b) which may be incurred after the Order Date.

9. The Petitioners are authorized to remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from Wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes or any such claims which are to be paid pursuant to Section 6(3) of the CCAA;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Petitioners in connection with the sale of goods and services by the Petitioners, but only where such Sales Taxes accrue or are collected after the Order Date, or where such Sales Taxes accrued or were collected prior to the Order Date but not required to be remitted until on or after the Order Date; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal property taxes, municipal business taxes or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors.

10. Until such time as a real property lease is disclaimed in accordance with the CCAA, the Petitioners shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated between the Petitioners and the landlord from time to time ("**Rent**"), for the period commencing from and including the Order Date, twice-monthly in equal payments on the first and fifteenth day of the month in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including Order Date shall also be paid.

11. Except as specifically permitted herein and subject to the Hale Commitment Letter, the Petitioners are hereby directed, until further Order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Petitioners to any of their creditors as of the Order Date except as authorized by this Order;

(b) to make no payments in respect of any financing leases which create security interests;

(c) to grant no security interests, trust, mortgages, liens, charges or encumbrances upon or in respect of any of their Property, nor become a guarantor or surety, nor otherwise become liable in any manner with respect to any other person or entity except as authorized by this Order;

(d) to not grant credit except in the ordinary course of the Business only to their customers for goods and services actually supplied to those customers, provided such customers agree that there is no right of set-off in respect of amounts owing for such goods and services against any debt owing by the Petitioners to such customers as of the Order Date; and

(e) to not incur liabilities except in the ordinary course of Business.

12. Notwithstanding paragraph 11, the Petitioners are permitted, with the consent of the Monitor and the Hale Interim Lender (as defined below), to make regular payments under all mortgages granted by the Petitioners due and after the Order date.

**RESTRUCTURING**

13. Subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents and Hale Definitive Documents (as hereinafter defined), the Petitioners shall have the right to:

(a) permanently or temporarily cease, downsize or shut down all or any part of their Business or operations and commence marketing efforts in respect of any of their redundant or non-material assets and to dispose of redundant or non-material assets not exceeding $10,000.00 in any one transaction or $100,000.00 in the aggregate. If

the disposition of assets exceeds these quantums, the Petitioners shall seek the approval of the Monitor, and if the Monitor deems appropriate, the approval of the Court for such dispositions;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate; and

(c) pursue all avenues of refinancing for their Business or Property, in whole or part;

all of the foregoing to permit the Petitioners to proceed with an orderly restructuring of the Business (the "**Restructuring**").

14. The Petitioners shall provide each of the relevant landlords with notice of the Petitioners' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Petitioners' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors who claim a security interest in the fixtures, such landlord and the Petitioners, or by further Order of this Court upon application by the Petitioners, the landlord or the applicable secured creditors on at least two (2) clear days' notice to the other parties. If a Petitioner disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any dispute concerning such fixtures (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Petitioners' claim to the fixtures in dispute.

15. If a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then: (a) during the period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours on giving the Petitioners and the Monitor 24 hours' prior written notice; and (b) at the effective time of the disclaimer, the landlord shall be entitled to take possession of any such leased premises without waiver of or

prejudice to any claims the landlord may have against the Petitioners, or any other rights the landlord might have, in respect of such lease or leased premises and the landlord shall be entitled to notify the Petitioners of the basis on which it is taking possession and gain possession of and re-lease such leased premises to any third party or parties on such terms as the landlord considers advisable, provided that nothing herein shall relieve the landlord of its obligation to mitigate any damages claimed in connection therewith.

16. Pursuant to Section 7(3)(c) of the *Personal Information Protection and Electronics Documents Act*, S.C. 2000, c. 5 and Section 18(1)(o) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63, and any regulations promulgated under authority of either Act, as applicable (the "**Relevant Enactment**"), the Petitioners, in the course of these proceedings, are permitted to, and hereby shall, disclose personal information of identifiable individuals in their possession or control to stakeholders, their advisors, prospective investors, financiers, buyers or strategic partners (collectively, "**Third Parties**"), but only to the extent desirable or required to negotiate and complete the Restructuring or to prepare and implement the Plan or transactions for that purpose; provided that the Third Parties to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners binding them in the same manner and to the same extent with respect to the collection, use and disclosure of that information as if they were an organization as defined under the Relevant Enactment, and limiting the use of such information to the extent desirable or required to negotiate or complete the Restructuring or to prepare and implement the Plan or transactions for that purpose, and attorning to the jurisdiction of this Court for the purposes of that agreement. Upon the completion of the use of personal information for the limited purposes set out herein, the Third Parties shall return the personal information to the Petitioners or destroy it. If the Third Parties acquire personal information as part of the Restructuring or the preparation and implementation of the Plan or transactions in furtherance thereof, such Third Parties may, subject to this paragraph and any Relevant Enactment, continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioner.

## STAY OF PROCEEDINGS, RIGHTS AND REMEDIES

17. Until and including October 2, 2020, or such later date as this Court may order (the "**Stay Period**"), no action, suit or proceeding in any court or tribunal (each, a "**Proceeding**") against or in respect of the Petitioners, or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of the Petitioners and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Petitioners or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

18. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Petitioners or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Petitioners and the Monitor or leave of this Court.

19. Nothing in this Order, including paragraphs 17 and 18, shall: (i) empower the Petitioners to carry on any business which the Petitioners are not lawfully entitled to carry on; (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (iii) prevent the filing of any registration to preserve or perfect a mortgage, charge or security interest (subject to the provisions of Section 39 of the CCAA relating to the priority of statutory Crown securities); or (iv) prevent the registration or filing of a lien or claim for lien or the commencement of a Proceeding to protect lien or other rights that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such lien, claim for lien or Proceeding except for service of the initiating documentation on the Petitioner.

## NO INTERFERENCE WITH RIGHTS

20. During the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or

permit in favour of or held by the Petitioners, except with the written consent of the Petitioners and the Monitor or leave of this Court.

**CONTINUATION OF SERVICES**

21. During the Stay Period, all Persons having oral or written agreements with the Petitioners or mandates under an enactment for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Petitioner, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by the Petitioners, and that the Petitioners shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the Order Date are paid by the Petitioners in accordance with normal payment practices of the Petitioners or such other practices as may be agreed upon by the supplier or service provider and the Petitioners and the Monitor, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

22. Notwithstanding any provision in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the Order Date, nor shall any Person be under any obligation to advance or re-advance any monies or otherwise extend any credit to the Petitioners on or after the Order Date. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

23. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against the directors or officers of the Petitioners with respect to any claim against the directors or officers that arose before the date hereof and

that relates to any obligations of the Petitioners whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Petitioners, if one is filed, is sanctioned by this Court or is refused by the creditors of the Petitioners or this Court. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of the Petitioners that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for service of the initiating documentation on the applicable director or officer.

**DIRECTORS AND OFFICERS INDEMNIFICATION AND CHARGE**

24. The Petitioners shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Petitioners after the commencement of the within proceedings, except to the extent that, with respect to any director or officer, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

25. The directors and officers of the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $350,000, as security for the indemnity provided in paragraph 24 of this Order. The Directors' Charge shall have the priority set out in paragraphs 48 and 50 herein.

26. Notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Petitioners' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 24 of this Order.

**APPOINTMENT OF MONITOR**

27. EY is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Petitioners with the powers and obligations set out in the CCAA or set forth herein, and that the Petitioners and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Petitioners pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

28. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) assist the Petitioners in sourcing debtor-in-possession financing, and advising the Petitioners in relation thereto;

(b) monitor the Petitioners' receipts and disbursements;

(c) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(d) advise the Petitioners in their preparation of the Petitioners' cash flow statements and reporting required by the Hale Interim Lender or Interim Lender, which information shall be reviewed with the Monitor and delivered to the applicable Hale Interim Lender or Interim Lender and their respective counsel in accordance with the Commitment Letter and Hale Commitment Letter;

(e) assist the Petitioners, to the extent required by the Petitioners and the Interim Lender and Hale Interim Lender, in its dissemination to the Interim Lender and Hale Interim Lender and their respective counsel, financial information and

reporting as contemplated in the Commitment Letter and Hale Commitment Letter;

(f) advise the Petitioners in their development of the Plan and any amendments to the Plan;

(g) assist the Petitioner, to the extent required by the Petitioner, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(h) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Petitioner, to the extent that is necessary to adequately assess the Petitioners' business and financial affairs or to perform its duties arising under this Order;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(j) hold funds in trust or in escrow, to the extent required, to facilitate settlements or other arrangements in connection with the Restructuring between the Applicants and any other Person;

(k) implement a sales and investment solicitation process for the sale of the ISS Cameras (as defined in Affidavit #1 of Sai Chu, sworn September 3, 2020); and

(l) perform such other duties or take any steps reasonably incidental to the exercise of any powers and obligations conferred upon the Monitor by this Order or any further order of the Court.

29. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or

performance of duties under this Order, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof, and nothing in this Order shall be construed as resulting in the Monitor being an employer or a successor employer, within the meaning of any statute, regulation or rule of law or equity, for any purpose whatsoever.

30. Nothing herein contained shall require or allow the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Fisheries Act*, the British Columbia *Environmental Management Act*, the British Columbia *Fish Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. For greater certainty, the Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

31. The Monitor shall provide any creditor of the Petitioners with information provided by the Petitioners in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Petitioners are confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Petitioners may agree.

32. In addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross

negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the rights and protections afforded the Monitor by the CCAA or any applicable legislation.

**ADMINISTRATION CHARGE**

33. The Monitor, counsel to the Monitor, if any, and counsel to the Petitioners shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Petitioners as part of the cost of these proceedings. The Petitioners are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor and counsel to the Petitioners on a periodic basis and, in addition, the Petitioners are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Petitioners, retainers in the amounts of $50,000 each to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

34. The Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the British Columbia Supreme Court who may determine the manner in which such accounts are to be passed, including by hearing the matter on a summary basis or referring the matter to a Registrar of this Court.

35. The Monitor, counsel to the Monitor, if any, and counsel to the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order which are related to the Petitioners' restructuring. The Administration Charge shall have the priority set out in paragraphs 48 and 50 hereof.

**INTERIM FINANCING**

36. The Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility from 1262743 B.C. Ltd. (the "**Interim Lender**") in order to finance the continuation of

the Business and preservation of the Property, provided that borrowings under such credit facility shall not exceed USD $1,000,000.00 unless permitted by further Order of this Court.

37. Such credit facility shall be on the terms and subject to the conditions set forth in a commitment letter between the Petitioners and the Interim Lender on terms to be approved by the Monitor (the "**Commitment Letter**").

38. The Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

39. The Interim Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property. The Interim Lender's Charge shall not secure an obligation that exists before this Order is made. The Interim Lender's Charge shall have the priority set out in paragraphs 48 and **50** hereof.

40. Notwithstanding any other provision of this Order:

(a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under any of the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon 7 days notice to the Petitioners and the Monitor, may exercise any and all of its rights and remedies against the Petitioners or the Property under or pursuant to the Commitment Letter, Definitive Documents and the Interim Lender's Charge, including without

limitation, to cease making advances to the Petitioners and set off and/or consolidate any amounts owing by the Interim Lender to the Petitioners against the obligations of the Petitioners to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Petitioners and for the appointment of a trustee in bankruptcy of the Petitioners; and

(c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioner or the Property.

41. The Interim Lender, in such capacity, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the CCAA, or any proposal filed by the Petitioners under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

**SENIOR INTERIM FINANCING**

42. The Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility (the "**Hale Facility**") from HCP-FVL, LLC, an affiliate of Hale Capital Partners L.P. (the "**Hale Interim Lender**"), in order to finance the continuation of the Business and preservation of the Property, provided that borrowings under such credit facility shall not exceed the principal amount of USD $5,000,000.00 unless permitted by further Order of this Court.

43. The Hale Facility shall be on the terms and subject to the conditions set forth in a commitment letter between the Petitioners and the Hale Interim Lender on terms to be approved by the Monitor (the "**Hale Commitment Letter**").

44. The Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Hale Definitive Documents**"), as are contemplated by

the Hale Commitment Letter or as may be reasonably required by the Hale Interim Lender pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the Hale Interim Lender under and pursuant to the Hale Commitment Letter and the Hale Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

45. The Hale Interim Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Hale Interim Lender's Charge**") on the Property. The Hale Interim Lender's Chargeshall not secure an obligation that exists before this Order is made. The Hale Interim Lender's Chargeshall rank behind the Administration Charge and in priority to the Interim Lender's Charge with the priority set out in paragraphs 48 and **50** provided however that the Hale Interim Lender must either obtain the Interim Lender's consent or the Interim Lender must be paid any amounts owing pursuant to the Commitment Letter prior to any advance above USD $2,000,000 being secured by the Hale Interim Lender's Charge.

46. Notwithstanding any other provision of this Order:

(a) the Hale Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Hale Interim Lender's Chargeor any of the Hale Definitive Documents;

(b) upon the occurrence of an event of default under any of the Hale Definitive Documents or the Hale Interim Lender's Charge, the Hale Interim Lender, upon 7 days notice to the Petitioners and the Monitor, may exercise any and all of its rights and remedies against the Petitioners or the Property under or pursuant to the Hale Commitment Letter, Hale Definitive Documents and the Hale Interim Lender's Charge, including without limitation, to cease making advances to the Petitioners and set off and/or consolidate any amounts owing by the Hale Interim Lender to the Petitioners against the obligations of the Petitioners to the Hale Interim Lender under the Hale Commitment Letter, the Hale Definitive Documents or the Hale Interim Lender's Charge, to make demand, accelerate

payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Petitioners and for the appointment of a trustee in bankruptcy of the Petitioners; and

(c) the foregoing rights and remedies of the Hale Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioner or the Property.

47. The Hale Interim Lender, in such capacity, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the CCAA, or any proposal filed by the Petitioners under the *BIA*, with respect to any advances made under the Hale Commitment Letter or the Hale Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

48. The priorities of the Administration Charge, the Interim Lender's Charge, the Hale Interim Lender's Charge, the Directors' Charge, and the Intercompany Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – Hale Interim Lender's Charge;

Third – Interim Lender's Charge;

Fourth – Directors' Charge (to the maximum amount of $350,000); and

Fifth – Intercompany Charge

Any security documentation evidencing, or the filing, registration or perfection of, the Administration Charge, the Hale Interim Lender's Charge, the Interim Lender's Charge, Directors' Charge, and the Intercompany Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be effective as against the Property and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or

perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register or perfect any such Charges.

49. Each of the Charges shall constitute a mortgage, security interest, assignment by way of security and charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**"), in favour of any Person, save and except those claims contemplated by section 11.8(8) of the CCAA.

50. Except as otherwise expressly provided herein, or as may be approved by this Court, the Petitioners shall not grant or suffer to exist any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Petitioners obtains the prior written consent of the Monitor and the beneficiaries of the Administration Charge, Hale Interim Lender's Charge, Interim Lender's Charge, Intercompany Charge and the Director's Charge.

51. The Administration Charge, the Director's Charge, the Interim Lender's Charge, the Hale Interim Lender's Charge, the Commitment Letter, the Hale Commitment Letter, the Definitive Documents, the Hale Definitive Documents, the Intercompany Charge and the Intercompany Advances Security Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Petitioners; and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Intercompany Advances, Security Documents,

the Commitment Letter, the Hale Commitment Letter, the Definitive Documents or Hale Definitive Documents shall create or be deemed to constitute a breach by the Petitioners of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges or from the Intercompany Lender entering into the Intercompany Advances Security Documents and the Commitment Letter, the Hale Commitment Letter, or the execution, delivery or performance of the Definitive Documents, the Hale Definitive Documents and the Intercompany Advances Security Documents; and

(c) the payments made by the Petitioners pursuant to this Order, the Intercompany Advances Security Documents, the Commitment Letter, the Hale Commitment Letter, the Definitive Documents, the Hale Definitive Documents and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

52. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Petitioners' interest in such real property leases.

**RELIEF FROM REPORTING OBLIGATIONS**

53. THIS COURT ORDERS that the decision by the Petitioners to incur no further expenses in relation to any filings, 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, including without limitation, the *Securities Act (British Columbia)* and comparable statutes enacted by other provinces of Canada, the *Securities Act of 1933* (United States) and the *Securities Exchange Act of 1934* (United States) and comparable statutes enacted by individual states of the

United States, the TSX Company Manual and other rules, regulations and policies of the Toronto Stock Exchange (collectively, the "**Securities Provisions**"), is hereby authorized, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of the Petitioners failing to make any Securities Filings required by the Securities Provisions.

54. THIS COURT ORDERS that none of the directors, officers, employees and other representatives of the Petitioners, the Monitor (and its directors, officers, employees and representatives, shall have any personal liability for any failure by the Petitioners to make any Securities Filings required by the Securities Provisions.

**INTERCOMPANY FINANCING**

55. THIS COURT ORDERS that subject to the Hale Commitment Letter, UrtheCast Corp. (the "**Intercompany Lender**") is authorized to loan to each of Geosys Holdings, ULC, Geosys-Int'l, Inc, Geosys SAS, Geosys Australia PTY, Geosys do Brasil Sistemas de Informacao Agricolas Ltda. and Geosys Europe SARL (collectively, the "**Geosys Petitioners**"), and each of the Geosys Petitioners is authorized to borrow, repay and re-borrow, such amounts from time to time as the Geosys Petitioners, with the approval of the Monitor, considers necessary or desirable on a revolving basis to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order (the "**Intercompany Advances**"), on terms consistent with existing arrangements or past practice or otherwise as approved by the Monitor, including as to the provision of any security to be provided by the Geosys Petitioners to the Intercompany Lender to secure the Intercompany Advances.

56. Subject to the Hale Commitment Letter, each of the Geosys Petitioners is authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Intercompany Advances Security Documents**") as may be reasonably necessary and as approved by the Monitor to perfect any security for the Intercompany Advances in any jurisdiction in which Property of the Geosys Petitioners may be located.

57. THIS COURT ORDERS that the Intercompany Lender shall be entitled to the benefit and is hereby granted a charge (the "**Intercompany Charge**") on all of the Property of each of the Geosys Petitioners, as security for the Intercompany Advances made to such Geosys Petitioner, which Intercompany Charge shall not secure an obligation that exists before the Order Date. The Intercompany Charge shall have the priority set out in paragraphs 48 and 50 of this Order.

58. THIS COURT ORDERS AND DECLARES that the Intercompany Lender shall be treated as unaffected and may not be compromised in any Plan or any proposal filed under the BIA in respect of the Petitioners, with respect to any Intercompany Advances made on or after the Order Date.

## SALES AND INVESTMENT SOLICITATION PROCESS ("SISP")

59. THIS COURT ORDERS that the Petitioners, upon obtaining the prior consent of the Monitor, are hereby authorized to commence a SISP with respect to the sale of the ISS Cameras (as defined in Affidavit #1 of Sai Chu, sworn September 3, 2020), in a form approved by the Monitor, which SISP may include a "stalking-horse" bid (the "**Stalking Horse Bid**") by the Interim Lender for the purchase price of $10,000.00 per ISS Camera and other commercial terms as reasonable necessary to implement the Stalking Horse Bid and as approved by the Monitor.

60. The Petitioners shall seek approval of the Court for a sale of all or any part of the Property following the conclusion of the SISP.

61. The Petitioners and the Monitor are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations under the SISP.

## SERVICE AND NOTICE

62. The Monitor shall (i) without delay, publish in the *Globe and Mail* a notice containing the information prescribed under the CCAA, (ii) within five days after Order Date, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed

manner, a notice to every known creditor who has a claim against the Petitioners of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

63. The Petitioners and the Monitor are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Petitioners' creditors or other interested parties at their respective addresses as last shown on the records of the Petitioners and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

64. Any Person that wishes to be served with any application and other materials in these proceedings must deliver to the Monitor by way of ordinary mail, courier, personal delivery or electronic transmission a request to be added to a service list (the "**Service List**") to be maintained by the Monitor. The Monitor shall post and maintain an up to date form of the Service List on its website at: www.ey.com/ca/urthecast.

65. Any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on its website at: www.ey.com/ca/urthecast.

66. Notwithstanding paragraphs 63 and 65 of this Order, service of the Petition, the Notice of Hearing of Petition, any affidavits filed in support of the Petition and this Order shall be made on the Federal and British Columbia Crowns in accordance with the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and regulations thereto, in respect of the Federal Crown, and the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, in respect of the British Columbia Crown.

**GENERAL**

67. The Petitioners or the Monitor may from time to time apply to this Court for directions in the discharge of its powers and duties hereunder.

68. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Petitioners, the Business or the Property.

69. THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any federal or State Court or administrative body in the United States of America, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.

70. Each of the Petitioners and the Monitor shall be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada, including acting as a foreign representative of the Petitioners to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1330, as amended.

71. The Petitioners may (subject to the provisions of the CCAA and the BIA) at any time file a voluntary assignment in bankruptcy or a proposal pursuant to the commercial reorganization provisions of the BIA if and when the Petitioners determines that such a filing is appropriate.

72. The Petitioners are hereby at liberty to apply for such further interim or interlocutory relief as it deems advisable within the time limited for Persons to file and serve Responses to the Petition.

73. Leave is hereby granted to hear any application in these proceedings on two (2) clear days' notice after delivery to all parties on the Service List of such Notice of Application and all affidavits in support, subject to the Court in its discretion further abridging or extending the time for service.

74. Any interested party (including the Petitioners and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to all parties on the Service List and to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

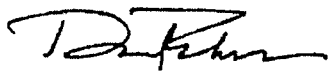
75. Any secured creditor may give notice to the Petitioners, the Monitor and the Hale Interim Lender that it intends to apply to this Court to vary or amend the terms of this Order pertaining to the Hale Commitment Letter within 48 hours of electronic delivery of this Order, the Notice of Application and the materials filed in support. If such notice is given and such application is brought, it shall proceed on a *de novo* basis. If no such notice is given, the respective secured creditor will be deemed to have consented or taken no position on the granting of the provisions in this Order pertaining to the Hale Commitment Letter.

76. Endorsement of this Order by counsel appearing on this application other than counsel for the Petitioners is hereby dispensed with.

77. This Order and all of its provisions are effective as of 12:01 a.m. local Vancouver time on the Order Date.

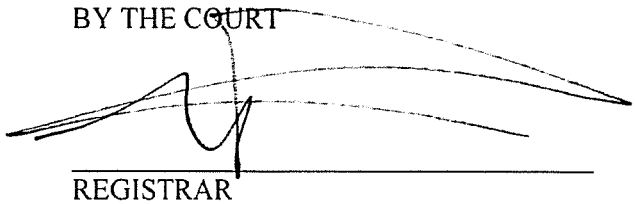
THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of David Gruber,



Lawyer for the Petitioners

BY THE COURT



REGISTRAR

**Schedule "A"**
**List of Petitioners**

1. 1185781 B.C. Ltd.
2. Deimos Imaging S.L.U.
3. DOT Imaging S.L.U.
4. Geosys Australia PTY
5. Geosys do Brasil Sistemas de Informacao Agricolas Ltda.
6. Geosys Europe Sarl
7. Geosys Holding, ULC (was Geosys Technology Holding LLC)
8. Geosys-Int'l, Inc.
9. Geosys S.A.S.
10. UrtheCast Holdings (Malta) Limited
11. UrtheCast Imaging S.L.U.
12. UrtheCast Investments (Malta) Limited
13. UrtheDaily Corp.

**Schedule "B"**

**List of Counsel**

| Name of Counsel | Party Represented |
|---|---|
| Colin Brousson | The Monitor |
| | |
| | |
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| | |
| | |

# TAB 28

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
19-Oct-20
Vancouver
REGISTRY

**No. S-208894**
**Vancouver Registry**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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 AND ARRANGEMENT OF URTHECAST CORP., URTHECAST INTERNATIONAL CORP., URTHECAST USA INC., 1185729 B.C. LTD. AND THOSE OTHER PETITIONERS SET OUT ON THE ATTACHED SCHEDULE "A"

**ORDER MADE AFTER APPLICATION**

**(Sales Process Order)**

| | | |
|---|---|---|
| BEFORE THE HONOURABLE<br>MADAM JUSTICE SHARMA | )<br>)<br>) | October 16, 2020 |

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 16th day of October, 2020, by telephone; AND ON HEARING Alexandra Andrisoi and David E. Gruber, counsel for the Petitioners and those other counsel listed on **Schedule "B"** hereto; AND UPON READING the material filed, including the Fourth Report of Ernst & Young, Inc. in its capacity as Monitor (the "**Monitor**"); AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended (the "**CCAA**"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS AND DECLARES THAT:

**SERVICE**

1. The time for service of the Notice of Application dated October 14, 2020 herein be and is hereby abridged such that the Notice of Application is properly returnable today and service thereof on any interested party is hereby dispensed with.

**APPROVAL OF SISP**

2. Capitalized terms used in this Order that are not otherwise defined have the same meaning as in the Amended and Restated Initial Order granted in these proceeding on September 23, 2020.

3. The sale and investment solicitation process (the "**General SISP**") substantially in the form set out in the attached **Schedule "C"** to this Order be and is hereby approved and the Petitioners be and are hereby authorized and directed, with the assistance and supervision of the Monitor, to carry out the General SISP in the manner set out Schedule "C" herein.

4. The Petitioners are authorized and directed, *nunc pro tunc,* to execute and deliver the stalking horse letter agreement and bid substantially in the form attached as **Schedule "D"** herein between the Petitioners and 1269336 B.C. Ltd (the "**Stalking Horse Bidder**") and/or one or more special purpose entities affiliated with Antarctica Infrastructure Partners, LLC (the "**Stalking Horse Bid**").

5. The Stalking Horse Bid payment of the break-up fee and expense reimbursement to the Stalking Horse Bidder provided for in the Stalking Horse Bid is approved.

**GENERAL**

6. Endorsement of this Order by counsel appearing on this application other than the counsel for the Petitioners is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Alexandra Andrisoi,
Lawyer for the Petitioners

BY THE COURT

REGISTRAR

**Schedule "A"**

**List of Petitioners**

1. 1185781 B.C. Ltd.
2. Deimos Imaging S.L.U.
3. DOT Imaging S.L.U.
4. Geosys Australia PTY
5. Geosys do Brasil Sistemas de Informacao Agricolas Ltda.
6. Geosys Europe Sarl
7. Geosys Holding, ULC (was Geosys Technology Holding LLC)
8. Geosys-Int'l, Inc.
9. Geosys S.A.S.
10. UrtheCast Holdings (Malta) Limited
11. UrtheCast Imaging S.L.U.
12. UrtheCast Investments (Malta) Limited
13. UrtheDaily Corp.

**Schedule "B"**

**List of Counsel**

| **Name of Counsel** | **Party Represented** |
|---|---|
| Jeffrey Bradshaw | The Monitor |
| Michael Nowina | Land O'Lakes, Inc. and Winfield Solutions LLC |
| Ian Aversa and Sam Babe | 1262743 B.C. Ltd. |
| Asim Iqbal | Hale Capital Partners L.P. |
| Sean Collins and Robert Richardson | Antarctica Infrastructure Partners LLC |
| Daniel Shouldice | Bolzano Investments Limited, Lunar Ventures Inc., Vine Rose Limited SMF Investments Limited |
| Ryan Laity | 1249836 B.C. Ltd. |

## Schedule "C" – Sale and Investment Solicitation Process

## Sale and Investment Solicitation Process Outline

### Introduction

On September 4, 2020, UrtheCast Corp., UrtheCast International Corp., UrtheCast USA Inc., 1185729 B.C. Ltd. and the other petitioner parties set out on Schedule A (collectively, the "**Petitioners**" or "**UrtheCast Group**") to the initial order (the "**Initial Order**") granted by the Supreme Court of British Columbia (the "**Court**"), obtained relief under the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") from the Court that, among other things, commenced the CCAA proceedings (the "**CCAA Proceedings**"), granted an initial stay of proceedings in respect of the Petitioners (the "**Stay**") and appointed Ernst & Young Inc., as monitor (the "**Monitor**").

On September 14, 2020, the Petitioners obtained an amended and restated version of the Initial Order from the Court (the "**Amended and Restated Initial Order**") that, among other things, extended the Stay to October 2, 2020, authorized a limited sales and investment solicitation process for certain camera equipment owned by the Petitioners and authorized an interim debtor-in-possession financing facility from 1262743 B.C. Ltd. (the "**Existing DIP Lender**") providing for borrowings of up to US$1,000,000 (the "**Existing DIP**") and the grant of a priority charge (the "**Existing DIP Lender's Charge")** to the Existing DIP Lender as security for borrowings under the Existing DIP.

On September 21, 2020, the Petitioners obtained a further amended and restated version of the Initial Order from the Court (the "**Second Amended and Restated Initial Order**") that, among other things, authorized an additional interim debtor-in-possession financing from HCP-FVL, LLC, an affiliate of Hale Capital Partners L.P. (the "**Second DIP Lender**") providing for borrowings of up to US $5,000,000 (the "**Second DIP**") pursuant to the DIP Facilities Loan Agreement dated as of September 21, 2020 (the "**Second DIP Agreement**").

On October 2, 2020, the Petitioners obtained an order of the Court (the "**Stay Extension Order**") that, among other things extended the Stay to December 18, 2020.

On October 16, 2020, the Petitioners obtained an order from the Court that amongst other things:

(a) authorized the Petitioners to pursue all avenues of refinancing or sale of its business or property, in whole or part, subject to prior approval of the Court before any material refinancing or sale is concluded;

(b) approved the Sale and Investment Solicitation Process set forth herein (the "**SISP**");

(c) approved an additional interim debtor-in-possession financing facility from an affiliate of Antarctica Infrastructure Partners, LLC (the "**AC DIP Lender**"), providing for borrowings of up to CAD $3,548,000 (the "**Stalking Horse DIP**") and the grant of a priority charge (the "**AC DIP Lender's Charge")** to the AC DIP Lender as security for borrowings under the Stalking Horse DIP, ranking in priority to the Existing DIP Lender's Charge;

(d) approved and accepted for the purpose of conducting a "stalking horse" solicitation in accordance with the SISP procedures set out in this this document (the "**SISP Process**

**Outline**") that certain letter agreement dated October 13, 2020 between the Petitioners and the Stalking Horse Bidder, providing for a potential sale (the "**Stalking Horse Bid**") of the Applicants' UrtheDaily Constellation project and UrthePipeline business (together, the "**Designated Assets**") to 1269336 B.C. Ltd. the Stalking Horse Bidder or a designated affiliate, including the payment of an expense reimbursement (the "**Expense Reimbursement**") by the Petitioners to the Stalking Horse Bidder as contemplated by the Stalking Horse Bid; and

(e) approved the procedures set forth in this SISP Process Outline.

To facilitate an efficient and thorough SISP in the face of UrtheCast's acute liquidity challenges, the Petitioners have:

(a) created a form of non-disclosure agreement ("**NDA**") and established a confidential online data site to facilitate due diligence investigations by Qualified Bidders (defined below) who enter into a NDA with UrtheCast Corp.; and

(b) finalized a list of potential bidders, including (i) parties that have approached the Petitioners or the Monitor indicating an interest in the Opportunity (defined below), (ii) domestic and international strategic and financial parties who UrtheCast Group in consultation with the Monitor, believe could be interested in purchasing all or part of the assets or investing in UrtheCast Group pursuant to the SISP (including, without limitation, any parties with whom were in contact prior to the Initial Order as part of UrtheCast Group's strategic review process) and (iii) any other parties reasonably suggested by a stakeholder as a potential bidder who may be interested in the Opportunity (collectively, "**Known Potential Bidders**").

**Opportunity**

1. The SISP is intended to solicit interest in and opportunities for a sale of or investment in all or part of the assets, property, business operations and undertaking (the "**Opportunity**") of the Petitioners and their subsidiaries (collectively, the "**UrtheCast Group**"). The Opportunity may include one or more of a recapitalization, arrangement or other form of investment in or reorganization of the business and affairs of the UrtheCast Group as a going concern or a sale of all, substantially all or one or more components of UrtheCast Group's assets, including without limitation, the sale of the shares of one or more of the corporations comprising the UrtheCast Group and its business operations (the "**Assets**") as a going concern or otherwise.

2. Except to the extent otherwise set forth in a definitive sale or investment agreement with a successful bidder, any sale of the Assets or investment in UrtheCast Group will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by any member of the UrtheCast Group, the Monitor or any of their respective agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of UrtheCast Group in and to the Assets to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders.

**Timeline**

3. The following table sets out the key milestones under the SISP:

| Milestone | Deadline |
|---|---|
| Teaser Letter sent to potential Known Potential Bidders | As soon as practicable and, in any case, not later than October 16, 2020 |
| Phase 1 Bid Deadline | November 6, 2020 |
| Phase 2 Bid Deadline | To be specified in Phase 2 Bid Process Letter, but in any case not later than November 18, 2020 |
| Auction (if required) | November 23, 2020 |

4. In recognition that certain of the UrtheCast Group Assets, including but not limited to the synthetic aperture radar ("**SAR**") and Deimos assets, have already been subject to extensive marketing, UrtheCast Group may, with the consent of the Monitor and in consultation with affected stakeholders, shorten any of the deadlines specified above.

**Solicitation of Interest: Notice of the SISP**

5. The SISP will include a notification process and up to two phases of activity for qualified interested bidders ("**Phase 1**" and "**Phase 2**", respectively). As soon as reasonably practicable, but in any event by no later than October 16, 2020:

   (a) UrtheCast Group will cause a notice of the SISP (and such other relevant information which UrtheCast Group, in consultation with the Monitor, considers appropriate) (the "**Notice**") to be published in such publications as UrtheCast Group in consultation with the Monitor, consider appropriate, if any; and

   (b) UrtheCast Group will issue a press release setting out the information contained in the Notice and such other relevant information which UrtheCast Group considers appropriate for dissemination in Canada and major financial centres in the United States.

**Stalking Horse Protections**

6. Unless and until the Stalking Horse Bid has been completed or terminated by one of the parties in accordance with its terms, or amended to provide expressly to the contrary, the Stalking Horse Bidder will be afforded complete and timely access to (a) all confidential information regarding the Opportunity that is shared with any Potential Bidder (defined below), (b) the Bid Process Letter (defined below), and (c)a bi-weekly status update from the Monitor regarding the status of the SISP generally, including an update on whether there are any Qualified Bidders (defined below), Qualified Bids (defined below) received from Phase 2 Qualified Bidders (defined below), Competing Bids (defined below) and/or Compliant Competing Bid (as defined below), however this update will not provide the Stalking Horse Bidder any confidential information about these bidders or the terms of their bids if they include, in whole or in part, the Designated Assets (defined below) unless

and until a Successful Bidder (defined below) is determined for the Designated Assets and the SISP is proceeding to the Auction (defined below). For certainty, nothing is this SISP Process Outline is intended to derogate from any contractual rights of the Stalking Horse Bidder in the Stalking Horse Bid (including in any definitive agreement that may be entered into in respect of the Stalking Horse Bid), including the Stalking Horse Bidder's right to participate in the Auction SISP process, to be paid a break fee and to have certain of its expenses reimbursed.

**PHASE 1: NON-BINDING LOIs**

**Phase 1 Qualified Bidders**

7. Any Known Potential Bidder or other third party who contacts any of the Petitioners or Monitor to express interest in participating in the SISP (each, a "**Potential Bidder**") must provide an executed NDA to the Monitor and provide a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder.

8. A Potential Bidder (who has delivered the executed NDA and letter as set out above) will be deemed a "**Phase 1 Qualified Bidder**" only if UrtheCast Group in its reasonable business judgment and in consultation with the Monitor, determines that such Potential Bidder is likely, based on the availability of financing, experience and other considerations, to be able to timely consummate a sale or investment pursuant to the SISP.

9. For certainty, the Stalking Horse Bidder will be deemed a Phase 1 Qualified Bidder for the purposes of the SISP and, unless terminated by the Stalking Horse Bidder or UrtheCast Corp. in accordance with its terms, the Stalking Horse Bid will be deemed a Qualified LOI and the Stalking Horse Bidder will not be required to submit any other bid during Phase 1 of the SISP.

10. At any time during Phase 1 of the SISP, UrtheCast Group may, in their reasonable business judgment and after consultation with and the consent of the Monitor, eliminate a Phase 1 Qualified Bidder (other than the Stalking Horse Bidder) from the SISP, in which case such bidder will be eliminated from the SISP and will no longer be a "Phase 1 Qualified Bidder" for the purposes of the SISP.

11. UrtheCast Group, in consultation with the Monitor, reserves the right to limit any Phase 1 Qualified Bidder's (other than the Stalking Horse Bidder's) access to any confidential information (including any information in the data room) and to customers and suppliers of UrtheCast Group, where, in UrtheCast Group's opinion after consultation with the Monitor, such access could negatively impact the SISP, the ability to maintain the confidentiality of the confidential information, the UrtheCast Group or the Assets.

12. Potential Bidders must rely solely on their own independent review, investigation and/or inspection of all information of the UrtheCast Group and the Assets in connection with their participation in the SISP and any transaction they enter into with UrtheCast Group.

**Non-Binding Letters of Intent from Qualified Bidders**

13. A Phase 1 Qualified Bidder (other than the Stalking Horse Bidder) that wishes to pursue the Opportunity further must deliver a non-binding letter of intent (an "**LOI**") to the Monitor

and UrtheCast Group at the addresses specified in Schedule "1" attached hereto (including by email or fax transmission), so as to be received by them not later than 5:00 PM (Pacific Time) on or before November 6, 2020, or such other date as the Monitor may advise in accordance with paragraph 4(the "**Phase 1 Bid Deadline**").

14. Subject to paragraph 13, an LOI so submitted will be considered a qualified LOI (a "**Qualified LOI**") only if:

(a) it is submitted on or before the Phase 1 Bid Deadline by a Phase 1 Qualified Bidder;

(b) it contains an indication of whether the Phase 1 Qualified Bidder is proposing:

(i) to acquire all, substantially all or a portion of the Assets (a "**Sale Proposal**"), or

(ii) a recapitalization, arrangement or other form of investment in or reorganization of the UrtheCast Group (an "**Investment Proposal**");

(c) in the case of a Sale Proposal (other than the Stalking Horse Bid), it identifies or contains the following:

(i) the purchase price or price range in Canadian dollars, including details of any liabilities to be assumed by the Phase 1 Qualified Bidder and key assumptions supporting the valuation;

(ii) a description of the Assets that is expected to be subject to the transaction and any of the Assets expected to be excluded;

(iii) a description of the Phase 1 Qualified Bidder's proposed treatment of material agreements and employees (for example, anticipated employment offers):

(iv) a specific indication of the financial capability of the Phase 1 Qualified Bidder and the expected structure and financing of the transaction (including, but not limited to, the sources of financing to fund the acquisition, preliminary evidence of the availability of such financing or such other form of financial disclosure and credit-quality support or enhancement that will allow UrtheCast Group and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Phase 1 Qualified Bidder's financial or other capabilities to consummate the transaction and to perform all obligations to be assumed in such transaction; and the steps necessary and associated timing to obtain financing and any related contingencies, as applicable);

(v) a description of the conditions and approvals required for the Phase 1 Qualified Bidder to be in a position to submit a final and binding offer, including any anticipated corporate, securityholder or other internal approvals and any anticipated impediments for obtaining such approvals;

(vi) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;

(vii) a description of all conditions to closing that the Phase 1 Qualified Bidder expects to include in its final and binding offer, including without limitation any regulatory approvals and any form of agreement required from a government body, stakeholder or other third party ("**Third Party Agreement**") and an outline of the principal terms thereof; and

(viii) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;

(d) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment;

(ii) the aggregate amount of the equity and/or debt investment to be made in the UrtheCast Group in Canadian dollars;

(iii) key assumptions supporting the Phase 1 Qualified Bidders' valuation;

(iv) a description of the Phase 1 Qualified Bidder's proposed treatment of any liabilities, material contracts and employees;

(v) the underlying assumptions regarding the pro forma capital structure (including the form and amount of anticipated equity and/or debt levels, debt service fees, interest or dividend rates, amortization, voting rights or other protective provisions (as applicable), redemption, prepayment or repayment attributes and any other material attributes of the investment);

(vi) a specific indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the transaction (including, but not limited to, the sources of capital to fund the investment, preliminary evidence of the availability of such capital or such other form of financial disclosure and credit-quality support or enhancement that will allow UrtheCast Group and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Phase 1 Qualified Bidder's financial or other capabilities to consummate the transaction, steps necessary and associated timing to obtain such capital and any related contingencies, as applicable, and a sources and uses analysis);

(vii) a description of the conditions and approvals required for the Phase 1 Qualified Bidder to be in a position to submit a final and binding offer, including any anticipated corporate, securityholder or other internal approvals and any anticipated impediments for obtaining such approvals;

(viii) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;

(ix) a description of all conditions to closing that the Phase 1 Qualified Bidder expects to include in its final and binding offer, including without limitation any regulatory approvals and any Third Party Agreement required and an outline of the principal terms thereof; and

(x) any other terms or conditions of the Investment Proposal which the Phase 1 Qualified Bidder believes are material to the transaction;

(e) in the case of

(i) a Sale Proposal for Assets that include any of the Designated Assets, or

(ii) an Investment Proposal that contemplates taking any security interest in any of the Designated Assets or that could reasonably be expected to take longer to complete than the sale of the Designated Assets to the Stalking Horse Bidder pursuant to the Stalking Horse Bid (any Sale Proposal or Investment Proposal referred to in this subsection (e) being referred to as a "**Conflicting Bid**"),

such Conflicting Bid provides for payment of the expense reimbursement and break fee (it being understood and agreed that only the Stalking Horse Bidder will be entitled to any bid protections including expense reimbursement and a break fee) and provides that, at a minimum and on closing of the Conflicting Bid, cash proceeds will be paid in an amount which is at least equal to the sum of: (A) the amount of cash payable under the Stalking Horse Bid, (B) the amount of obligations being credit bid and debt assumed (exclusive of cure costs) in the Stalking Horse Bid, (C) the amount of the Expense Reimbursement, (D) the amount of any break fee payable under the Stalking Horse Bidder, (E) the principal and any accrued and unpaid interest owing under the Stalking Horse Bid DIP and the Existing DIP, plus (F) a minimum overbid amount of CAD $250,000 (the sum of such amounts in clauses (A) through (F) of this paragraph 14(e) being referred to as the "**Minimum Purchase Price**") and provides that, upon closing of the Conflicting Bid, the Stalking Horse DIP will be repaid in full and all amounts owing to the Stalking Horse Bidder (including the Stalking Horse's reimbursable expenses and break fee) will be paid at closing (a Conflicting Bid that satisfies the Minimum Purchase Price and other requirements of this clause being referred to as a "**Compliant Conflicting Bid**"); and

(f) in the case of either a Sale Proposal or an Investment Proposal, it contains such other information as reasonably requested by UrtheCast Group in consultation with the Monitor.

15. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

**Preliminary Assessment of Phase 1 Bids and Subsequent Process**

16. Following the Phase 1 Bid Deadline, UrtheCast Group, in consultation with the Monitor, will assess the Qualified LOIs. If it is determined by UrtheCast Group in consultation with the Monitor, that a Phase 1 Qualified Bidder that has submitted a Qualified LOI: (i) has a

bona fide interest in completing a Sale Proposal or Investment Proposal (as the case may be); and (ii) has the financial capability (based on availability of financing, experience and other considerations) to consummate such a transaction based on the financial information provided, then such Phase 1 Qualified Bidder will be deemed a "**Phase 2 Qualified Bidder**", provided that UrtheCast Group may, in their reasonable business judgment and after consultation with and with the approval of the Monitor, limit the number of Phase 2 Qualified Bidders (and thereby eliminate some bidders from the process) taking into account the factors identified in paragraph 18 below and any material adverse impact on the operations and performance of UrtheCast Group. Only Phase 2 Qualified Bidders shall be permitted to proceed to Phase 2 of the SISP.

17. For certainty, the Stalking Horse Bidder will be deemed a Phase 2 Qualified Bidder for the purposes of the SISP and, unless terminated by the Stalking Horse Bidder or UrtheCast Corp. in accordance with its terms, the Stalking Horse Bid will be deemed a Qualified Bid and the Stalking Horse Bidder will not be required to submit any other bid during Phase 2 of the SISP.

18. As part of the assessment of Qualified LOIs and the determination of the process subsequent thereto, UrtheCast Group, in consultation with the Monitor and with the approval of the Monitor, shall determine the process and timing to be followed in pursuing Qualified LOIs based on such factors and circumstances as they consider appropriate in the circumstances including, but not limited to: (i) the number of Qualified LOIs received, (ii) the extent to which the Qualified LOIs relate to the same Assets or involve Investment Proposals predicated on certain Assets, (iii) the scope of the Assets to which any Qualified LOIs may relate, and (iv) whether to proceed by way of sealed bid or auction (with or without a stalking horse bidder) with respect to some or all of the Assets (other than the Designated Assets). With respect to the Designated Assets, an auction shall be held in accordance with the auction process set out below (the "Auction") where UrtheCast Group in consultation with the Monitor, determines that one or more, or a combination thereof, of the Qualified Bids constitutes a Superior Bid (as defined below).

19. Upon the determination by UrtheCast Group, in consultation with the Monitor and with the approval of the Monitor, of the manner in which to proceed to Phase 2 of the SISP, UrtheCast Group, in consultation with and with the approval of the Monitor, will prepare a bid process letter for Phase 2 (the "**Bid Process Letter**"), and the Bid Process Letter will be (i) sent by the Monitor to all Phase 2 Qualified Bidders, and (ii) posted by the Monitor on the website the Monitor maintains in respect of this CCAA proceeding.

20. Notwithstanding the process and deadlines outlined above with respect to Phase 1 of the SISP and the process to supplement Phase 2 by way of the Bid Process Letter:

    (a) UrtheCast Group may, at any time bring a motion to seek approval of a stalking horse agreement in respect of some or all of the assets (excluding the Designated Assets) or the UrtheCast Group and related bid procedures in respect of such Assets or to establish further or other procedures for Phase 2; and

    (b) If no Compliant Conflicting Bid is received by UrtheCast Group on or before the Phase 1 Bid Deadline, the Petitioners will promptly bring an application seeking the granting of an order by the Court authorizing the Petitioners to proceed with the sale of the Designated Assets to the Stalking Horse Bidder in accordance with the terms and subject conditions of the Stalking Horse Bid.

## PHASE 2: FORMAL OFFERS AND SELECTION OF SUCCESSFUL BIDDER

21. Paragraphs 22 to 32 below and the conduct of Phase 2 are subject to paragraphs 18, 19, and 20 and any adjustments made to Phase 2 in accordance with the Bid Process Letter and any further Court order regarding the SISP.

### Due Diligence

22. UrtheCast Group in consultation with the Monitor, shall in their reasonable business judgment and subject to competitive and other business considerations, afford each Phase 2 Qualified Bidder (which shall be deemed to include the Stalking Horse Bidder, if the Stalking Horse Bid has not been completed in accordance with paragraph 20(b) or terminated by one of the parties in accordance with its terms) such access to due diligence materials and information relating to the Assets and UrtheCast Group as they deem appropriate. Due diligence access may include management presentations, on-site inspections, and other matters which a Phase 2 Qualified Bidder may reasonably request and as to which UrtheCast Group in their reasonable business judgment and after consulting with the Monitor, may agree. The UrtheCast Group will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Phase 2 Qualified Bidders and the manner in which such requests must be communicated. Neither the UrtheCast Group nor the Monitor will be obligated to furnish any information relating to the Assets or UrtheCast Group to any person other than to Phase 2 Qualified Bidders. Further and for the avoidance of doubt, selected due diligence materials may be withheld from certain Phase 2 Qualified Bidders if UrtheCast Group in consultation with the Monitor, determine such information to represent proprietary or sensitive competitive information.

### Formal Binding Offers

23. Phase 2 Qualified Bidders (other than the Stalking Horse Bidder, which will be deemed to have satisfied this paragraph 23 by delivering a definitive agreement of purchase and sale to effectuate the transactions contemplated by the Stalking Horse Bid, as the same may be amended by the parties thereto) that wish to make a formal offer to purchase or make an investment in UrtheCast Group or its Assets shall submit a binding offer that complies with all of the following requirements prior to the date set out the Bid Process Letter (the "**Phase 2 Bid Deadline**"):

    (a) the bid shall comply with all of the requirements set forth in respect of Phase 1 Qualified LOIs, including without limitation paragraph 14(e);

    (b) the bid (either individually or in combination with other bids that make up one bid) is an offer to purchase or make an investment in some or all of the Assets or UrtheCast Group and is consistent with any necessary terms and conditions communicated to Phase 2 Qualified Bidders;

    (c) the bid includes a letter stating that the Phase 2 Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder (as defined below), provided that if such Phase 2 Qualified Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the transaction with the Successful Bidder;

(d) the bid includes duly authorized and executed transaction agreements, including the purchase price, investment amount and any other key economic terms expressed in Canadian dollars (the "**Purchase Price**"), together with all exhibits and schedules thereto, all applicable ancillary agreements with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such agreements), and proposed order to approve the sale by the Court;

(e) the bid includes written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed transaction, that will allow UrtheCast Group and the Monitor to make a determination as to the Phase 2 Qualified Bidder's financial and other capabilities to consummate the proposed transaction;

(f) the bid is not conditioned on (i) the outcome of unperformed due diligence by the Phase 2 Qualified Bidder, apart from, to the extent applicable, to the disclosure of due diligence materials that represent proprietary or sensitive competitive information which was withheld in Phase 2 from the Phase 2 Qualified Bidder and/or (ii) obtaining financing;

(g) the bid fully discloses the identity of each entity that will be entering into the transaction or the financing (including through the issuance of debt in connection with such bid), or that is participating or benefiting from such bid, and such disclosure shall include, without limitation: (i) in the case of a Phase 2 Qualified Bidder formed for the purposes of entering into the proposed transaction, the identity of each of the actual or proposed direct or indirect equity holders of such Phase 2 Qualified Bidder and the terms and participation percentage of such equity holder's interest in such bid; and (ii) the identity of each entity that has or will receive a benefit from such bid from or through the Phase 2 Qualified Bidder or any of its equity holders and the terms of such benefit;

(h) the bid includes a commitment by the Phase 2 Qualified Bidder to provide a non-refundable deposit in the amount of not less than 10% of the purchase price offered upon the Phase 2 Qualified Bidder being selected as the Successful Bidder and in any event, prior to service of the materials for the Sale Approval Motion (as defined below);

(i) the bid includes acknowledgements and representations of the Phase 2 Qualified Bidder that: (i) the transaction is on an "as is, where is" basis; (ii) it has had an opportunity to conduct any and all due diligence regarding the Assets and UrtheCast Group prior to making its offer (apart from, to the extent applicable, the disclosure of due diligence materials that represent proprietary or sensitive competitive information which were withheld in Phase 2 from the Phase 2 Qualified Bidder); (iii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; and (iv) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Assets, or UrtheCast Group or the completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by UrtheCast Group;

(j) the bid includes evidence, in form and substance reasonably satisfactory to UrtheCast Group, in consultation with the Monitor, of authorization and approval from the Phase 2 Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction agreement(s) submitted by the Phase 2 Qualified Bidder;

(k) the bid contains other information required by UrtheCast Group or the Monitor including, without limitation, such additional information as may be required in the event Phase 2 is supplemented in accordance with paragraph 19 to contemplate that an auction of certain Assets be conducted; and

(l) the bid is received by the Phase 2 Bid Deadline.

24. Following the Phase 2 Bid Deadline, UrtheCast Group in consultation with the Monitor, will assess the Phase 2 bids received. UrtheCast Group, in consultation with the Monitor, will designate the most competitive bids that comply with the foregoing requirements to be "**Qualified Bids**". No Phase 2 bids received shall be deemed not to be Qualified Bids unless the Monitor so approves. Only Phase 2 Qualified Bidders whose bids have been designated as Qualified Bids are eligible to become the Successful Bidder(s).

25. The Monitor shall notify each Phase 2 Qualified Bidder in writing as to whether its bid constituted a Qualified Bid within three (3) business days of the Phase 2 Bid Deadline, or at such later time as UrtheCast Group in consultation with the Monitor, deem appropriate.

26. UrtheCast Group may, in consultation with the Monitor, aggregate separate bids from unaffiliated Phase 2 Qualified Bidders (if, and only if, such aggregation is reasonably practicable to effect a transaction without overlap) to create one "Qualified Bid".

**Evaluation of Competing Bids**

27. A Qualified Bid will be evaluated based upon several factors, including, without limitation, items such as the Purchase Price and the net value provided by such bid, the claims likely to be created by such bid in relation to other bids, the identity, circumstances and ability of the Phase 2 Qualified Bidder to successfully complete such transactions, the proposed transaction documents, the effects of the bid on the stakeholders of UrtheCast Group, factors affecting the speed, certainty and value of the transaction (including any regulatory approvals or third party contractual arrangements required to close the transactions), the Assets included or excluded from the bid, any related restructuring costs, and the likelihood and timing of consummating such transactions, each as determined by UrtheCast Group and the Monitor.

28. A Qualified Bid will be deemed a Superior Bid where a credible, unconditional and financially viable third party offer, or combination of offers for (A) the acquisition of all, substantially all or certain of the Designated Assets; or (B) an investment, restructuring, recapitalization, refinancing or other reorganization of the UrtheCast Group, the terms of which offer are no less favourable and no more burdensome or conditional than the terms contained in the Stalking Horse Asset Purchase Agreement, and which at a minimum, alone, or in a combination with other offers, includes:

(a) a payment in cash in excess of CAD $250,000 of the aggregate of the total consideration payable pursuant to the Stalking Horse APA, being CAD $69.3 million;

(b) a payment in cash in the amount necessary to fully pay the Stalking Horse bidder's break fee and expense reimbursement together with any CCAA priority amounts owing, including any interim financing obligations as at the closing of such transaction; and

(c) a payment in cash of all priority charges and an assumption of liabilities to satisfy and payment of all cure costs required to the closing of such transaction.

**Selection of Successful Bid**

29. UrtheCast Group, in consultation with the Monitor, (a) will review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated between UrtheCast Group, in consultation with the Monitor, and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations, and (b) identify the highest or otherwise best bid (the "**Successful Bid**"), and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") for any particular Assets or UrtheCast Group, in whole or part. UrtheCast's determination of any Successful Bid, with the assistance of the Monitor, shall be subject to approval by the Court and in the case of the Designated Assets, where the Successful Bid constitutes a Superior Bid, the UrtheCast Group will proceed to an auction (the "Auction").

30. For certainty, notwithstanding the process and deadlines outlined above with respect to Phase 2 of the SISP, if no binding offer for a Compliant Conflicting Bid is received by UrtheCast Group during Phase 2 on or before the Phase 2 Bid Deadline, then the Petitioners will promptly bring an application seeking the granting of an order by the Court authorizing the Petitioners to proceed with the sale of the Designated Assets to the Stalking Horse Bidder in accordance with the terms and subject conditions of the Stalking Horse Bid. UrtheCast Group shall have no obligation to enter into a Successful Bid (excluding the Stalking Horse Bid, if applicable), and it reserves the right, after consultation with the Monitor to reject any or all Phase 2 Qualified Bids.

**Auction**

31. The Auction shall run in accordance with the following procedures, which may be modified by the UrtheCast Group in its discretion, after consultation with the Monitor:

(a) prior to the Auction Monitor shall have identified the Superior Offer and all bidding at the Auction shall be irrevocably made on the terms of the Superior Offer, except for price/investment amount and certain other identified business terms;

(b) the Monitor will provide to all Qualified Bidders the material terms and conditions of the Superior Offer (the "**Starting Bid**") and each Qualified Bidder must inform the UrtheCast Group whether it intends to participate in the Auction (the parties who so inform the UrtheCast Group, that they intend to participate are the "**Auction Bidders**");

(c) Only representatives of the Auction Bidders, the UrtheCast Group, the Monitor, the DIP Lenders and such other persons permitted by the UrtheCast Group and the Monitor (and the advisors to each of the foregoing) are entitled to attend the Auction;

(d) At the commencement of the Auction, each Auction Bidder shall be required to confirm that it has not engaged in any collusion with any other Auction Bidder to detrimentally affect the price for any sale;

(e) Only the Auction Bidders will be entitled to make any Subsequent Bids (as defined herein);

(f) All Subsequent Bids presented during the auction shall be made and received in one room on an open basis. All Auction Bidders will be entitled to be present for all Subsequent Bids at the Auction with the understanding that the true identity of each Auction Bidder at the Auction will be fully disclosed to all other Auction Bidders at the Auction and that all material terms of each Subsequent Bid will be fully disclosed to all other Auction Bidders throughout the entire Auction;

(g) All Auction Bidders must have at least one individual representative with authority to bind such Auction Bidder present in person at the Auction;

(h) The UrtheCast Group, after consultation with the Monitor, may employ and announce at the auction additional procedural rules that are reasonable under the circumstances, (e.g. the amount of time allotted to make Subsequent Bids, requirement to bid in each round, and the ability of multiple Auction Bidders to combine to present a single bid) for conducting the auction, provided that such rules are (i) not inconsistent with any applicable law, and (ii) disclosed to each Auction Bidder at the auction;

(i) Bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by an Auction Bidder (a "**Subsequent Bid**") that the UrtheCast Group determines, after consultation with the Monitor, is (A) for the first round, a higher or otherwise better offer than the Starting Bid, and (B) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (as defined herein); in each case by at least the Minimum Incremental Overbid. Each bid at the auction shall provide net value to the UrtheCast Group of at least CAD $100,000 (the "**Minimum Incremental Overbid**") over the Starting Bid or the Leading Bid (as defined herein), as the case may be; provided however that the UrtheCast Group, after consultation with the Monitor, shall retain the right to modify the incremental requirements at the Auction and provided further that the UrtheCast Group, in determining the net value of an incremental bid, shall not be limited to evaluating the incremental dollar value of such bid and may consider other factors. After each Subsequent Bid, the UrtheCast Group shall, after consultation with the Monitor, announce whether such bid (including the value and material terms thereof) is higher or otherwise better than the prior bid (the "**Leading Bid**"). A round of bidding will conclude after each Auction Bidder has the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid;

(j) If, in any round of bidding, no new Subsequent Bid is made that becomes a Leading Bid, the Auction shall be closed;

(k) The Auction shall be closed by midnight on the day of the Auction unless extended for a further 24 hour period by the UrtheCast Group with the approval of the Monitor;

(l) No bids (from Auction Bidders or otherwise) shall be considered after the conclusion of the Auction; and

(m) At the close of the Auction, the Monitor shall identify the winning bid (the "**Auction Successful Bid**"). At the conclusion of the Auction, the Monitor will notify the other bidders of the identities of the bidders of the Auction Successful Bid. (n) following conclusion of the Stalking Horse Scenario Auction, the UrtheCast Group, with the assistance of the Monitor, may finalize a definitive agreement or agreements in respect of the Stalking Horse Auction Successful Bid and the Stalking Horse Auction Backup Bid, respectively, if any, conditional upon approval of the Court.

32. All other bids received at the Auction shall be deemed rejected on the earlier of: (i) the date of closing of the Auction Successful Bid, and (ii) confirmation from the Monitor that the bid has been rejected.

**Sale Approval Motion Hearing**

33. At the hearing of the motion to approve any transaction with a Successful Bidder (which would include the Stalking Horse Bidder in the circumstances contemplated by paragraphs 20(b) or 29 (the "**Sale Approval Motion**"), UrtheCast Group shall seek, among other things, approval from the Court to consummate any Successful Bid. All the Phase 2 Qualified Bids other than the Successful Bid, if any, shall be deemed rejected by UrtheCast Group on and as of the date of approval of the Successful Bid by the Court.

**Confidentiality, Stakeholder/Bidder Communication and Access to Information**

34. All discussions regarding an LOI, Sale Proposal or Investment Proposal must be directed through the Monitor. Under no circumstances should the management of the UrtheCast Group or any stakeholder of UrtheCast Group be contacted directly without the prior consent of the Monitor. Any such unauthorized contact or communication could result in exclusion of the interested party from the SISP process.

35. Participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Phase 1 Qualified Bidders, LOIs, Phase 2 Qualified Bidders, Phase 2 Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between UrtheCast Group, the Monitor and such other bidders or Potential Bidders in connection with the SISP, except to the extent UrtheCast Group with the approval of the Monitor and consent of the applicable participants, are seeking to combine separate bids from Phase 1 Qualified Bidders or Phase 2 Qualified Bidders.

**Supervision of the SISP**

36. The participation of UrtheCast Group in the SISP will be directed by UrtheCast Corp.'s board of directors.

37. The Monitor will participate in the conduct of the SISP in the manner set out in this SISP Process Outline and the Initial Order and is entitled to receive all information in relation to the SISP.

38. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between UrtheCast Group and any Phase 1 Qualified Bidder, any Phase 2 Qualified Bidder (other than the Stalking Horse Bidder) or any other party, other than as specifically set forth in a definitive agreement that may be signed with UrtheCast Group.

39. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any LOI, Phase 2 bid, due diligence activities, and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

40. UrtheCast Group shall have the right to modify the SISP (including, without limitation, pursuant to the Bid Process Letter) provided always that the outside date for closing a transaction of purchase and sale of the Designated Assets will only be amended with the written consent of the Stalking Horse Bidder) with the prior written approval of the Monitor if, in their reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP; provided that the Service List in this CCAA proceeding shall be advised of any substantive modification to the procedures set forth herein.

## Schedule "1"

## Address for Submitting LOIs and Phase 2 Bids

**Bennett Jones LLP**
666 Burrard St
Suite #2500
Vancouver, BC V6C 2X8

Fax: •
Attn : •

**Ernst & Young Inc.**
700 West Georgia Street
Vancouver, BC V7Y 1C7

Fax: •
Attn : Mr. Philippe Mendelson, Vice President

## Schedule "D" – Stalking Horse Bid

DELIVERED BY EMAIL

October 13, 2020

URTHECAST CORP.
Unit 33-1055 Canada Place
Vancouver, BC V6C 0C3

Attention: Mr. Don Osborne
Director & Chief Executive Officer

- and to -

ERNST & YOUNG INC., as Monitor
700 West Georgia Street
Vancouver, BC V7Y 1C7

Attention: Mr. Mike Bell
Senior Vice President

Dear Sirs:

**Re: Stalking Horse Bid Letter for UrtheDaily Constellation and UrtheCast Pipeline**

This letter of intent, including the term sheet attached hereto as Exhibit "A" (the "Acquisition Term Sheet"), confirms our mutual understanding regarding the proposed material terms and conditions upon which Antarctica Infrastructure Partners, LLC ("Antarctica"), through its wholly-owned subsidiary 1269336 B.C. Ltd. and/or one or more special purpose entities affiliated with Antarctica (in any case, "Bidco"), is prepared to acquire (the "Proposed Transaction") from UrtheCast Corp., an Ontario corporation ("UrtheCast") and/or certain of UrtheCast's direct and indirect subsidiaries (together with UrtheCast, the "Sellers"), all of the assets and certain liabilities of the UrtheDaily Constellation project[1] and the UrthePipeline[2] product offering (together, the "Acquired Business"), including, without limitation, the assets set forth in Schedule "A" to the Acquisition Term Sheet (collectively, the "Acquired Assets"), in connection with a filing by the Sellers and certain of their affiliates made under the *Companies Creditors' Arrangement Act* (Canada) ("CCAA"). The Proposed Transaction will be subject to Sellers' undertaking a competitive process on the terms and conditions set out in a Sale and Investment Solicitation Process ("SISP") on terms agreed to by UrtheCast's board of directors (the "Board"), UrtheCast, Ernst & Young Inc., as CCAA monitor (the "Monitor") and the Supreme Court of British Columbia (the "Court"), and provided by UrtheCast to Antarctica and approved by the Court. The form of SISP that UrtheCast will present to the Court for approval for

[1] As that term is used in UrtheCast's annual information form dated May 4, 2020, and including all related assets, contracts, intellectual property, software, books and records and employees that are owned by the Sellers (or any of them) and that are reasonably necessary to design, complete, finance, launch and operate the UrtheDaily Constellation.
[2] As that term is used in UrtheCast's annual information form dated May 4, 2020, and including all related assets, products, contracts, intellectual property, software, books and records and employees that are owned by the Sellers (or any of them) and that are reasonably necessary to design, complete, finance, launch and operate the UrthePipeline ground segment systems.

such purpose is attached hereto as Exhibit "A." The execution and delivery of the Purchase Agreement by Antarctica and Bidco, and the execution and delivery by the Antarctica DIP Lender (as defined below) of the AC DIP Loan (as defined below) shall be subject to Antarctica's satisfaction with the form of the SISP that is approved by the Court.

In addition, conditional upon obtaining approval of this letter of intent by the Board, the Monitor, and the Court, Antarctica, through one and/or one or more other special purpose entities ("Antarctica DIP Lender"), will agree to participate in an interim senior secured financing (the "AC DIP Loan") on the terms set forth in the term sheet attached hereto as Exhibit "B" (the "AC Interim Financing Term Sheet"). Subject to the terms and conditions set forth in the AC DIP Loan, the Antarctica DIP Lender will make available to UrtheCast up to CAD$3,548,000 to fund the Sellers' requirements in accordance with the Agreed Weekly Budgets (as defined in the AC Interim Financing Term Sheet, which will include (a) any amounts owing to 1262743 B.C. LTD. under a DIP Facilities Loan Agreement made between 1262743 B.C. LTD, UrtheCast and certain affiliates of UrtheCast, approved by the Court on October 2, 2020, and (b) UrtheCast's forecast operating cash requirements for the period from the Closing Date (as defined below) to January 15, 2021) and the Third DIP Order (as defined in the AC Interim Financing Term Sheet), each of which shall be in form and substance satisfactory to the Lender.

**About Antarctica Capital**

Antarctica Infrastructure Partners, LLC is an affiliate of Antarctica Capital, LLC (together with its affiliates, "Antarctica Capital"). Antarctica Capital is a global alternative investment manager with operations in the United States, United Kingdom, and India. Antarctica Capital is a SEC registered investment adviser with a primary focus upon real assets and has assets under management in excess of USD$2 billion. Antarctica Capital's objective is to offer its investors transaction opportunities that are either off-market or require a particular set of expertise and relationships not readily available to others. This approach often leads our team towards path-breaking investment strategies or overlooked companies and assets that can be enhanced through operational transformation or consolidation strategies. Antarctica Capital has integrated investment and operating teams that permits us to take an "owner/operator" approach to our investments. Antarctica Capital remains heavily involved and embedded in shaping the direction and transformation of portfolio companies and assets. Our holistic investment approach with its emphasis on instilling strong oversight, financial discipline, technology, operational consulting, capital structure, and optimization of management and the workforce, helps to maximize value through the investment lifecycle.

We believe that the Proposed Transaction will be in the best interests of the Sellers and their respective stakeholders, including their creditors, employees, suppliers and customers, as well as the Government of British Columbia and the Government of Canada. We also believe our proposal will provide an opportunity for the Acquired Business to continue as going concerns, while facilitating completion of UrtheCast's other restructuring efforts and offering the maximum recovery for the Sellers' creditors.

**Overview of the Proposed Transaction**

The terms and conditions set forth in this letter of intent, including the Exhibits attached hereto, are not intended to be comprehensive and if, in the course of Bidco's ongoing due diligence investigations or the parties' ongoing development of the proposed acquisition structure and related negotiations, Bidco or Sellers determine that additional or modified terms and

conditions are necessary or advisable, then the parties reserve the right to address such matters, either by amending this letter of intent or by reflecting such additional or modified terms in any definitive purchase agreement (the "Purchase Agreement") that may be entered into between the parties in connection with the Proposed Transaction.

1. Terms of Proposed Transaction. Under our proposal, Bidco would purchase and acquire the Acquired Assets, and assume certain liabilities of Sellers, on the terms and subject to the conditions identified in the Acquisition Term Sheet, and as will be set out more particularly in the Purchase Agreement.

2. Sale Procedures. We understand that the Proposed Transaction will be subject to Sellers undertaking a competitive bid process which has been designed by UrtheCast and the Monitor to maximize value for Sellers and their stakeholders. Our proposal is conditional upon the Proposed Transaction being approved as the stalking horse bid for the Acquired Assets, on the terms and conditions set forth in the Acquisition Term Sheet, the SISP and the Amended and Restated Initial Order (as defined below).

3. Amended and Restated Initial Order. Our proposal is also contingent upon each of the Acquisition Term Sheet, the SISP and the AC Interim Financing Term Sheet being approved by the Court pursuant to a further modification to the initial order issued on September 4, 2020 by the Court in Vancouver Registry Action No. VLC-S-S208894, as modified by the amended and restated initial orders of the Court dated September 14, 2020, September 23, 2020 and October 2, 2020 (as modified to date and as contemplated to be modified pursuant to this letter of intent, the "Amended and Restated Initial Order"), and which Amended and Restated Initial Order shall otherwise be in form and substance acceptable to Bidco in its sole and absolute discretion.

4. Antarctica DIP Lender. In connection with the execution and delivery of this letter of intent, and subject to Antarctica DIP Lender being approved as an Interim Lender pursuant to the Amended and Restated Initial Order, Antarctica DIP Lender will enter into the AC Interim Financing Term Sheet.

5. Purchase Agreement. As soon as reasonably practical after execution of this letter of intent, the parties will commence negotiations of a definitive binding Purchase Agreement. The Purchase Agreement will be negotiated in good faith, will be subject to the mutual satisfaction of Bidco and Sellers and will contain terms and conditions consistent with those set forth in the Acquisition Term Sheet and other terms and conditions customary for transactions of this nature. Each party's obligations under this letter of intent are subject to its execution and delivery of a Purchase Agreement that is satisfactory to such party.

6. Public Announcements. None of UrtheCast, the other Sellers, Antarctica or Bidco shall make public announcements or public statements concerning the Proposed Transaction, unless such public announcement or public statement is jointly approved by all of UrtheCast, the other Sellers and Antarctica. In the event, however, that the parties are unable to agree on a public announcement or public statement at any time, and UrtheCast determines, after consultation with its legal counsel, that a public announcement or public statement is required by law at such time, then UrtheCast may issue such public statement or public announcement; provided that UrtheCast shall not identify Antarctica Capital in any public announcement or public statement without obtaining Antarctica Capital's prior written consent and UrtheCast gives the other parties advance notice of such public statement or public announcement, and an opportunity to provide comments, to the extent

practicable.

7. Designated Bidcos. Antarctica shall be entitled to designate one or more entities formed by Antarctica or its affiliates (including Bidco) to purchase specified assets (from among the Acquired Assets, as such term is defined below), to assume specified liabilities (from among the Assumed Liabilities, as such term is defined below), to perform any of the other covenants and agreements to be performed by Bidco under the Purchase Agreement and to have the rights and benefits of Bidco thereunder; provided, however, that Antarctica shall be a party to the Purchase Agreement and shall guarantee any and all obligations to the Sellers of such entities so designated by Antarctica.

8. Expense Reimbursement. The Purchase Agreement will provide that, subject to funds being available to UrtheCast under the AC DIP Loan, within three days of completion of the Proposed Transaction, UrtheCast will reimburse Antarctica for its out-of-pocket expenses (including the fees, disbursements and taxes of its professional advisors, McCarthy Tétrault LLP, Argosat Consulting LLC and KPMG LLP), not to exceed CAD$1.0 million in the aggregate incurred in connection with its due diligence investigations, structuring discussions and negotiations with UrtheCast and preparing this letter of intent, the AC DIP Loan and the Purchase Agreement.

9. Governing Law. This letter of intent, and any questions, claims, disputes, remedies or actions arising from or related to this letter of intent, and any relief or remedies sought by any party to this letter of intent, shall be governed exclusively by the laws of the Province of British Columbia and the laws of Canada applicable therein without regard to the rules of conflict of laws applied therein or any other jurisdiction.

Other than paragraph **Error! Reference source not found.**, 8 and **Error! Reference source not found.**, which are binding on the parties, this letter of intent is not intended and does not create any binding legal obligation on the part of any of UrtheCast, Antarctica, or Sellers. This letter of intent is subject to the confidentiality agreement dated June 24, 2020 made between UrtheCast and SIGA II, LLC an affiliate of Antarctica, is not intended and does not create any binding legal obligation on the part of UrtheCast, Antarctica, or Sellers to enter into any Purchase Agreement. Entering into any binding Purchase Agreement remains subject to, among other things, Antarctica's satisfactory completion of its remaining due diligence investigations, finalizing the parties' structuring discussions, negotiation of mutually acceptable definitive terms of a Purchase Agreement, obtaining approvals by the boards of directors (or similar governance bodies) of each of Antarctica, UrtheCast and the other Sellers, and obtaining approval of the Monitor

*** [The next page is the signature page] ***

If you are in agreement with the foregoing, please execute a copy of this letter and return to me.

Yours truly,

**ANTARCTICA INFRASTRUCTURE PARTNERS, LLC**

By: _____

Name:
Title:

The foregoing is Accepted and Agreed by each of the undersigned as of this ____ day of October, 2020:

**URTHECAST CORP.**

By: _____

Name:
Title:

**1185729 B.C. LTD.**

By: _____

Name:
Title:

**1185781 B.C. LTD.**

By: _____

Name:
Title:

## Exhibit "A"

## Acquisition Term Sheet

This term sheet (the "Acquisition Term Sheet") sets forth a summary of certain terms for a proposed definitive "stalking horse" acquisition agreement (the "Purchase Agreement") to be entered into between Antarctica Infrastructure Partners, LLC ("Antarctica"), 1269336 B.C. Ltd. and/or one or more special purpose entities (in any case, "Bidco") to be formed by Antarctica and UrtheCast Corp. ("UrtheCast") and/or certain of UrtheCast's direct and indirect subsidiaries (together with UrtheCast, the "Sellers"), in connection with a filing in the British Columbia Supreme Court (the "Court") (as Vancouver Registry Action No. VLC-S-S208894) by the Sellers and certain of their affiliates (the "Applicants") under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA").

This Acquisition Term Sheet is not intended and does not create any binding legal obligation on the part of either Bidco or Sellers. No legal obligation to negotiate, enter into or consummate any transaction will exist, unless and until the Purchase Agreement has been entered into by the parties, which is subject to board approval by Bidco and Sellers, satisfactory completion of confirmatory due diligence, and negotiation of final documentation. The terms and conditions set forth in this Acquisition Term Sheet are not intended to be comprehensive and if, in the course of Bidco's due diligence review or development of the proposed acquisition structure, or in the course of negotiations, Bidco or Sellers determine that additional terms and conditions, or modification to the terms and conditions set out herein, are necessary, then the parties reserve the right to address such matters.

This Acquisition Term Sheet is attached as Exhibit "A" to a letter of intent between Antarctica and the Sellers (the "Letter of Intent"). Capitalized terms used but not otherwise defined in this Acquisition Term Sheet have the meaning given to those terms in the Letter of Intent.

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| Transaction Structure: | The Proposed Transaction would be structured as a sale of assets, which may include the acquisition of all of the outstanding shares in the capital of one or more of the Sellers or other direct or indirect subsidiaries of UrtheCast, and certain of the liabilities of the Sellers. |
| Acquired Assets: | At the closing of the Proposed Transaction (the "Closing"), Bidco will acquire all of the assets, contracts, intellectual property, inventory, software, books and records comprising the UrthePipeline product offering and all of the assets, contracts, intellectual property, inventory, software, books and records that are owned by the Sellers (or any of them) and that are reasonably necessary to design, finance, complete, launch, own and operate the UrtheDaily Constellation project (collectively, the "Acquired Assets"). The Acquired Assets will include, without limitation, the assets described in the attached Schedule "A" titled "Purchased Assets" and:<br>(1) all of the equity interests of Sellers in:<br>a. 1185729 B.C. Ltd.<br>b. 1185781 B.C. Ltd.<br>c. GEOSYS U.S. ULC |

d. Geosys International Inc.
e. Geosys Brasil Ltd.
f. GEOSYS S.A.S.
g. GEOSYS Australia Pty.
h. GEOSYS Europe SARL

(collectively, the "Acquired Entities");

(2) all right, title and interest of UrtheCast and all of its affiliates in the Purchase and Sale Agreement dated November 6, 2018 (the "GEOSYS Purchase Agreement") made between Land O' Lakes, Inc. ("Land O'Lakes"), UrtheCast Corp. and 1185781 B.C. Ltd.;

(3) all right, title and interest of UrtheCast and all of its affiliates in each of the following agreements (collectively, the Subscription Agreements"):

a. UrtheDaily Constellation Subscription Purchase Agreement dated September 20, 2018 between Remote Sensing Inc. and UrtheCast;

b. UrtheDaily Constellation Subscription Purchase Agreement dated October 17, 2018 between TerraTech SAC and UrtheCast; and

c. Long Term License and Services Agreement dated January 14, 2019 between UrtheCast, Deimos Imaging SLU, GEOSYS SAS and Winfield Solutions, LLC;

(4) all equipment and tangible property of Sellers, including inventory, raw materials and work in process, to the extent they are directly related to, or required to complete and operate, the UrtheDaily Constellation and/or the UrthePipeline services segment;

(5) all contracts (other than disclaimed contracts) of Sellers, to the extent they are directly related to, or required to complete and operate, the UrtheDaily Constellation and/or the UrthePipeline services segment;

(6) all permits, licenses, leases, patents, trademarks held by Sellers, to the extent assignable, that are directly related to, or required to complete and operate, the UrtheDaily Constellation and/or the UrthePipeline;

(7) all rights, options, claims and causes of action, to the extent they are directly related to, or required to complete and operate, the UrtheDaily Constellation and/or the UrthePipeline; and

(8) all real property, fixtures and leases or other rights to the extent they are directly related to, or required to

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| | complete and operate, the UrtheDaily Constellation and/or the UrthePipeline. |
| Assumption of Liabilities: | The following liabilities, and only the following liabilities, will be assumed by Bidco at Closing:<br>(1) Assumption of UrtheCast's obligations under the GEOSYS Purchase Agreement to pay approximately CAD$17.8 million[3] in respect of the final installment payable to Land O' Lakes thereunder of approximately CAD$2.7 million[4] of accrued past due expenses, provided that Bidco shall have received from Land O' Lakes satisfactory waiver of any and all prior defaults under the GEOSYS Purchase Agreement and assurances from Land O' Lakes that the completion of the Proposed Transaction will not affect completion of the transfer of IP rights thereunder; and<br>(2) Assumption of approximately CAD$11.7 million[5] of SADI unsecured indebtedness, provided that Bidco shall have received satisfactory assurances from the government agencies under which the UrtheCast obtains low-interest loans that the completion of the Proposed Transaction will not affect the continued availability of future funding thereunder, as well as completion of the CAD$40,000,000 loan contemplated by the letter of May 15, 2020 from Innovation, Science and Economic Development Canada and that the related funding agreements remain in good standing at Closing. |
| Purchase Price: | In consideration for the Acquired Assets, Bidco will pay consideration having an aggregate value of CAD$69.3 million[6] (the "Purchase Price"), which will be comprised of the following components and payable as follows:<br>(1) CAD$1,000,000 (the "Cash Purchase Price"), CAD$500,000 of which will be payable to the Monitor, in trust, as a deposit (the "Deposit")[7] upon the parties' execution and delivery of the Purchase Agreement and the remaining CAD$500,000 (the "Final |

[3] Number to be updated prior to signing the Purchase Agreement.
[4] Number to be updated prior to signing the Purchase Agreement.
[5] Number to be updated prior to signing the Purchase Agreement.
[6] Number to be updated prior to signing the Purchase Agreement.
[7] Bidco shall have the option, in its sole discretion, to satisfy all or part of the Deposit by forgiving all or a portion (but in an equal amount) of any amount owing to the AC DIP Lender for advances made to UrtheCast under the AC DIP Loan prior to Bidco's execution and delivery of the Purchase Agreement.

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| | Payment") will be payable at closing of the Proposed Transaction (the "Closing");[8]<br><br>(2) Assumption of UrtheCast's obligations to pay approximately CAD$20.5 million[9] in respect of the sum of the final installment payable to Land O' Lakes thereunder and the aggregate amount of UrtheCast's accrued past due expenses owing to Land O'Lakes, provided that Bidco shall have received from Land O' Lakes satisfactory waiver of any prior defaults under the GEOSYS Purchase Agreement and assurances from Land O' Lakes that the completion of the Proposed Transaction will not affect completion of the transfer of IP rights thereunder;<br><br>(3) As consideration for the purchase of the Secured Debt (as defined below) Bidco will issue to UrtheCast, for the benefit of the Secured Lenders (as defined below), 35% of Bidco's non-voting equity as of the date of Closing (the "Closing Date"), which would be governed by a shareholders and/or limited partnership agreement (in any case, a "Shareholders Agreement"), providing for governance and minority approval rights, pre-emptive rights, mandatory dilution for any non-participation in the equity component of the project financing raised to develop and launch the Project (Antarctica to finance a material portion of the costs for completing the Project) and other customary provisions.<br><br>If and to the extent that UrtheCast determines to distribute any Bidco equity to its securityholders, such distribution will be conditional upon each recipient signing a joinder to the Shareholders Agreement, in form satisfactory to Antarctica. For purposes of this letter agreement, "Secured Debt" means the approximately CAD$36.1 million[10] of principal and accrued and unpaid interest and all other amounts owing to Bolzano Investments Limited, Lunar Ventures Inc., SMF Investments Limited, Skidmore Group and each of Messrs. Don Osborne, Sai Chu, William Evans, James Topham, and Mark Piegza (collectively, the "Secured Lenders").<br><br>Prior to the parties' execution of the Purchase Agreement, certain of the Secured Lenders (being |

[8] Bidco shall have the option, in its sole discretion, to satisfy all or part of the Final Payment by forgiving all or a portion (but in an equal amount) of any amount owing to the AC DIP Lender for advances made to UrtheCast under the AC DIP Loan prior to the Closing.

[9] Number to be updated prior to signing the Purchase Agreement.

[10] Number to be updated prior to signing the Purchase Agreement.

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| | Bolzano Investments Limited, Lunar Ventures Inc., SMF Investments Limited and all or most of Messrs. Don Osborne, Sai Chu, William Evans, James Topham and Mark Piegza) will enter into a Support Agreement with the Sellers, Antarctica and Bidco, confirming their support for the completion of the Proposed Transaction; and<br><br>(4) Assumption of SADI indebtedness of approximately CAD$11.7 million[11], as described above under "Assumption of Liabilities." |
| Deposit: | The Deposit (if any)[12] shall be payable by Bidco or an affiliate thereof to the Monitor, in trust, upon the parties' execution and delivery of the Purchase Agreement.<br><br>The Purchase Agreement will provide that: (a) if the Proposed Transaction closes, the Deposit and any accrued interest thereon shall be released by the Monitor at Closing and applied as partial satisfaction of the Cash Purchase Price; (b) if the Purchase Agreement is terminated by UrtheCast as a result of a material breach by Bidco or any of its affiliates that would prevent the satisfaction of the closing conditions in the Purchase Agreement prior to the Outside Date, and such material breach is not cured within five business days, the full amount of the Deposit together, with any accrued interest earned thereon, shall be released by the Monitor to the Sellers, to become the absolute property of the Sellers as liquidated damages (and not as a penalty) and as the Sellers' sole rights and remedy pursuant to the Purchase Agreement; and (c) if the Purchase Agreement is terminated for any other reason, the Deposit, together with any interest accrued thereon, shall be returned to Bidco. |
| Representations and Warranties: | Representations and warranties given by Sellers and Bidco will include fundamental representations and warranties (valid existence, due authorization, title to assets, validity of permits etc.), and, in the case of Sellers, the absence of a material adverse change with respect to the Acquired Businesses or a material breach or default under material contracts and operating representations and warranties that are customarily provided in a stalking horse bid purchase agreement for a company in CCAA and, in the case of Bidco, (i) the Proposed Transaction is on an "as is, where is" basis; (ii) it has had an opportunity to conduct any and all due diligence regarding the Acquired Assets and the Sellers prior to making its offer; (iii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Acquired Assets in making its bid; and |

[11] Number to be updated prior to signing the Purchase Agreement.
[12] See footnote #11.

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| | (iv) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Acquired Assets, or the Sellers or the completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by the Sellers. |
| Operation of the Business Prior to Closing: | Sellers will agree to customary operating covenants, including an agreement to continue operations in the normal course, *provided that* Sellers will not enter into, terminate, disclaim or materially amend any contract, terminate or fail to renew any license or hire or terminate any executive without obtaining Bidco's prior written consent.<br><br>Sellers also agree to provide weekly operating updates as well as daily cash balances and working capital updates, including rolling monthly cash flow forecasts. |
| Employees: | No decisions relating to employees that are material to the business, including dealing with furloughed employees, unions and collective bargaining arrangements, and any changes to employee compensation arrangements (including changes approved by the Court as part of the CCAA process) shall be made without prior approval of Bidco, such approval not to be unreasonably withheld.<br><br>Subject to the foregoing, Bidco anticipates that it will offer employment to certain employees of Sellers to be identified by Bidco, on terms and conditions of employment (or continued terms and conditions of employment) acceptable to Bidco. |
| Conditions to Closing: | The parties' obligations under the Purchase Agreement will be subject to the following conditions:<br><br>(1) an Order shall be issued by the Court approving the Proposed Transaction pursuant to the SISP and shall have become a final Order;<br><br>(2) a Sale Approval and Vesting Order shall be issued by the Court in form and substance satisfactory to Bidco, and shall have become a final Order;<br><br>(3) receipt of all required third party consents and regulatory approvals to complete the transfer of the Acquired Assets to Bidco, including under applicable competition and foreign investment laws;<br><br>(4) absence of laws or court orders prohibiting the transaction;<br><br>(5) all indebtedness of all of the Acquired Entities will be extinguished on or prior to the Closing, other than any obligations expressly assumed by Bidco pursuant to |

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| | the Purchase Agreement, to the satisfaction of Bidco, acting reasonably; and<br>(6) certain key employees for the Project to be identified in the Purchase Agreement will have accepted offers of employment.<br>The conditions to Bidco's obligation to consummate the Proposed Transaction would also include:<br>(1) accuracy of Sellers' representations and warranties in all material respects;<br>(2) absence of a Material Adverse Change with respect to the Acquired Business, measured from the date of the Purchase Agreement;<br>(3) receipt of all consents and other approvals required to effect the Proposed Transaction (to the extent that the transfer of any contracts, licenses or permits are not effected through the CCAA process without consent separately being needed); and<br>(4) receipt of all required permits and approvals to operate the business after the Closing, including the transfer and assignment of licenses, permits, etc. to Bidco.<br>Notwithstanding any timeline established under the SISP, the Closing Date for the transactions contemplated by the Purchase Agreement shall be as soon as practicable after all of the conditions to closing have been satisfied or waived. |
| Termination Rights: | Each of the parties would be entitled to terminate the Purchase Agreement if:<br>(1) the Closing Date does not occur on or before November 30, 2020 or, if the Closing has been delayed solely as a result of an auction involving the Acquired Business in accordance with the requirements of the SISP, December 18, 2020, or such other date as may be agreed between all of the parties to the Purchase Agreement (in any case, the "Outside Date");<br>(2) the Court, or other court or governmental authority, takes action to restrain, enjoin or otherwise prohibit the transfer of the Acquired Assets to Bidco which is not capable of appeal;<br>(3) Bidco is not the successful bidder chosen as a result of the SISP; or<br>(4) the Court does not approve the sale of the Acquired Assets to Bidco on the terms set out in the Purchase Agreement or approves an alternative transaction. |
| | Bidco would also be entitled to terminate the Purchase Agreement if: |

| | |
|---|---|
| | • Land O' Lakes or any of the Sellers terminates the GEOSYS Purchase Agreement or the Winfield Long Term License and Services Agreement;<br>• UrtheCast, any of the Sellers or the Sellers' counterparties to the Subscription Agreements terminate any of the Subscription Agreements;<br>• in the event that Antarctica DIP Lender enters into the AC Interim Financing Term Sheet, any unwaived or uncured event of default occurs under the AC Interim Financing Term Sheet;<br>• the CCAA proceeding is terminated or a trustee in bankruptcy or receiver is appointed, and such trustee in bankruptcy or receiver refuses to proceed with the transactions contemplated by the Purchase Agreement;<br>• Sellers breach the Purchase Agreement and fail to cure; or<br>• either (a) the Sellers or their affiliates request or (b) the Court approves any amendments or modifications to the SISP that materially adversely affects the interests of the AC DIP Lender under the AC DIP Loan or of Bidco in respect of the Proposed Transaction |
| Break-Up Fee and Expense Reimbursement: | If the Purchase Agreement is terminated as a result of Bidco not being a successful bidder under the SISP, the Sellers shall pay Bidco a termination fee equal to 2% of the Purchase Price.<br><br>If the Purchase Agreement is terminated (except for any termination by the Sellers following a material breach by Bidco) and either a Successful Bid (as defined in the SISP) or any other sale of assets or any plan in the CCAA proceeding is completed within six months of such termination (in any case, an "Alternate Transaction"), and such Alternate Transaction results in the Sellers or any of them, or their respective stakeholders, receiving any cash at closing of such Alternate Transaction:<br>(1) UrtheCast shall promptly reimburse all reasonable third-party expenses incurred by Bidco after the signing of the Letter of Intent, if and to the extent related to the Purchase Agreement and the SISP, subject to a cap of $1.0 million; and<br>(2) UrtheCast shall pay a Break-Up Fee in an amount equal to 3.0% of the aggregate value of the consideration to be received by the Applicants and their stakeholders pursuant to the Alternate Transaction, subject to a cap of $1.5 million,<br>in each case, upon the closing of such Alternate Transaction. |

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| Limitation of Liability: | If the Purchase Agreement is terminated for Bidco breach, Sellers' sole remedy will be liquidated damages in an amount equal to 10% of the Cash Purchase Price. |
| Not a Back-Up Bid: | Bidco's bid will not be deemed to be a "Back-Up Bid" and Bidco will not be required under any circumstances to be a Back-Up Bidder. |
| Governing Law: | British Columbia |
| Dispute Resolution: | Supreme Court of British Columbia |

## SCHEDULE "A"
## PURCHASED ASSETS

**[Note: Schedule subject to detailed review by UrtheCast]**

**UrthePipeline, UrthePlatform and Value-Added Services**

All intellectual property, assets, and equipment associated with the *UrtheDaily* business, including but not limited to:

1. All software already developed or in development, including, without limitation:
    a. Raw downlinked optical and SAR Data processing services
    b. Optical satellite/sensor commissioning, image calibration and QA services
    c. Generic Satellite Imagery Improvement services for previously processed data
    d. Automated mosaic generation prototype services
    e. Next generation data platform prototype with cloud optimized formats
    f. Geospatial analytics prototypes, e.g., soil moisture maps, generic change detection
2. All products, trademarks and/or brands that constitute the UrthePipeline offering. This includes the UrthePlatform (patented API driven web-based EO satellite platform) and the Earth Data Store (ecosystem for data processing, discovery, and access: https://www.digitalsupercluster.ca/programs/data-commons/earth-data-store-2/).
3. All plans, specifications, documents, analyses and reports and all project management and engineering documentation related to the UrthePipeline, including:
    a. UrthePipeline Project Charter – Details on project scope, requirements, deliverables, schedule
    b. UrthePipeline Monthly Project Status Updates – Achievements, financial summary
    c. UrthePipeline Roadmap – Quarterly and yearly roadmaps
    d. UrthePipeline Software Engineering Processes – Engineering practices, processes and agile methodologies
    e. UrthePipeline Tasks and Work backlog – Work packages and activities for each team
    f. UrthePipeline Technical Notes (Design, Analysis, and Review) – e.g., Processing, Calibration, Architecture, Analytics
    g. UrthePipeline Satellite Test Data – E.g., Theia, Deimos-1, Deimos-2 raw data for testing
    h. UrthePipeline Requirements – Requirements to satisfy UrtheDaily Mission
    i. Marketing Materials – UrthePipeline brochures
    j. Proposals – Proposal responses to CSA, DRDC, customers, etc.
4. All intellectual property (including patents filed, approved or in process).
5. All supplier contracts (cloud compute or storage, network services, etc.) which includes AWS as the primary cloud provider and Microsoft as a research partner for free development use.
6. All automated operational services currently running, including CBERS-4 ortho improvement pipeline and the Deimos-1 raw data processing service which currently serve Geosys
7. All currently existing government contracts which includes the Canadian Space Agency, Digital Supercluster, LookNorth, and DRDC for the years 2020-2022

8. Certain employees of the Sellers (who will be identified to the Sellers in a separate schedule) to be transferred to Bidco on terms and conditions of employment acceptable to Bidco

**Geosys**

All intellectual property (owned or licensed), assets (owned or mid-transaction with Land O'Lakes) and equipment *necessary for operating Geosys as either a standalone business unit or in support of UrtheDaily*, including but not limited to:

1. All software, firmware and hardware already developed or in development
2. All products, trademarks and/or brands that constitute the Geosys product and services offering
3. All intellectual property (including patents filed, approved or in process) and intellectual property licenses (including Interim License from Land O'Lakes) and associated platforms and data archives
4. All legal entities as described in the Land O'Lakes Purchase Agreement
5. All supplier contracts, including, without limitation:
    a. Microsoft Azure – cloud storage and computing services
    b. ASE – cloud masking service
    c. Tavant – offshore development
    d. Deimos Imaging – imagery data
    e. Airbus – imagery data
    f. Iteris – weather data
    g. MeteoFrance – weather data
    h. Office leases – Maple Grove, MN (USA) and Balma, (France)
6. All customer contracts, MOUs, LOIs, sales pipeline, or other commercial agreements
7. Certain employees of the Sellers (who will be identified to the Sellers in a separate schedule) to be transferred to Bidco on terms and conditions of employment acceptable to Bidco

**UrtheDaily**

All intellectual property, assets and equipment necessary for developing and operating the UrtheDaily constellation, including but not limited to:

1. All software, firmware and hardware already developed or in development
2. All products, trademarks and/or brands that constitute the UrtheDaily offering
3. All technical documentation associated with the UrtheDaily program. This includes technical reports describing the UrtheDaily design, technology and the Concept of Operations, Technical Specifications for elements of the system, Analyses Reports, and Analyses Source Files (e.g., spreadsheets) providing technical budgets and performing specific analyses, including:
    a. MRD – Mission Requirements Document
    b. Conops – Mission concept of operations
    c. SRS – System requirements specification
    d. Space Segment RS – Space segment requirements specification
    e. Calibration RS – Camera calibration requirements specification
    f. GS Spec – Ground Segment system requirements specification
    g. Launch Vehicle IRD – Launch Vehicle Interface Requirements Document, between spacecraft and Launch vehicle

   h. FOS RS – Flight Operation System Requirements Specification
   i. Space Segment Description – Space Segment Technical Description
   j. EM Camera Test Description – Description of the EM UrtheDaily Camera that was built and the tests undertaken
   k. Spreadsheets – Coverage Gap Calculator, Onboard Data Rates, Propellant & Delta-V Calculations, Pointing Control Impact on MTF
   l. Analyses Reports – EDS Mission Analysis Report
   m. Informal Technical Notes – CMOSIS CMV Detector family space mission history
   n. Vendor Data – SSTL UrtheDaily Technical Presentation, CMV12000 detector datasheet, GSN Service Provider Proposals
4. All Project Management related documentation related to the UrtheDaily Program that includes plans, schedules and Statements of Work for suppliers that are developing elements of the UrtheDaily system, including:
   a. PMP – Project management plan
   b. SEMP – System engineering management plan
   c. WBS – Work Breakdown Structure
   d. WPDs – Work package descriptions
   e. Master Schedule – Mission master schedule including detailed schedule for Space segment and major activities for WBS
   f. PBS – Product breakdown structure, preliminary
   g. Risk Register – Mission risk register
   h. Charter – UrtheDaily Program Charter
   i. SS SOW – UrtheDaily Space Segment Statement of Work
   j. LV SOW – UrtheDaily Launch Vehicle Statement of Work
   k. GSN RFP – RFP for GSN services which includes key GSN requirements & SOW
5. All supplier proposals and contracts. This includes the SSTL subcontract for the Satellites, Launch Vehicle Subcontract, L1 Calibration Services Contract, Ground Station Network Service (GSN) Contract, Flight Operations System ground segment hardware and AWS Cloud Compute, cloud compute, storage and network services contract.
6. All customer Service Level Agreement (i.e., FPP contracts), MOUs and LOIs, backlog, sales pipeline, or other agreements
7. Certain employees of the Sellers (who will be identified to the Sellers in a separate schedule) to be transferred to Bidco or an affiliate on terms and conditions of employment acceptable to Bidco

# Exhibit "A"

## FORM OF SISP

## Exhibit "A"

## Sale and Investment Solicitation Process Outline

### Introduction

On September 4, 2020, UrtheCast Corp., UrtheCast International Corp., UrtheCast USA Inc., 1185729 B.C. Ltd. and the other petitioner parties set out on Schedule A (collectively, the "**Petitioners**" or "**UrtheCast Group**") to the initial order (the "**Initial Order**") granted by the Supreme Court of British Columbia (the "**Court**"), obtained relief under the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") from the Court that, among other things, commenced the CCAA proceedings (the "**CCAA Proceedings**"), granted an initial stay of proceedings in respect of the Petitioners (the "**Stay**") and appointed Ernst & Young Inc., as monitor (the "**Monitor**").

On September 14, 2020, the Petitioners obtained an amended and restated version of the Initial Order from the Court (the "**Amended and Restated Initial Order**") that, among other things, extended the Stay to October 2, 2020, authorized a limited sales and investment solicitation process for certain camera equipment owned by the Petitioners and authorized an interim debtor-in-possession financing facility from 1262743 B.C. Ltd. (the "**Existing DIP Lender**") providing for borrowings of up to US$1,000,000 (the "**Existing DIP**") and the grant of a priority charge (the "**Existing DIP Lender's Charge")** to the Existing DIP Lender as security for borrowings under the Existing DIP.

On September 21, 2020, the Petitioners obtained a further amended and restated version of the Initial Order from the Court (the "**Second Amended and Restated Initial Order**") that, among other things, authorized an additional interim debtor-in-possession financing from HCP-FVL, LLC, an affiliate of Hale Capital Partners L.P. (the "**Second DIP Lender**") providing for borrowings of up to US $5,000,000 (the "**Second DIP**") pursuant to the DIP Facilities Loan Agreement dated as of September 21, 2020 (the "**Second DIP Agreement**").

On October 2, 2020, the Petitioners obtained an order of the Court (the "**Stay Extension Order**") that, among other things extended the Stay to December 18, 2020.

On October 16, 2020, the Petitioners obtained an order from the Court that amongst other things:

(a) authorized the Petitioners to pursue all avenues of refinancing or sale of its business or property, in whole or part, subject to prior approval of the Court before any material refinancing or sale is concluded;

(b) approved the Sale and Investment Solicitation Process set forth herein (the "**SISP**");

(c) approved an additional interim debtor-in-possession financing facility from an affiliate of Antarctica Infrastructure Partners, LLC (the "**AC DIP Lender**"), providing for borrowings of up to CAD $3,548,000 (the "**Stalking Horse DIP**") and the grant of a priority charge (the "**AC DIP Lender's Charge")** to the AC DIP Lender as security for borrowings under the Stalking Horse DIP, ranking in priority to the Existing DIP Lender's Charge;

(d) approved and accepted for the purpose of conducting a "stalking horse" solicitation in accordance with the SISP procedures set out in this this document (the "**SISP Process**

**Outline**") that certain letter agreement dated October 13, 2020 between the Petitioners and the Stalking Horse Bidder, providing for a potential sale (the "**Stalking Horse Bid**") of the Applicants' UrtheDaily Constellation project and UrthePipeline business (together, the "**Designated Assets**") to 1269336 B.C. Ltd. the Stalking Horse Bidder or a designated affiliate, including the payment of an expense reimbursement (the "**Expense Reimbursement**") by the Petitioners to the Stalking Horse Bidder as contemplated by the Stalking Horse Bid; and

(e) approved the procedures set forth in this SISP Process Outline.

To facilitate an efficient and thorough SISP in the face of UrtheCast's acute liquidity challenges, the Petitioners have:

(a) created a form of non-disclosure agreement ("**NDA**") and established a confidential online data site to facilitate due diligence investigations by Qualified Bidders (defined below) who enter into a NDA with UrtheCast Corp.; and

(b) finalized a list of potential bidders, including (i) parties that have approached the Petitioners or the Monitor indicating an interest in the Opportunity (defined below), (ii) domestic and international strategic and financial parties who UrtheCast Group in consultation with the Monitor, believe could be interested in purchasing all or part of the assets or investing in UrtheCast Group pursuant to the SISP (including, without limitation, any parties with whom were in contact prior to the Initial Order as part of UrtheCast Group's strategic review process) and (iii) any other parties reasonably suggested by a stakeholder as a potential bidder who may be interested in the Opportunity (collectively, "**Known Potential Bidders**").

**Opportunity**

1. The SISP is intended to solicit interest in and opportunities for a sale of or investment in all or part of the assets, property, business operations and undertaking (the "**Opportunity**") of the Petitioners and their subsidiaries (collectively, the "**UrtheCast Group**"). The Opportunity may include one or more of a recapitalization, arrangement or other form of investment in or reorganization of the business and affairs of the UrtheCast Group as a going concern or a sale of all, substantially all or one or more components of UrtheCast Group's assets, including without limitation, the sale of the shares of one or more of the corporations comprising the UrtheCast Group and its business operations (the "**Assets**") as a going concern or otherwise.

2. Except to the extent otherwise set forth in a definitive sale or investment agreement with a successful bidder, any sale of the Assets or investment in UrtheCast Group will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by any member of the UrtheCast Group, the Monitor or any of their respective agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of UrtheCast Group in and to the Assets to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders.

## Timeline

3. The following table sets out the key milestones under the SISP:

| Milestone | Deadline |
|---|---|
| Teaser Letter sent to potential Known Potential Bidders | As soon as practicable and, in any case, not later than October 16, 2020 |
| Phase 1 Bid Deadline | November 6, 2020 |
| Phase 2 Bid Deadline | To be specified in Phase 2 Bid Process Letter, but in any case not later than November 18, 2020 |
| Auction (if required) | November 23, 2020 |

4. In recognition that certain of the UrtheCast Group Assets, including but not limited to the synthetic aperture radar ("**SAR**") and Deimos assets, have already been subject to extensive marketing, UrtheCast Group may, with the consent of the Monitor and in consultation with affected stakeholders, shorten any of the deadlines specified above.

## Solicitation of Interest: Notice of the SISP

5. The SISP will include a notification process and up to two phases of activity for qualified interested bidders ("**Phase 1**" and "**Phase 2**", respectively). As soon as reasonably practicable, but in any event by no later than October 16, 2020:

   (a) UrtheCast Group will cause a notice of the SISP (and such other relevant information which UrtheCast Group, in consultation with the Monitor, considers appropriate) (the "**Notice**") to be published in such publications as UrtheCast Group in consultation with the Monitor, consider appropriate, if any; and

   (b) UrtheCast Group will issue a press release setting out the information contained in the Notice and such other relevant information which UrtheCast Group considers appropriate for dissemination in Canada and major financial centres in the United States.

## Stalking Horse Protections

6. Unless and until the Stalking Horse Bid has been completed or terminated by one of the parties in accordance with its terms, or amended to provide expressly to the contrary, the Stalking Horse Bidder will be afforded complete and timely access to (a) all confidential information regarding the Opportunity that is shared with any Potential Bidder (defined below), (b) the Bid Process Letter (defined below), and (c)a bi-weekly status update from the Monitor regarding the status of the SISP generally, including an update on whether there are any Qualified Bidders (defined below), Qualified Bids (defined below) received from Phase 2 Qualified Bidders (defined below), Competing Bids (defined below) and/or Compliant Competing Bid (as defined below), however this update will not provide the Stalking Horse Bidder any confidential information about these bidders or the terms of their bids if they include, in whole or in part, the Designated Assets (defined below) unless

and until a Successful Bidder (defined below) is determined for the Designated Assets and the SISP is proceeding to the Auction (defined below). For certainty, nothing is this SISP Process Outline is intended to derogate from any contractual rights of the Stalking Horse Bidder in the Stalking Horse Bid (including in any definitive agreement that may be entered into in respect of the Stalking Horse Bid), including the Stalking Horse Bidder's right to participate in the Auction SISP process, to be paid a break fee and to have certain of its expenses reimbursed.

**PHASE 1: NON-BINDING LOIs**

**Phase 1 Qualified Bidders**

7. Any Known Potential Bidder or other third party who contacts any of the Petitioners or Monitor to express interest in participating in the SISP (each, a "**Potential Bidder**") must provide an executed NDA to the Monitor and provide a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder.

8. A Potential Bidder (who has delivered the executed NDA and letter as set out above) will be deemed a "**Phase 1 Qualified Bidder**" only if UrtheCast Group in its reasonable business judgment and in consultation with the Monitor, determines that such Potential Bidder is likely, based on the availability of financing, experience and other considerations, to be able to timely consummate a sale or investment pursuant to the SISP.

9. For certainty, the Stalking Horse Bidder will be deemed a Phase 1 Qualified Bidder for the purposes of the SISP and, unless terminated by the Stalking Horse Bidder or UrtheCast Corp. in accordance with its terms, the Stalking Horse Bid will be deemed a Qualified LOI and the Stalking Horse Bidder will not be required to submit any other bid during Phase 1 of the SISP.

10. At any time during Phase 1 of the SISP, UrtheCast Group may, in their reasonable business judgment and after consultation with and the consent of the Monitor, eliminate a Phase 1 Qualified Bidder (other than the Stalking Horse Bidder) from the SISP, in which case such bidder will be eliminated from the SISP and will no longer be a "Phase 1 Qualified Bidder" for the purposes of the SISP.

11. UrtheCast Group, in consultation with the Monitor, reserves the right to limit any Phase 1 Qualified Bidder's (other than the Stalking Horse Bidder's) access to any confidential information (including any information in the data room) and to customers and suppliers of UrtheCast Group, where, in UrtheCast Group's opinion after consultation with the Monitor, such access could negatively impact the SISP, the ability to maintain the confidentiality of the confidential information, the UrtheCast Group or the Assets.

12. Potential Bidders must rely solely on their own independent review, investigation and/or inspection of all information of the UrtheCast Group and the Assets in connection with their participation in the SISP and any transaction they enter into with UrtheCast Group.

**Non-Binding Letters of Intent from Qualified Bidders**

13. A Phase 1 Qualified Bidder (other than the Stalking Horse Bidder) that wishes to pursue the Opportunity further must deliver a non-binding letter of intent (an "**LOI**") to the Monitor

and UrtheCast Group at the addresses specified in Schedule "1" attached hereto (including by email or fax transmission), so as to be received by them not later than 5:00 PM (Pacific Time) on or before November 6, 2020, or such other date as the Monitor may advise in accordance with paragraph 4(the "**Phase 1 Bid Deadline**").

14. Subject to paragraph 13, an LOI so submitted will be considered a qualified LOI (a "**Qualified LOI**") only if:

(a) it is submitted on or before the Phase 1 Bid Deadline by a Phase 1 Qualified Bidder;

(b) it contains an indication of whether the Phase 1 Qualified Bidder is proposing:

(i) to acquire all, substantially all or a portion of the Assets (a "**Sale Proposal**"), or

(ii) a recapitalization, arrangement or other form of investment in or reorganization of the UrtheCast Group (an "**Investment Proposal**");

(c) in the case of a Sale Proposal (other than the Stalking Horse Bid), it identifies or contains the following:

(i) the purchase price or price range in Canadian dollars, including details of any liabilities to be assumed by the Phase 1 Qualified Bidder and key assumptions supporting the valuation;

(ii) a description of the Assets that is expected to be subject to the transaction and any of the Assets expected to be excluded;

(iii) a description of the Phase 1 Qualified Bidder's proposed treatment of material agreements and employees (for example, anticipated employment offers);

(iv) a specific indication of the financial capability of the Phase 1 Qualified Bidder and the expected structure and financing of the transaction (including, but not limited to, the sources of financing to fund the acquisition, preliminary evidence of the availability of such financing or such other form of financial disclosure and credit-quality support or enhancement that will allow UrtheCast Group and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Phase 1 Qualified Bidder's financial or other capabilities to consummate the transaction and to perform all obligations to be assumed in such transaction; and the steps necessary and associated timing to obtain financing and any related contingencies, as applicable);

(v) a description of the conditions and approvals required for the Phase 1 Qualified Bidder to be in a position to submit a final and binding offer, including any anticipated corporate, securityholder or other internal approvals and any anticipated impediments for obtaining such approvals;

(vi) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;

(vii) a description of all conditions to closing that the Phase 1 Qualified Bidder expects to include in its final and binding offer, including without limitation any regulatory approvals and any form of agreement required from a government body, stakeholder or other third party ("**Third Party Agreement**") and an outline of the principal terms thereof; and

(viii) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;

(d) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment;

(ii) the aggregate amount of the equity and/or debt investment to be made in the UrtheCast Group in Canadian dollars;

(iii) key assumptions supporting the Phase 1 Qualified Bidders' valuation;

(iv) a description of the Phase 1 Qualified Bidder's proposed treatment of any liabilities, material contracts and employees;

(v) the underlying assumptions regarding the pro forma capital structure (including the form and amount of anticipated equity and/or debt levels, debt service fees, interest or dividend rates, amortization, voting rights or other protective provisions (as applicable), redemption, prepayment or repayment attributes and any other material attributes of the investment);

(vi) a specific indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the transaction (including, but not limited to, the sources of capital to fund the investment, preliminary evidence of the availability of such capital or such other form of financial disclosure and credit-quality support or enhancement that will allow UrtheCast Group and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Phase 1 Qualified Bidder's financial or other capabilities to consummate the transaction, steps necessary and associated timing to obtain such capital and any related contingencies, as applicable, and a sources and uses analysis);

(vii) a description of the conditions and approvals required for the Phase 1 Qualified Bidder to be in a position to submit a final and binding offer, including any anticipated corporate, securityholder or other internal approvals and any anticipated impediments for obtaining such approvals;

(viii) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;

(ix) a description of all conditions to closing that the Phase 1 Qualified Bidder expects to include in its final and binding offer, including without limitation any regulatory approvals and any Third Party Agreement required and an outline of the principal terms thereof; and

(x) any other terms or conditions of the Investment Proposal which the Phase 1 Qualified Bidder believes are material to the transaction;

(e) in the case of

(i) a Sale Proposal for Assets that include any of the Designated Assets, or

(ii) an Investment Proposal that contemplates taking any security interest in any of the Designated Assets or that could reasonably be expected to take longer to complete than the sale of the Designated Assets to the Stalking Horse Bidder pursuant to the Stalking Horse Bid (any Sale Proposal or Investment Proposal referred to in this subsection (e) being referred to as a "**Conflicting Bid**"),

such Conflicting Bid provides for payment of the expense reimbursement and break fee (it being understood and agreed that only the Stalking Horse Bidder will be entitled to any bid protections including expense reimbursement and a break fee) and provides that, at a minimum and on closing of the Conflicting Bid, cash proceeds will be paid in an amount which is at least equal to the sum of: (A) the amount of cash payable under the Stalking Horse Bid, (B) the amount of obligations being credit bid and debt assumed (exclusive of cure costs) in the Stalking Horse Bid, (C) the amount of the Expense Reimbursement, (D) the amount of any break fee payable under the Stalking Horse Bidder, (E) the principal and any accrued and unpaid interest owing under the Stalking Horse Bid DIP and the Existing DIP, plus (F) a minimum overbid amount of CAD $250,000 (the sum of such amounts in clauses (A) through (F) of this paragraph 14(e) being referred to as the "**Minimum Purchase Price**") and provides that, upon closing of the Conflicting Bid, the Stalking Horse DIP will be repaid in full and all amounts owing to the Stalking Horse Bidder (including the Stalking Horse's reimbursable expenses and break fee) will be paid at closing (a Conflicting Bid that satisfies the Minimum Purchase Price and other requirements of this clause being referred to as a "**Compliant Conflicting Bid**"); and

(f) in the case of either a Sale Proposal or an Investment Proposal, it contains such other information as reasonably requested by UrtheCast Group in consultation with the Monitor.

15. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

**Preliminary Assessment of Phase 1 Bids and Subsequent Process**

16. Following the Phase 1 Bid Deadline, UrtheCast Group, in consultation with the Monitor, will assess the Qualified LOIs. If it is determined by UrtheCast Group in consultation with the Monitor, that a Phase 1 Qualified Bidder that has submitted a Qualified LOI: (i) has a

bona fide interest in completing a Sale Proposal or Investment Proposal (as the case may be); and (ii) has the financial capability (based on availability of financing, experience and other considerations) to consummate such a transaction based on the financial information provided, then such Phase 1 Qualified Bidder will be deemed a "**Phase 2 Qualified Bidder**", provided that UrtheCast Group may, in their reasonable business judgment and after consultation with and with the approval of the Monitor, limit the number of Phase 2 Qualified Bidders (and thereby eliminate some bidders from the process) taking into account the factors identified in paragraph 18 below and any material adverse impact on the operations and performance of UrtheCast Group. Only Phase 2 Qualified Bidders shall be permitted to proceed to Phase 2 of the SISP.

17. For certainty, the Stalking Horse Bidder will be deemed a Phase 2 Qualified Bidder for the purposes of the SISP and, unless terminated by the Stalking Horse Bidder or UrtheCast Corp. in accordance with its terms, the Stalking Horse Bid will be deemed a Qualified Bid and the Stalking Horse Bidder will not be required to submit any other bid during Phase 2 of the SISP.

18. As part of the assessment of Qualified LOIs and the determination of the process subsequent thereto, UrtheCast Group, in consultation with the Monitor and with the approval of the Monitor, shall determine the process and timing to be followed in pursuing Qualified LOIs based on such factors and circumstances as they consider appropriate in the circumstances including, but not limited to: (i) the number of Qualified LOIs received, (ii) the extent to which the Qualified LOIs relate to the same Assets or involve Investment Proposals predicated on certain Assets, (iii) the scope of the Assets to which any Qualified LOIs may relate, and (iv) whether to proceed by way of sealed bid or auction (with or without a stalking horse bidder) with respect to some or all of the Assets (other than the Designated Assets). With respect to the Designated Assets, an auction shall be held in accordance with the auction process set out below (the "Auction") where UrtheCast Group in consultation with the Monitor, determines that one or more, or a combination thereof, of the Qualified Bids constitutes a Superior Bid (as defined below).

19. Upon the determination by UrtheCast Group, in consultation with the Monitor and with the approval of the Monitor, of the manner in which to proceed to Phase 2 of the SISP, UrtheCast Group, in consultation with and with the approval of the Monitor, will prepare a bid process letter for Phase 2 (the "**Bid Process Letter**"), and the Bid Process Letter will be (i) sent by the Monitor to all Phase 2 Qualified Bidders, and (ii) posted by the Monitor on the website the Monitor maintains in respect of this CCAA proceeding.

20. Notwithstanding the process and deadlines outlined above with respect to Phase 1 of the SISP and the process to supplement Phase 2 by way of the Bid Process Letter:

    (a) UrtheCast Group may, at any time bring a motion to seek approval of a stalking horse agreement in respect of some or all of the assets (excluding the Designated Assets) or the UrtheCast Group and related bid procedures in respect of such Assets or to establish further or other procedures for Phase 2; and

    (b) If no Compliant Conflicting Bid is received by UrtheCast Group on or before the Phase 1 Bid Deadline, the Petitioners will promptly bring an application seeking the granting of an order by the Court authorizing the Petitioners to proceed with the sale of the Designated Assets to the Stalking Horse Bidder in accordance with the terms and subject conditions of the Stalking Horse Bid.

## PHASE 2: FORMAL OFFERS AND SELECTION OF SUCCESSFUL BIDDER

21. Paragraphs 22 to 32 below and the conduct of Phase 2 are subject to paragraphs 18, 19, and 20 and any adjustments made to Phase 2 in accordance with the Bid Process Letter and any further Court order regarding the SISP.

### Due Diligence

22. UrtheCast Group in consultation with the Monitor, shall in their reasonable business judgment and subject to competitive and other business considerations, afford each Phase 2 Qualified Bidder (which shall be deemed to include the Stalking Horse Bidder, if the Stalking Horse Bid has not been completed in accordance with paragraph 20(b) or terminated by one of the parties in accordance with its terms) such access to due diligence materials and information relating to the Assets and UrtheCast Group as they deem appropriate. Due diligence access may include management presentations, on-site inspections, and other matters which a Phase 2 Qualified Bidder may reasonably request and as to which UrtheCast Group in their reasonable business judgment and after consulting with the Monitor, may agree. The UrtheCast Group will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Phase 2 Qualified Bidders and the manner in which such requests must be communicated. Neither the UrtheCast Group nor the Monitor will be obligated to furnish any information relating to the Assets or UrtheCast Group to any person other than to Phase 2 Qualified Bidders. Further and for the avoidance of doubt, selected due diligence materials may be withheld from certain Phase 2 Qualified Bidders if UrtheCast Group in consultation with the Monitor, determine such information to represent proprietary or sensitive competitive information.

### Formal Binding Offers

23. Phase 2 Qualified Bidders (other than the Stalking Horse Bidder, which will be deemed to have satisfied this paragraph 23 by delivering a definitive agreement of purchase and sale to effectuate the transactions contemplated by the Stalking Horse Bid, as the same may be amended by the parties thereto) that wish to make a formal offer to purchase or make an investment in UrtheCast Group or its Assets shall submit a binding offer that complies with all of the following requirements prior to the date set out the Bid Process Letter (the "**Phase 2 Bid Deadline**"):

    (a) the bid shall comply with all of the requirements set forth in respect of Phase 1 Qualified LOIs, including without limitation paragraph 14(e);

    (b) the bid (either individually or in combination with other bids that make up one bid) is an offer to purchase or make an investment in some or all of the Assets or UrtheCast Group and is consistent with any necessary terms and conditions communicated to Phase 2 Qualified Bidders;

    (c) the bid includes a letter stating that the Phase 2 Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder (as defined below), provided that if such Phase 2 Qualified Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the transaction with the Successful Bidder;

(d) the bid includes duly authorized and executed transaction agreements, including the purchase price, investment amount and any other key economic terms expressed in Canadian dollars (the "**Purchase Price**"), together with all exhibits and schedules thereto, all applicable ancillary agreements with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such agreements), and proposed order to approve the sale by the Court;

(e) the bid includes written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed transaction, that will allow UrtheCast Group and the Monitor to make a determination as to the Phase 2 Qualified Bidder's financial and other capabilities to consummate the proposed transaction;

(f) the bid is not conditioned on (i) the outcome of unperformed due diligence by the Phase 2 Qualified Bidder, apart from, to the extent applicable, to the disclosure of due diligence materials that represent proprietary or sensitive competitive information which was withheld in Phase 2 from the Phase 2 Qualified Bidder and/or (ii) obtaining financing;

(g) the bid fully discloses the identity of each entity that will be entering into the transaction or the financing (including through the issuance of debt in connection with such bid), or that is participating or benefiting from such bid, and such disclosure shall include, without limitation: (i) in the case of a Phase 2 Qualified Bidder formed for the purposes of entering into the proposed transaction, the identity of each of the actual or proposed direct or indirect equity holders of such Phase 2 Qualified Bidder and the terms and participation percentage of such equity holder's interest in such bid; and (ii) the identity of each entity that has or will receive a benefit from such bid from or through the Phase 2 Qualified Bidder or any of its equity holders and the terms of such benefit;

(h) the bid includes a commitment by the Phase 2 Qualified Bidder to provide a non-refundable deposit in the amount of not less than 10% of the purchase price offered upon the Phase 2 Qualified Bidder being selected as the Successful Bidder and in any event, prior to service of the materials for the Sale Approval Motion (as defined below);

(i) the bid includes acknowledgements and representations of the Phase 2 Qualified Bidder that: (i) the transaction is on an "as is, where is" basis; (ii) it has had an opportunity to conduct any and all due diligence regarding the Assets and UrtheCast Group prior to making its offer (apart from, to the extent applicable, the disclosure of due diligence materials that represent proprietary or sensitive competitive information which were withheld in Phase 2 from the Phase 2 Qualified Bidder); (iii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; and (iv) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Assets, or UrtheCast Group or the completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by UrtheCast Group;

(j) the bid includes evidence, in form and substance reasonably satisfactory to UrtheCast Group, in consultation with the Monitor, of authorization and approval from the Phase 2 Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction agreement(s) submitted by the Phase 2 Qualified Bidder;

(k) the bid contains other information required by UrtheCast Group or the Monitor including, without limitation, such additional information as may be required in the event Phase 2 is supplemented in accordance with paragraph 19 to contemplate that an auction of certain Assets be conducted; and

(l) the bid is received by the Phase 2 Bid Deadline.

24. Following the Phase 2 Bid Deadline, UrtheCast Group in consultation with the Monitor, will assess the Phase 2 bids received. UrtheCast Group, in consultation with the Monitor, will designate the most competitive bids that comply with the foregoing requirements to be "**Qualified Bids**". No Phase 2 bids received shall be deemed not to be Qualified Bids unless the Monitor so approves. Only Phase 2 Qualified Bidders whose bids have been designated as Qualified Bids are eligible to become the Successful Bidder(s).

25. The Monitor shall notify each Phase 2 Qualified Bidder in writing as to whether its bid constituted a Qualified Bid within three (3) business days of the Phase 2 Bid Deadline, or at such later time as UrtheCast Group in consultation with the Monitor, deem appropriate.

26. UrtheCast Group may, in consultation with the Monitor, aggregate separate bids from unaffiliated Phase 2 Qualified Bidders (if, and only if, such aggregation is reasonably practicable to effect a transaction without overlap) to create one "Qualified Bid".

**Evaluation of Competing Bids**

27. A Qualified Bid will be evaluated based upon several factors, including, without limitation, items such as the Purchase Price and the net value provided by such bid, the claims likely to be created by such bid in relation to other bids, the identity, circumstances and ability of the Phase 2 Qualified Bidder to successfully complete such transactions, the proposed transaction documents, the effects of the bid on the stakeholders of UrtheCast Group, factors affecting the speed, certainty and value of the transaction (including any regulatory approvals or third party contractual arrangements required to close the transactions), the Assets included or excluded from the bid, any related restructuring costs, and the likelihood and timing of consummating such transactions, each as determined by UrtheCast Group and the Monitor.

28. A Qualified Bid will be deemed a Superior Bid where a credible, unconditional and financially viable third party offer, or combination of offers for (A) the acquisition of all, substantially all or certain of the Designated Assets; or (B) an investment, restructuring, recapitalization, refinancing or other reorganization of the UrtheCast Group, the terms of which offer are no less favourable and no more burdensome or conditional than the terms contained in the Stalking Horse Asset Purchase Agreement, and which at a minimum, alone, or in a combination with other offers, includes:

(a) a payment in cash in excess of CAD $250,000 of the aggregate of the total consideration payable pursuant to the Stalking Horse APA, being CAD $69.3 million;

(b) a payment in cash in the amount necessary to fully pay the Stalking Horse bidder's break fee and expense reimbursement together with any CCAA priority amounts owing, including any interim financing obligations as at the closing of such transaction; and

(c) a payment in cash of all priority charges and an assumption of liabilities to satisfy and payment of all cure costs required to the closing of such transaction.

**Selection of Successful Bid**

29. UrtheCast Group, in consultation with the Monitor, (a) will review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated between UrtheCast Group, in consultation with the Monitor, and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations, and (b) identify the highest or otherwise best bid (the "**Successful Bid**"), and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") for any particular Assets or UrtheCast Group, in whole or part. UrtheCast's determination of any Successful Bid, with the assistance of the Monitor, shall be subject to approval by the Court and in the case of the Designated Assets, where the Successful Bid constitutes a Superior Bid, the UrtheCast Group will proceed to an auction (the "Auction").

30. For certainty, notwithstanding the process and deadlines outlined above with respect to Phase 2 of the SISP, if no binding offer for a Compliant Conflicting Bid is received by UrtheCast Group during Phase 2 on or before the Phase 2 Bid Deadline, then the Petitioners will promptly bring an application seeking the granting of an order by the Court authorizing the Petitioners to proceed with the sale of the Designated Assets to the Stalking Horse Bidder in accordance with the terms and subject conditions of the Stalking Horse Bid. UrtheCast Group shall have no obligation to enter into a Successful Bid (excluding the Stalking Horse Bid, if applicable), and it reserves the right, after consultation with the Monitor to reject any or all Phase 2 Qualified Bids.

**Auction**

31. The Auction shall run in accordance with the following procedures, which may be modified by the UrtheCast Group in its discretion, after consultation with the Monitor:

(a) prior to the Auction Monitor shall have identified the Superior Offer and all bidding at the Auction shall be irrevocably made on the terms of the Superior Offer, except for price/investment amount and certain other identified business terms;

(b) the Monitor will provide to all Qualified Bidders the material terms and conditions of the Superior Offer (the "**Starting Bid**") and each Qualified Bidder must inform the UrtheCast Group whether it intends to participate in the Auction (the parties who so inform the UrtheCast Group, that they intend to participate are the "**Auction Bidders**");

(c) Only representatives of the Auction Bidders, the UrtheCast Group, the Monitor, the DIP Lenders and such other persons permitted by the UrtheCast Group and the Monitor (and the advisors to each of the foregoing) are entitled to attend the Auction;

(d) At the commencement of the Auction, each Auction Bidder shall be required to confirm that it has not engaged in any collusion with any other Auction Bidder to detrimentally affect the price for any sale;

(e) Only the Auction Bidders will be entitled to make any Subsequent Bids (as defined herein);

(f) All Subsequent Bids presented during the auction shall be made and received in one room on an open basis. All Auction Bidders will be entitled to be present for all Subsequent Bids at the Auction with the understanding that the true identity of each Auction Bidder at the Auction will be fully disclosed to all other Auction Bidders at the Auction and that all material terms of each Subsequent Bid will be fully disclosed to all other Auction Bidders throughout the entire Auction;

(g) All Auction Bidders must have at least one individual representative with authority to bind such Auction Bidder present in person at the Auction;

(h) The UrtheCast Group, after consultation with the Monitor, may employ and announce at the auction additional procedural rules that are reasonable under the circumstances, (e.g. the amount of time allotted to make Subsequent Bids, requirement to bid in each round, and the ability of multiple Auction Bidders to combine to present a single bid) for conducting the auction, provided that such rules are (i) not inconsistent with any applicable law, and (ii) disclosed to each Auction Bidder at the auction;

(i) Bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by an Auction Bidder (a "**Subsequent Bid**") that the UrtheCast Group determines, after consultation with the Monitor, is (A) for the first round, a higher or otherwise better offer than the Starting Bid, and (B) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (as defined herein); in each case by at least the Minimum Incremental Overbid. Each bid at the auction shall provide net value to the UrtheCast Group of at least CAD $100,000 (the "**Minimum Incremental Overbid**") over the Starting Bid or the Leading Bid (as defined herein), as the case may be; provided however that the UrtheCast Group, after consultation with the Monitor, shall retain the right to modify the incremental requirements at the Auction and provided further that the UrtheCast Group, in determining the net value of an incremental bid, shall not be limited to evaluating the incremental dollar value of such bid and may consider other factors. After each Subsequent Bid, the UrtheCast Group shall, after consultation with the Monitor, announce whether such bid (including the value and material terms thereof) is higher or otherwise better than the prior bid (the "**Leading Bid**"). A round of bidding will conclude after each Auction Bidder has the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid;

(j) If, in any round of bidding, no new Subsequent Bid is made that becomes a Leading Bid, the Auction shall be closed;

(k) The Auction shall be closed by midnight on the day of the Auction unless extended for a further 24 hour period by the UrtheCast Group with the approval of the Monitor;

(l) No bids (from Auction Bidders or otherwise) shall be considered after the conclusion of the Auction; and

(m) At the close of the Auction, the Monitor shall identify the winning bid (the "**Auction Successful Bid**"). At the conclusion of the Auction, the Monitor will notify the other bidders of the identities of the bidders of the Auction Successful Bid. (n) following conclusion of the Stalking Horse Scenario Auction, the UrtheCast Group, with the assistance of the Monitor, may finalize a definitive agreement or agreements in respect of the Stalking Horse Auction Successful Bid and the Stalking Horse Auction Backup Bid, respectively, if any, conditional upon approval of the Court.

32. All other bids received at the Auction shall be deemed rejected on the earlier of: (i) the date of closing of the Auction Successful Bid, and (ii) confirmation from the Monitor that the bid has been rejected.

**Sale Approval Motion Hearing**

33. At the hearing of the motion to approve any transaction with a Successful Bidder (which would include the Stalking Horse Bidder in the circumstances contemplated by paragraphs 20(b) or 29 (the "**Sale Approval Motion**"), UrtheCast Group shall seek, among other things, approval from the Court to consummate any Successful Bid. All the Phase 2 Qualified Bids other than the Successful Bid, if any, shall be deemed rejected by UrtheCast Group on and as of the date of approval of the Successful Bid by the Court.

**Confidentiality, Stakeholder/Bidder Communication and Access to Information**

34. All discussions regarding an LOI, Sale Proposal or Investment Proposal must be directed through the Monitor. Under no circumstances should the management of the UrtheCast Group or any stakeholder of UrtheCast Group be contacted directly without the prior consent of the Monitor. Any such unauthorized contact or communication could result in exclusion of the interested party from the SISP process.

35. Participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Phase 1 Qualified Bidders, LOIs, Phase 2 Qualified Bidders, Phase 2 Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between UrtheCast Group, the Monitor and such other bidders or Potential Bidders in connection with the SISP, except to the extent UrtheCast Group with the approval of the Monitor and consent of the applicable participants, are seeking to combine separate bids from Phase 1 Qualified Bidders or Phase 2 Qualified Bidders.

**Supervision of the SISP**

36. The participation of UrtheCast Group in the SISP will be directed by UrtheCast Corp.'s board of directors.

37. The Monitor will participate in the conduct of the SISP in the manner set out in this SISP Process Outline and the Initial Order and is entitled to receive all information in relation to the SISP.

38. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between UrtheCast Group and any Phase 1 Qualified Bidder, any Phase 2 Qualified Bidder (other than the Stalking Horse Bidder) or any other party, other than as specifically set forth in a definitive agreement that may be signed with UrtheCast Group.

39. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any LOI, Phase 2 bid, due diligence activities, and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

40. UrtheCast Group shall have the right to modify the SISP (including, without limitation, pursuant to the Bid Process Letter) provided always that the outside date for closing a transaction of purchase and sale of the Designated Assets will only be amended with the written consent of the Stalking Horse Bidder) with the prior written approval of the Monitor if, in their reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP; provided that the Service List in this CCAA proceeding shall be advised of any substantive modification to the procedures set forth herein.

## Schedule "1"

## Address for Submitting LOIs and Phase 2 Bids

**Bennett Jones LLP**
666 Burrard St
Suite #2500
Vancouver, BC V6C 2X8

Fax: •
Attn : •

**Ernst & Young Inc.**
700 West Georgia Street
Vancouver, BC V7Y 1C7

Fax: •
Attn : Mr. Philippe Mendelson, Vice President

## Exhibit "B"

## AC INTERIM FINANCING TERM SHEET

**DIP FACILITY LOAN AGREEMENT**
**DATED AS OF OCTOBER 1, 2020**

Summary of Terms and Conditions ("**Term Sheet**")
CAD $3,548,000 Secured Super-Priority Debtor-in-Possession Credit Facilities

This document is highly confidential and neither this document nor the identity of the lender listed on the signature page hereof ("**Lender**") shall be disclosed to any person other than UrtheCast Corp., its subsidiaries (collectively "**UrtheCast**") or its financing advisors (insofar as such advisors have been informed of, and agree to abide by, the confidentiality of this Term Sheet), and as required to be disclosed in connection with any court proceeding contemplated herein, without the prior written consent of Lender. Term Sheet is subject to the terms of the Confidentiality Agreement dated June 24, 2020 by and among SIGA II, LLC (an affiliate of Antarctica Capital LLC) and UrtheCast.

| | |
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| **Borrower**: | UrtheCast Corp. (an Ontario, Canada corporation), 1185729 B.C. Ltd. (a British Columbia, Canada corporation), 1185781 B.C. Ltd. (a British Columbia, Canada corporation), UrtheCast International Corp. (a Canadian corporation), Geosys Holding, ULC (was Geosys Technology Holding LLC) (a British Columbia, Canada corporation) and Urthedaily Corp. (a British Columbia, Canada corporation) (collectively, the "**CAD Borrower**"), and Geosys Europe Sarl (a Switzerland corporation), UrtheCast USA Inc. (a Delaware, USA corporation), Geosys-Int'l, Inc. (a USA corporation) and Geosys S.A.S. (a France corporation) (collectively with the CAD Borrower, the "**Borrower**") during the pendency of the CCAA (as defined below) proceeding (the "**CCAA Proceeding**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") commenced pursuant to an initial order (the "**Initial Order**") issued on September 4, 2020 by the Supreme Court of British Columbia, Vancouver Registry Action No. VLC-S-S208894 (the "**CCAA Court**"), as modified by the amended and restated initial order of the CCAA Court dated September 14, 2020 (the "**ARIO**") |
| **Guarantors**: | Deimos Imaging S.L.U., DOT Imaging S.L.U., Geosys Australia Pty, Geosys do Brasil Sistemas de Informacao Agricolas Ltda., Urthecast Holdings (Malta) Limited, UrtheCast Imaging S.L.U., UrtheCast Investments (Malta) Limited and each of the existing and future affiliates and direct and indirect subsidiaries of the Borrower deemed necessary by the Lender in its sole discretion (collectively, the "**Guarantors**" and, together with the Borrower, the "**Debtors**" or "**CCAA Debtors**") shall provide unconditional secured (subject to applicable law) guarantees of payment and not of collection in form satisfactory to the Lender. |
| **Lender**: | An affiliate of Antarctica Infrastructure Partners LLC |
| **DIP Facility**: | A facility consisting of a CAD $3,548,000 term loan facility (the "**DIP Facility**"). Subject to the conditions set forth below and the final loan documents, the Borrower may draw down funds under the DIP Facility in tranches consisting of: (i) an initial tranche in the amount of CAD $1,267,000 (the "**Initial Tranche**") on November 6, 2020; (ii) a second tranche in the amount of CAD $733,000 (the "**Second** |

| | |
|---|---|
| | **Tranche**"); and (iii) a third tranche in the amount of CAD $1,548,000 (the "**Third Tranche**") provided that no advances (an "**Advance**") shall be made if there is an Event of Default hereunder, or the Borrower is in default of any term of the DIP Facility and such default is continuing. |
| **Use of Proceeds**: | The proceeds of the DIP Facility shall only be advanced to and used by the CCAA Debtors in accordance with the Agreed Weekly Budgets (as defined below) and Third DIP Order (as defined below), each of which shall be in form and substance satisfactory to the Lender in its sole discretion. The CCAA Debtors shall not utilize the DIP Facility for any other purpose without the prior written approval of the Lender (in its sole discretion). Except as set out in the Agreed Weekly Budget, the DIP Facility may not be used to pay any outstanding principal amount, accrued and unpaid interest, exit fees, expenses or any other amounts owning in respect of any existing debtor-in-possession financing, with the exception that it is agreed, that the Second Tranche shall be used to pay any amounts outstanding pursuant to the interim debtor-in-possession financing facility from 1262743 B.C. Ltd. The DIP Facility may not be used in connection with any investigation (including discovery proceedings), initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation against or adverse to the Lender or its affiliates or any of their interests (whether direct or indirect). |
| **Direct Advance Condition**: | The Borrower shall not use, advance or flow any funds from the DIP Facility to any CCAA Debtor located outside of Canada (a "**Foreign CCAA Debtor**"), including without limitation, the United States, France, Spain or Switzerland unless and until the Lender is satisfied that the Lender has a first priority lien and charge in any such foreign jurisdiction in form and substance (and/or court order) satisfactory to the Lender in its sole discretion (the "**Direct Advance Condition**"). |
| **Closing Date**: | The closing date for the DIP Facility shall be November 6, 2020 or such later date as may be agreed to by the Lender in its sole discretion (the "**Closing Date**"). |
| **Evidence of Indebtedness**: | The Lender shall open and maintain accounts and records evidencing advances and repayments under the DIP Facility and all other amounts owing from time to time hereunder. The Lender's accounts and records constitute, in the absence of manifest error, *prima facie* evidence of the indebtedness of the CCAA Debtors to the Lender pursuant to the DIP Facility. |
| **Currency**: | Unless otherwise stated, all monetary denominations shall be in lawful currency of the Canada. |
| **Interest Rate**: | All amounts owing hereunder on account of the principal, overdue interest, costs, fees and expenses shall bear interest at the rate of 17.5% per annum payable in cash monthly in arrears on the last day of each calendar month. To the extent permitted by applicable law, upon the occurrence of an Event of Default (as defined below), interest shall accrue and be calculated and compounded at a rate of 20% per annum. |

**Standby Fee:** The Borrower shall pay the Lender a standby fee of 2% per annum on any undrawn portion of the DIP Facility. Such fee shall be calculated daily and payable monthly in arrears on the last day of each calendar month.

**Commitment Fee:** The Borrower shall pay to the Lender a non-refundable pro-rated commitment fee of 3% of each amount advanced under the DIP Facility, which initial pro-rated fee shall be payable on the Closing Date.

**Other Costs and Expenses:** The Borrower shall pay, monthly after the Closing Date, all costs and expenses of the Lender for all out-of-pocket due diligence and travel costs and all reasonable fees, costs, expenses and disbursements of outside counsel, appraisers, field auditors, and any financial consultant in connection with the drafting, negotiating and administration of the DIP Facility, including any costs and expenses incurred by the Lender in connection with the enforcement of its security, any of the rights and remedies available hereunder or under any order of the CCAA Court or under the Guarantees or any related security.

**Repayment and Maturity Date:** All amounts owing to the Lender under the DIP Facility shall be due and payable on the earliest of the occurrence of the following:

(i) January 15, 2021;

(ii) the implementation of a plan of compromise or arrangement within the CCAA proceedings (a "**Plan**") which has been approved by the requisite majorities of the applicable CCAA Debtors' creditors and by order entered by the CCAA court (the "**Sanction Order**") and by the Lender;

(iii) conversion of the CCAA proceeding into a proceeding under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**")

(iv) on the sale of any of the assets of any CCAA Debtor outside of the ordinary course of business which is not consented to by the Lender in writing (collectively, the "**Approval Conditions**")), including any sale of assets pursuant to a sales and investment solicitation process are for a value in excess of CAD $50,000 without first having received approval from the CCAA Court (unless the Lender agrees otherwise in its sole discretion); and

(v) an Event of Default (as defined below) in respect of which the Lender has elected in its sole discretion to accelerate all amounts owing and demand repayment;

(such earliest date being the "**Maturity Date**").

The Lender's commitment to make further advances under the DIP Facility shall expire on the Maturity Date and all amounts outstanding under the DIP Facility shall be permanently and indefeasibly repaid in full and in cash no later than the Maturity Date without the Lender

being required to make demand upon the Borrower or other parties or to give notice that the DIP Facility has expired and that the obligations thereunder are due and payable. The Sanction Order shall not discharge or otherwise affect in any way any of the obligations of the CCAA Debtors to the Lender under the DIP Facility other than after the permanent and indefeasible payment in cash to the Lender of all obligations under the DIP Facility on or before the date that the Plan is implemented.

**Mandatory Prepayments and Commitment Reduction:** Unless the Lender consents in writing otherwise, the Borrower is required to prepay amounts outstanding under the DIP Facility:

(i) upon the receipt of net cash proceeds from the issuance by any of the CCAA Debtors of any indebtedness for borrowed money;

(ii) upon receipt of insurance proceeds or expropriation awards by any of the CCAA Debtors;

(iii) upon receipt of net cash proceeds from the sale of any of the Collateral (as defined below) except for sales of inventory in the ordinary course of business by any of the CCAA Debtors;

(iv) any receipt by any of the CCAA Debtors of cash proceeds outside of the ordinary course that is not expressly contemplated in the Agreed Weekly Budget (except for proceeds from new customer contracts); and

(v) upon receipt of net cash proceeds from the sale or issuance of any equity interests (as such term is defined or used in any applicable securities laws and legislation) in any of the CCAA Debtors or the receipt of capital contributions by any of the CCAA Debtors.

Any prepayment required hereunder shall be a permanent reduction of the DIP Facility and may not be re-borrowed without the prior written consent of the Lender in its sole discretion.

**Optional Prepayment:** The DIP Facility may be repaid at any time, in whole or in part, prior to the Maturity Date on not less than two (2) business days' notice to the Lender.

**Lender Account:** All payments to the Lender, in addition to payments made to the Lender under the cash management arrangements, shall be made by wire transfer to the account specified in writing to the Borrower from time to time.

**Agreed Budgets:** The CCAA Debtors shall provide the Lender with a 13-week cash flow (the "**Agreed Weekly Budget**") reviewed by the Monitor, which shall be filed with the CCAA Court in connection with the CCAA Proceedings. The Agreed Weekly Budget shall be form and substance satisfactory to the Lender and shall reflect, on a line item basis, among other things, anticipated cash flow, cash receipts and

disbursements, sales. The Lender may, in its sole discretion, require changes to the format of the Agreed Weekly Budget and the details provided therein including, without limitation, information on a line item basis as to (i) projected cash receipts; (ii) projected disbursements (including ordinary course operating expenses, restructuring expenses, including professional fees), capital and maintenance expenditures; and (iii) such other matters as may be reasonably required by the Lender. The Agreed Weekly Budget shall be rolled forward on a weekly basis and its format and the detail provided therein may only be amended and modified with the prior written consent of the Lender in its sole discretion.

On the Thursday of each week, the CCAA Debtors shall provide to the Lender a variance report (the "**Weekly Budget Variance Report**") showing on a line-by-line basis actual receipts and disbursements and the total available liquidity for the last day of the prior week for the cumulative period since the commencement of the CCAA proceeding and for a rolling cumulative four week period once the CCAA Proceedings have been pending for four weeks and noting therein all variances on a line-by-line basis from the amounts in the Agreed Weekly Budget and shall include explanations for all negative variances in excess of fifteen percent (15%) and shall be certified by the Chief Financial Officer of the Borrower and approved by the Monitor. The first Weekly Budget Variance Report shall be delivered on November 19, 2020.

**Conditions Precedent to DIP Advances:**

No advance shall be made under the DIP Facility until the following conditions precedent (the "**Funding Conditions**") have been satisfied or waived in writing, as determined by the Lender in its sole discretion, acting reasonably:

1. The Borrower shall have served an application for an order or orders, in a form and substance satisfactory to the Lender in its sole discretion, approving this Term Sheet, the DIP Facility, the cash management arrangements, granting the DIP Lender's Charge (as defined below), the Sales and Investment Solicitation Process (the "**SISP**") attached hereto as Schedule "A", and approval of the Stalking Horse Bid Letter (the "**Stalking Horse Bid Letter**") attached hereto as Schedule "B" (the "**Third DIP Order**") on or before October 16, 2020. Notice of the application for the Third DIP Order shall include any party required by the Lender in its sole discretion, acting reasonably. For greater certainty, the Third DIP Order shall provide, *inter alia*: (i) for the approval of the DIP Term Sheet, the DIP Facility, (ii) for the granting of a charge (the "**DIP Lender's Charge**") over all of the Property (as defined in the ARIO) of all of the CCAA Debtors and shall secure all obligations owing by the CCAA Debtors to the Lender hereunder, including without limitation, all principal, interest, fees, costs and expenses (including professional fees) (collectively the "**DIP Obligations**"), which, pursuant to the Third DIP Order, shall rank in priority to all other liens, charges, mortgages, hypothecs, adverse rights or claims, deemed trusts, grants (including any licensing rights provided to any person other than customers or licensees in the ordinary course of business), encumbrances,

security interests of every kind and nature (including, without limitation, the current debtor-in-possession financing) (collectively, "**Liens**") granted by the CCAA Debtors against any of the Property of any of the CCAA Debtors of any kind other than an administration charge granted by the CCAA Court to a maximum of CAD $500,000 (the "**Administration Charge**"); (iii) that such Third DIP Order may not be rescinded, amended or revised without at least five (5) business days' notice to the Lender and its counsel and shall not stay the rights of the Lender hereunder or under the DIP Credit Documentation (as defined below); (iv) that the Lender and the DIP Facility (including any participation rights hereunder) shall be unaffected under any plan of arrangement in respect of the CCAA Debtors; and (v) for such amendments to the ARIO as may be required by the Lender in its sole discretion;

2. The Third DIP Order shall have been issued and shall not have been amended, restated, rescinded or modified, or be subject to pending a motion, application or other proceeding to amend, restate, rescind, vary or modify, in a manner that, in the Lender's sole opinion, adversely affects the rights or interests of the Lender without the written consent of the Lender;

3. Any and all existing debtor-in-possession financings (including, without limitation, the debtor-in-possession financings provided to the Borrower (or any of them) by HCP-FVL, LLC and/or 1262743 B.C. Ltd.) shall have been repaid in full and subordinated to the Lender pursuant to a Court Order (as defined below) or a fully enforceable executed subordination agreement;

4. The Lender shall have approved the applicable Agreed Weekly Budget;

5. All outstanding fees and expenses payable to the Lender shall have been paid or will be paid within such time as is acceptable to the Lender in its sole discretion, acting reasonably;

6. There shall be no Liens (including any license rights granted to any secured party) existing (registered, inchoate or otherwise) that rank in priority to or *pari passu* with the DIP Lender's Charge other than the Administration Charge;

7. The CCAA Debtors shall be in compliance in all material respects with the timetables in the SISP;

8. The DIP Credit Documentation (as defined below) shall be satisfactory to the Lender in its sole discretion, acting reasonably, and the Lender shall be in receipt of fully executed copies of the DIP Credit Documentation;

9. The Lender shall be satisfied that the CCAA Debtors have complied and are continuing to comply, in all material respects, with

all applicable laws, regulations, policies in relation to their property and business, other than as may be permitted under any order of the CCAA Court (each a "**Court Order**") which is satisfactory to the Lender in its sole discretion;

10. No Event of Default shall have occurred that is continuing or will occur as a result of the requested advance;

11. All amounts due and owing to the Lender at the time of an advance under the DIP Facility shall have been paid or shall be paid from the requested advance;

12. The Lender shall have been satisfied that all motions, orders and other pleadings and related documents filed or submitted to the CCAA Court by the CCAA Debtors shall be consistent in all material respects with the terms hereof and all orders entered by the CCAA Court shall not be inconsistent with or have an adverse impact in any material respect on the terms of the DIP Facility or the interests of the Lender;

13. Any necessary third party approvals to preserve or perfect the DIP Lender's Charge shall have been obtained;

14. The Lender shall be in receipt of executed copies of guarantees and security, in form and substance satisfactory to the Lender in its sole discretion, from each of the Guarantors;

15. No material portion of the Collateral be lost or stolen; and

16. There has been no fact, circumstance, change or event (whether in respect of termination, usage, value, implementation of set off rights, or any other matter) in respect of those certain Interim License and Services Agreement among Winfield, Urthecast Corp., Geosys-Int'l, Inc., Geosys Australia Pty, Geosys Europe Sarl, Geosys S.A.S. and Geosys do Brasil sistemas de Informacao Agriocola Ltda, or that certain Purchase and Sale Agreement of Certain Subsidiaries of Land O'Lakes Inc. and Certain Platform Assets dated November 6, 2018 (collectively, the "**Winfield Agreements**"), that, in the Lender's opinion, acting reasonably, would adversely affect the Lender in any material respect, its security or interests, the Collateral.

No advance shall be made under the Second Tranche until the: (i) Funding Conditions have been satisfied or waived in writing, as determined by the Lender in its sole discretion, acting reasonably; and (ii) transaction of purchase and sale as contemplated by the Stalking Horse Bid Letter has closed (such determination to be made in accordance with the provisions of the definitive asset purchase agreement).:

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| | The Third Tranche will be advanced seven days following the transfer of the Designated Assets (as defined in the SISP). |
| **DIP Facility Security and Documentation:** | The DIP Obligations shall be secured by (the "DIP Security"):<br><br>1. the DIP Lender's Charge;<br><br>2. any Recognition Order; and<br><br>3. such other security documentation as may be required by the Lender from time to time in its sole discretion, which shall include customary ULC carve out provisions.<br><br>If required by the Lender, the DIP Security shall be a perfected first priority charge and not subject to subordination other than in respect of the Administration Charge. |
| **Deposit Accounts:** | The CCAA Debtors shall maintain all cash in bank accounts designated by the Borrower at a financial institution approved by the Lender ("**Approved Depository Banks**"). |
| **Monitor:** | The Lender shall be authorized by the Third DIP Order to have direct discussions with the Monitor and to receive information from the Monitor as requested by the Lender from time to time. |
| **Indemnity:** | The CCAA Debtors agree, jointly and severally, to indemnify and hold harmless the Lender, its affiliates and their respective shareholders, officers, directors, employees, advisors, partners and agents (each, an "**indemnified person**") from and against any and all losses, claims, damages, liabilities, and expenses to which any such indemnified person may become subject or may incur arising out of or in connection with the DIP Facility, the proposed or actual use of the proceeds of the DIP Facility, the CCAA Proceeding, participation in any sales process or resulting from the DIP Credit Documentation, and the use of the proceeds thereof, or any claim, litigation, investigation or proceeding relating to any of the foregoing regardless of whether any indemnified person is a party thereto, and to reimburse each indemnified person upon demand for any documented legal or other expenses incurred in connection with investigating or defending any of the foregoing, provided that the foregoing indemnity will not, as to an indemnified person, apply to losses, claims, damages, liabilities or related expenses to the extent (i) they are found by a final, non-appealable judgment of a court to arise directly from the willful misconduct or gross negligence of such indemnified person. This indemnification shall survive whether or not the transactions set out herein are consummated. Further, the Lender shall not be responsible or liable to any CCAA Debtor or any other person for any lost profits, consequential or punitive damages. |
| **Representations and Warranties:** | Each of the CCAA Debtors represents and warrants to the Lender, upon which the Lender relies in entering into this Term Sheet and the other DIP Credit Documentation, that |

1. The transactions contemplated by this Term Sheet and the other DIP Credit Documentation:

(a) upon the granting of the Third DIP Order, are within the powers of the CCAA Debtors;

(b) have been duly authorized, executed and delivered by or on behalf of the CCAA Debtors;

(c) upon the granting of the Third DIP Order, constitute legal, valid and binding obligations of the CCAA Debtors;

(d) upon the granting of the Third DIP Order, do not require the consent or approval of, registration or filing with, or any other action by, any governmental authority, other than filings which may be made to register or otherwise record the DIP Lender's Charge or any DIP Security;

2. The business operations of the CCAA Debtors and their direct and indirect subsidiaries have been and will continue to be conducted in material compliance with all applicable laws of each jurisdiction in which each such business has been or is being carried on subject to the provisions of any Court Order;

3. As at the date of this Term Sheet, all Priority Payables (as defined below) that are due and payable by the CCAA Debtors have been paid.

4. The CCAA Debtors legally or beneficially owns all of their respective cash, intellectual property, contracts, operations and material assets.

5. All of the CCAA Debtors' material assets, cash, intellectual property, contracts and operations are located in Canada, the United States, France, Spain and Switzerland.

6. Each of the CCAA Debtors and their direct and indirect subsidiaries own all intellectual property and material contracts and has obtained all material licences and permits required for the operation of its business, which intellectual property, material contracts, licences and permits remain, and after the DIP Facility, will remain in full force and effect. No proceedings have been commenced to revoke or amend any of such intellectual property, material contracts, licences and permits;

7. Except as set out in Schedule "B" hereto, each of the CCAA Debtors and their direct and indirect subsidiaries has paid where due its obligations for payroll, employee source deductions, Harmonized Sales Tax, value added taxes and is not in arrears in respect of these obligations;

8. None of the CCAA Debtors and their direct and indirect subsidiaries has any defined benefit pension plans or similar plans;

9. All written factual information provided by or on behalf of the CCAA Debtors to the Lender in the data room entitled "Datasite: Atlas DataRoom 2019" as constituted as of the date hereof for the purposes of or in connection with this Term Sheet or any transaction contemplated herein is true and accurate in all material respects on the date as of which such information is dated or certified and is not incomplete by omitting to state any fact necessary to make such information (taken as a whole) not materially misleading at such time in light of the circumstances under which such information was provided. In particular, and without limiting the generality of the foregoing all information regarding the CCAA Debtors' and its direct and indirect subsidiaries' corporate structure is true and complete, all public filings and financial reports are complete and true in all material respects and the CCAA Debtors have provided the Lender with all material information regarding all intellectual property, including, without limitation, patents, copyright, material contracts, cash, bank accounts, assets, jurisdictions, operations, source codes, title information and opinions and environmental reports affecting or relating to the Property (as defined in the ARIO) of the CCAA Debtors;

**Affirmative Covenants:**

In addition to all other covenants and obligations contained herein, the CCAA Debtors agree and covenant to perform and do each of the following until the DIP Facility is permanently and indefeasibly repaid in full and cancelled:

1. Comply with the provisions of the Court Orders made in the CCAA Proceeding and any foreign proceedings including, without limitation, the Third DIP Order and the proceedings commenced by, *inter alios*, UrtheCast Corp. under and pursuant to Chapter 15, Title 11 of the United States *Code* in the United States Bankruptcy Court for the District of Minnesota;

2. Utilize the DIP Facility only in accordance with the terms hereof and the applicable Agreed Weekly Budget;

3. Pay when due, or otherwise provide confirmation satisfactory to the Lender that payment arrangements satisfactory to the Lender have been entered into by the CCAA Debtors, to pay all claims which rank prior to the indebtedness and security held by the Lender, in any jurisdiction, from the CCAA Debtors (the "**Priority Payables**"), not consented to in writing by the Lender, or a claim or Lien pursuant to any law, statute, regulation or otherwise, which ranks or is capable of ranking in priority to or *pari passu* with the Lender's security in any jurisdiction or otherwise in priority to any claim for the repayment of any amount owing under the DIP Facility, including without limitation,

all amounts owing to any federal, provincial, municipal or other government entity or Crown corporation, all statutory, actual or deemed trusts, all withholdings and source deductions, all accrued and unpaid payroll and employee claims, including vacation pay, and all amounts owing to any person having a Lien, encumbrance, trust or charge ranking in priority to the Lender's security.

4. Comply with any timetable or process established from time to time by the CCAA Court including, without limitation, the SISP, for the sale of all or part of the assets of the CCAA Debtors and/or their direct and indirect subsidiaries or solicitation of investment in any of the CCAA Debtors and/or their direct and indirect subsidiaries as part of the CCAA Proceedings or in anticipation of a Plan and obtain the approval for such timetable or process from the Lender;

5. Allow the Lender and its advisors full access to the books and records of the CCAA Debtors and/or their direct and indirect subsidiaries on one business day's notice and during normal business hours and cause management thereof to fully cooperate with the Lender and its advisors;

6. Provide the Lender with draft copies of all motions, applications, proposed orders or other material or documents that any of them intend to file within the CCAA Proceeding at least three (3) business days prior to any such filing or, where it is not practically possible to do so with as much notice as possible prior to any such filing;

7. The Third DIP Order, and any other Court Orders which are being sought by the CCAA Debtors shall be submitted to the CCAA Court in a form confirmed in advance to be satisfactory to the Lender, acting reasonably, subject to any amendments required by the CCAA Court and the Monitor and acceptable to the Lender;

8. Any and all materials of the CCAA Debtors in respect of a proposed Plan or any other transaction or solicitation process seeking the investment in or refinancing of the CCAA Debtors and/or their direct and indirect subsidiaries, the sale or process for the selling of all or any part of the assets of the CCAA Debtors and/or their direct and indirect subsidiaries or any other restructuring of the CCAA Debtors' businesses and operations, including any liquidation, bankruptcy or other insolvency proceeding in respect of any of the CCAA Debtors (a "**Restructuring Option**") that does not contemplate the indefeasible repayment in full and in cash of the DIP Facility shall only be submitted to the CCAA Court in or presented to any stakeholder of the CCAA Debtors in a form that is satisfactory to the Lender in its sole discretion, acting reasonably, and has been provided to the Lender at least three (3) business days prior to any such filing or, where it is not practically possible to do so, with as much notice as possible prior to any such filing;

9. The CCAA Debtors shall promptly advise the Lender of, and provide copies of, any proposal received from a third party in respect of a Restructuring Option or any other transaction to be carried out pursuant to or as part of a Plan and, thereafter, shall advise the Lender of the status of any such proposal as well as any material amendments to the terms thereof;

10. Unless such payments are first approved by the Lender, none of the CCAA Debtors shall:

(i) increase any termination or severance entitlements or pay any termination or severance payments or modify any compensation or benefit plans whatsoever; or

(ii) establish or make any payments by way of a "key employee retention plan" except as otherwise disclosed in the Agreed Weekly Budget and the application materials filed in respect of the ARIO;

11. Provide to the Lender a weekly status update regarding the status of the CCAA Proceeding and their restructuring process including, without limitation, reports on the progress of any Plan, Restructuring Option, and any information which may otherwise be confidential subject to same being maintained as confidential by the Lender;

12. Inform the Lender on a timely basis of all material developments (as determined by the Lender in its sole discretion) with respect to the business and affairs of the CCAA Debtors and their direct and indirect subsidiaries, the development of a Plan and/or a Restructuring Option;

13. Deliver to the Lender the reporting required under this Term Sheet on or before the timelines required herein and such other reporting and other information from time to time as is reasonably requested by the Lender, in form and substance satisfactory to the Lender, on or before the timeline required by the Lender;

14. The CCAA Debtors shall deliver to the Lender: (i) within one business day of delivery thereof to the Monitor, copies of all financial reporting provided to the Monitor; and (ii) within one business day of receipt from the Monitor any reports or other commentary or analysis received by the CCAA Debtors from the Monitor regarding the financial position of the CCAA Debtors or otherwise;

15. Use the proceeds of the DIP Facility and other cash on hand only in a manner consistent with the terms hereof and the Agreed Weekly Budgets in all material respects to the extent reasonably practicable in the circumstances;

16. Provide the Lender with copies of all general communications out of the ordinary course, or any communication in respect of the CCAA Proceeding, to customers, suppliers, employees and other stakeholders simultaneously with the distribution thereof to such persons;

17. Preserve, renew, maintain and keep in full force its corporate existence and its material licenses, permits, approvals, contracts, and intellectual property rights required in respect of its business, properties, assets or any activities or operations carried out therein and maintain its properties and asset in good working order having regard to the current cessation of operations;

18. Pay all taxes, permitting and licence fees, Priority Payables not consented to in writing by the Lender, and to preserve the Collateral to avoid any Lien thereon and pay all amounts due under any critical supplier contracts as and when due and payable;

19. Maintain all insurance with respect to the Collateral in existence as of the date hereof;

20. Forthwith notify the Lender of the occurrence of any Event of Default, or of any event or circumstance that, with the passage of time, may constitute an Event of Default;

21. Execute and deliver the DIP Credit Documentation, including such security agreements, guarantees, financing statements, discharges, opinions or other documents and information, as may be reasonably requested by the Lender in connection with the DIP Facility, which documentation shall be in form and substance satisfactory to the Lender;

22. Pay upon request by the Lender all documented fees and expenses of the Lender (including professional fees) provided, however, that if any such fees and expenses incurred after the date of this Term Sheet are not paid by the Borrower, the Lender may in its discretion (i) deduct such fees and expenses from any advance of the DIP Facility, or (ii) pay all such fees and expenses whereupon such amounts shall be added to and form part of the DIP Obligations and shall reduce the availability under the DIP Facility; and

23. Pay when due all principal, interest, fees and other amounts payable by the Borrower under this Term Sheet and under any other DIP Credit Documentation on the dates, at the places and in the amounts and manner set forth herein or therein (as the case may be).

24. Notwithstanding any of the provisions of this Term Sheet, the Lender shall not be entitled to receive information regarding the identity of bidders or prospective bidders participating in any such SISP, the terms of any bids received or similar information in

connection with the SISP for the Designated Assets that would customarily not be available to a prospective bidder participating in a SISP (the "SISP Information") until the SISP provides for such disclosure in the Auction (as defined in the SISP). The Lender shall be entitled to receive SISP Information in respect of any asset subject to the SISP that the Lender declares to the Monitor that the Lender will not submit a bid for such asset in the SISP, provided that the asset is not included in a broader bid for additional assets including the Designated Assets which are part of the Stalking Horse Bid.

**Guarantee:** Prior to any advance of the DIP Facility, the Borrower will cause its other affiliates and subsidiaries (including the CCAA Debtors) to grant guarantees of payment to the Lender and to grant charges on their assets to secure the DIP Obligations. However, no such guarantee or security will be required for those subsidiaries which the Lender in its sole discretion, acting reasonably, determines to have no material value. Any such subsidiary which provides a guarantee shall thereafter be included as a "Guarantor".

**Negative Covenants:** Each of the CCAA Debtors covenants and agrees not to do the following, other than with the prior written consent of the Lender from and after the date hereof:

1. Except as contemplated by this Agreement or any Court Order, make any payment, without consent of the Lender, of any debt or obligation existing as at the date of the Initial Order (being September 4, 2020) (the "**Pre-Filing Debt**");

2. Transfer any funds to any other CCAA Debtors or related party thereof in any foreign jurisdiction prior to obtaining a first priority security interest and Lien in all of the CCAA Debtors' assets, property and undertaking located in such jurisdiction, in accordance with applicable law of such jurisdictions, and providing the Lender with executed copies of all documents required by the Lender (including, if requested by the Lender, an opinion from Borrower's counsel in form and substance satisfactory to the Lender) in order to establish a valid, binding and enforceable first priority security interest (and court order) in all of the assets, property and undertaking of the CCAA Debtors with material assets in such jurisdiction;

3. Create, incur or permit to exist, or permit any subsidiary to incur or permit to exist, any indebtedness for borrowed money or contingent liabilities, or issue any new securities (as such term has the meaning ascribed thereto under applicable law), other than Pre-Filing Debt, the DIP Facility, and post-filing accounts payable in the ordinary course of business;

4. Make any payments contrary to the provisions hereof or outside the ordinary course of business without the prior written consent of the Lender;

5. Sell, assign, lease, gift, transfer, convey or otherwise dispose of any of the Collateral except for sales contemplated by the Third DIP Order and sales of inventory in ordinary course of business;

6. Except for as contemplated herein or as otherwise consented to by the Lender, permit any new Liens to exist on any of the properties or assets of the CCAA Debtors or any of their direct or indirect subsidiaries other than the Liens in favour of the Lender as contemplated by this Agreement;

7. Shall not issue any notice to disclaim or resiliate any agreement pursuant to section 32 of the CCAA without the express written consent of the Lender, in its sole discretion, acting reasonably;

8. Create or permit to exist any other Lien which is senior to or *pari passu* with the DIP Lender's Charge except the Administration Charge;

9. Make any investments in or loans to or guarantee the debts or obligations of any other person or entity or permit any of its subsidiaries to do so;

10. Make any distribution, advance, loan, investment, gift, transfer, loan or other distribution, transaction, conveyance or assignment contrary to the provisions hereof or to any related party without the prior written consent of the Lender in its sole discretion;

11. Enter any restrictive covenants or agreements which might affect the value or liquidity of any Collateral

12. Present, seek the approval of or support any Restructuring Option without prior written consent of the Lender, acting reasonably, unless at the time of such presentment, approval or support, the DIP Facility have been indefeasibly repaid in full in cash.

13. Change or permit any subsidiary to change its jurisdiction of incorporation or registered office;

14. Change its name, fiscal year end or accounting policies or amalgamate, consolidate with, merge into, dissolve or enter into any similar transaction with any other entity without the writtenconsent of the Lender or permit any subsidiary to do so;

15. Terminate any key employees of the CCAA Debtors, including those involved in maintaining the Collateral, without the written consent of the Lender acting reasonably;

16. Provide or seek or support a motion by another party for a charge against any Property (as defined in the ARIO) of any of the CCAA Debtors that ranks equally or in priority to the charge of the Lender without the prior written consent of the Lender;

17. Distribute, loan, advance or otherwise use or transfer any advance or monies under the DIP Facility to any Foreign CCAA Debtor except upon satisfaction of the Direct Advance Condition and in accordance with an approved Foreign Advance Notice, or as otherwise may be agreed to by the Lender in its sole discretion;

18. Agree to a Restructuring Option without the prior written consent of the Lender, acting reasonably; and

19. Carry out any changes to the composition (including the addition, removal or replacement of directors or officers) of the board of directors or the officers (including any chief restructuring officer) of any of the CCAA Debtors or their direct and indirect affiliates or subsidiaries without the prior written consent of the Lender.

**Events of Default**

The occurrence of any one or more of the following events shall constitute an event of default (each, an "**Event of Default**") under this Term Sheet if such event of default is not cured within two (2) business days of the Borrower receiving notice of the event of default (to the extent such event of default is capable of being cured):

1. Any Court Order or Recognition Order is dismissed, stayed, reversed, vacated, amended or restated and such dismissal, stay, reversal, vacating, amendment or restatement adversely affects or would reasonably be expected to adversely affect the interests of the Lender in a material manner, unless the Lender has consented thereto;

2. Any Court Order is issued which adversely affects or would reasonably be expected to adversely affect the interests of the Lender in a material manner, unless the Lender has consented thereto in writing including, without limitation:

(a) the issuance of an order dismissing the CCAA Proceeding or lifting the stay imposed within the CCAA Proceeding to permit the enforcement of any security or claim against any of the CCAA Debtors or the appointment of a receiver and manager, receiver, interim receiver or similar official or the making of a bankruptcy order against any of the Debtors;

(b) the issuance of an order granting any other claim or a Lien of equal or priority status to that of the DIP Lender's Charge except as permitted by the Lender in its sole discretion;

(c) the issuance of an order staying, reversing, vacating or otherwise modifying the DIP Credit Documentation or the provisions of any Court Order affecting the Lender or the Collateral, or the issuance of an order adversely impacting the rights and interests of the Lender, in each case without the consent of the Lender;

(d) the failure of the CCAA Debtors to diligently oppose any party that brings an application or motion for the relief set out in (a) through (c) above and/or fails to secure the dismissal of such motion or application within 10 days from the date that such application or motion is brought;

3. Any sales or investor solicitation process is proposed to the CCAA Court by any of the CCAA Debtors without the prior written consent of the Lender, which consent shall not be unreasonably withheld;

4. Any CCAA Debtor presents, seeks the approval of or supports any Restructuring Option without the prior written consent of the Lender, which consent shall not be unreasonably withheld;

5. Failure of the CCAA Debtors to pay any amounts when due and owing by any of the CCAA Debtors hereunder;

6. Any of the Debtors cease to carry on business or operate or maintain their properties in the ordinary course as it is carried on as of the date hereof, except where such cessation is consented to by the Lender in writing;

7. Any representation or warranty by any of the CCAA Debtors herein or in any DIP Credit Documentation shall be incorrect or misleading in any material respect when made or any breach by any of the CCAA Debtors of any of the terms hereunder;

8. A Court Order is made, a liability arises or an event occurs, including any change in the business, assets, or conditions, financial or otherwise, any of the CCAA Debtors, that will in the Lender's judgment, acting reasonably, materially further impair the CCAA Debtors' financial condition, operations or ability to comply with its obligations under this Term Sheet, any DIP Credit Documentation or any Court Order or carry out a Plan or a Restructuring Option acceptable to the Lender;

9. Any material violation or breach of any Court Order by any of the Debtors;

10. Failure of the CCAA Debtors to perform or comply in any material respect with any term or covenant of this Term Sheet or any other DIP Credit Documentation;

11. Failure to maintain a cumulative net cash flow, for the CCAA Debtors on a consolidated basis which is at all times within 15% of the amounts set out in the Agreed Weekly Budget (measured weekly) and failure to provide an updated Agreed Weekly Budget, as required on a rolling basis, which shows sufficient liquidity to meet all of the projected cash requirements of the CCAA Debtors until the Maturity Date;

12. If any of senior officers cease to be senior officers of the CCAA Debtors and are not replaced with persons acceptable to the Lender;

13. Any proceeding, motion or application is commenced or filed by the CCAA Debtors, or if commenced by another party, supported or otherwise consented to by the CCAA Debtors, seeking the invalidation, subordination or other challenging of the terms of the DIP Facility, the DIP Lender's Charge, this Term Sheet, the CCAA stay of proceedings, any foreign court recognition order (each, a "Recognition Order") , or any of the other DIP Credit Documentation or approval of any Plan or Restructuring Option which does not have the prior written consent of the Lender;

14. Any of the CCAA Debtors become subject to a material environmental liability;

15. Any Plan is sanctioned or any Restructuring Option is consummated by any of the Debtors that is not consistent with or contravenes any provision of this Agreement or the other DIP Credit Documentation in a manner that is adverse to the interests of the Lender or would reasonably be expected to adversely affect unless the Lender has consented thereto in writing or unless it provides for repayment in full of all DIP Obligations to the Lenders under this Agreement;

16. The sale, assignment, transfer, lease, farm-out or other form of disposition of all or any part of a CCAA Debtor's property, assets or undertaking, without the prior written consent of the Lender, excluding transfers, leases and dispositions (a) in the ordinary course of business and (b) in accordance with the Sale and Investment Solicitation Process described in the ARIO;

17. The making of any payments or distributions of any kind by any CCAA Debtor, including payments of principal or interest in respect of existing (pre-filing) debts or obligations, other than as may be permitted by an order of the CCAA Court and that does not result

in an Event of Default and is provided for in the Agreed Weekly Budget;

18. The creation of or permitting to exist indebtedness (including guarantees thereof or indemnities or other financial assistance in respect thereof) by any CCAA Debtor other than (i) Pre-Filing Debt, (ii) debt contemplated by this Term Sheet; and (iii) post-filing trade payables or other post-filing unsecured obligations incurred in the ordinary course of business in accordance with the Agreed Weekly Budget and any Court Order;

19. The making of or giving any additional financial assurances by any CCAA Debtor, in the form of bonds, letters of credit, guarantees or otherwise, to any person (including, without limitation, any governmental authority); and

20. The commencement, continuation or seeking CCAA Court approval of a transaction by any CCAA Debtor in respect of the sale of all or any portion of any CCAA Debtor's assets that will not repay the Lender in full, without the prior written consent of the Lender, in its sole discretion.

**Remedies:** Upon the occurrence of an Event of Default, the Lender, in its sole discretion, may, subject to the Third DIP Order and applicable law:

1. Cease to make any further advances of the DIP Facility;

2. Terminate the DIP Facility and declare all amounts outstanding under the DIP Facility as immediately due and payable;

3. Apply to the Court for the appointment of a receiver, an interim receiver or a receiver and manger over the Collateral, or for the appointment of a trustee in bankruptcy of the CCAA Debtors;

4. Apply to the Court for an order, on terms satisfactory to the Monitor and the Lender, providing the Monitor with the power, in the name of and on behalf of any or all of the CCAA Debtors, to take all necessary steps in the CCAA Proceeding to realize on the Collateral;

5. Exercise the powers and rights of a secured party under the applicable federal, provincial or state legislation governing personal property security and the rights of secured creditors, including, for greater certainty, the *Personal Property Security Act* (British Columbia) or any legislation of similar effect; and

6. Exercise all such other rights and remedies available to the Lender under the DIP Credit Documentation, the Court Orders and applicable law or equity.

**Lender Approvals:** All consents of the Lender hereunder shall be in writing. Any consent, approval, instruction or other expression of the Lender to be

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| | delivered in writing may be delivered by any written instrument, including by way of electronic mail. |
| **Taxes:** | All payments by the CCAA Debtors under this Agreement and the other DIP Credit Documentation, including any payments required to be from and after the exercise of any remedies available to the Lender upon an Event of Default, shall be made free and clear of, without reduction for or on account of, any present or future taxes, levies, imposts, duties, charges, fees, deductions or withholdings of any kind or nature whatsoever or any interest or penalties payable with respect thereto now or in the future imposed, levied, collected, withheld or assessed by any country or any political subdivision of any country (collectively, "**Taxes**"); provided, however, that if any Taxes are required by applicable law to be withheld ("**Withholding Taxes**") from any amount payable to the Lender under this Agreement or under any DIP Credit Documentation, the amounts so payable to the Lender shall be increased to the extent necessary to yield to the Lender on a net basis after payment of all Withholding Taxes, the amount payable under such DIP Credit Documentation at the rate or in the amount specified in such DIP Credit Documentation and the CCAA Debtors shall provide evidence satisfactory to the Lender that the Taxes have been so withheld and remitted. |
| **Further Assurances:** | The CCAA Debtors shall, at their own expense, from time to time do, execute and deliver, or will cause to be done, executed and delivered, all such further acts, documents (including, without limitation, certificates, declarations, affidavits, reports and opinions) and things as the Lender may reasonably request for the purpose of giving effect to this Term Sheet. |
| **Entire Agreement:** | This Term Sheet and the DIP Credit Documentation, constitutes the entire agreement between the parties related to the subject matter hereof. To the extent there is any inconsistency between this Term Sheet and any of the other DIP Credit Documentation, this Term Sheet shall prevail. |
| **Credit Bid:** | The Lender or any affiliate to whom it has assigned the loan and security hereunder shall have the right at all times to credit bid all or any portion of the DIP Facility in connection with any sale of shares, assets or property of the Debtors. The DIP Credit Documentation and the CCAA Order will contain provisions recognizing and confirming the ability of the Lender (or its affiliate assignee) to credit bid for the full face value of all amounts outstanding under the DIP Facility without discount or set-off in any sales process, auction or other disposition of the property, assets and undertaking of the CCAA Debtors in the CCAA Proceedings. |
| **Business Day:** | If any payment is due on a day which is not a business day in Vancouver and New York City, such payment shall be due on the next following business day. |
| **No Waiver or Delay:** | No waiver or delay on the part of the Lender in exercising any right or privilege hereunder or under any other DIP Credit Documentation |

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| | will operate as a waiver hereof or thereof unless made in writing and delivered in accordance with the terms of this Agreement. |
| **Assignability:** | The Lender may assign this Term Sheet and its rights and obligations hereunder, in whole or in part, or grant a participation in its rights and obligations hereunder to any party acceptable to the Lender in its sole and absolute discretion (subject to providing the Borrower and the Monitor with reasonable evidence that such assignee has the financial capacity to fulfill the obligations of the Lender hereunder). Neither this Agreement nor any right and obligation hereunder may be assigned by the Borrower or any of the other CCAA Debtors. |
| **Severability:** | Any provision in this Agreement or in any DIP Credit Documentation which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof or effecting the validity of enforceability of such provision in any other jurisdiction. |
| **No Third Party Beneficiary:** | No person, other than the CCAA Debtors and the Lender, is entitled to rely upon this Agreement and the parties expressly agree that this Agreement does not confer rights upon any party not a signatory hereto. |
| **Press Releases:** | The CCAA Debtors shall not issue any press releases naming the Lender without its prior approval, acting reasonably, unless the CCAA Debtors are required to do so by applicable securities laws or other applicable law. |
| **Counter Parts and Facsimile Signatures:** | This Agreement may be executed in any number of counterparts and delivered by e-mail, including in PDF format, each of which when executed and delivered shall be deemed to be an original, and all of which when taken together shall constitute one and the same instrument. Any party may execute this Agreement by signing any counterpart of it. |
| **Notices:** | Any notice, request or other communication hereunder to any of the parties shall be in writing and be well and sufficiently given if delivered personally or sent by electronic mail to the attention of the person as set forth below:<br><br>**In the case of the Lender:**<br><br>Antarctica Infrastructure Partners, LLC<br>630 Fifth Avenue,<br>20th Floor<br>New York, NY 10111<br><br>Attention: Chandra Patel<br>Email: crpatel@antarcticacapital.com<br><br>**With a copy to:** |

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
66 Wellington Street West
Toronto, ON M5K 1E6

Attention: Jonathan See
Email: jsee@mccarthy.ca

**In the case of the CCAA parties:**

UrtheCast Corp.
1055 Canada Place, PI#33
Vancouver, British Columbia
V6C 0C3

Attention: Sai Chu
Email: schu@urthecast.com

**With a copy to:**

Bennett Jones LLP
666 Burrard Street, Suite 2500
V6C 2X8

Attention: Christian P. Gauthier
Email: gauthierc@bennettjones.com

**In either case, with a copy to the Monitor:**

EY Inc.
700 West Georgia Street
PO Box 10101
Vancouver, British Columbia
V7Y 1C7

Attention: Mike Bell
Email: mike.bell@ca.ey.com

Any such notice shall be deemed to be given and received, when received, unless received after 5:00 PM local time or on a day other than a business day, in which case the notice shall be deemed to be received the next business day.

**English Language:** The parties hereto confirm that this Agreement and all related documents have been drawn up in the English language at their request. *Les parties aux présentes confirment que le présent acte et tous les documents y relatifs furent rédigés en anglais à leur demande.*

**Governing Law :** This Agreement shall be governed by, and construed in accordance with the laws of the Province of British Columbia and the federal laws of Canada applicable therein.

*[Signature pages follow]*

# TAB 29

**CITATION:** U.S. Steel Canada Inc. (Re), 2016 ONSC 7899
**COURT FILE NO.:** CV-14-10695-00CL
**DATE:** 20161222

2016 ONSC 7899 (CanLII)

**SUPERIOR COURT OF JUSTICE - ONTARIO**

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

**AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.**

**BEFORE:** Mr. Justice H. Wilton-Siegel

**COUNSEL:** *Paul Steep, Steve Fulton* and *Jamey Gage,* for the Applicant, U.S. Steel Canada Inc.

*Robert Staley* and *Kevin J. Zych*, for the Monitor, Ernst & Young Inc.

*Alan Mark, Gale Rubenstein* and *Logan Willis* for the Province of Ontario

*Ken Rosenberg,* for the United Steelworkers International Union and the United Steelworkers International Union, Local 8782

*Andrew Hatnay,* Representative Counsel for the non-unionized active employees and retirees

*Robert Thornton, Michael Barrack* and *Mitch Grossell,* for United States Steel Corporation

*Sharon White,* for the United Steelworkers International Union, Local 1005

*Michael Kovacevic* and *Justyna Hidalgo,* for the City of Hamilton

*Lou Brzezinski,* for Robert and Sharon Milbourne

*Waleed Malik,* for Brookfield Capital Partners Ltd.

*Mario Forte,* for Bedrock Industries Canada LLC and Bedrock Industries L.P.

*Bryan Finlay* and *Marie-Andrée Vermette,* for the Board of Directors of U.S. Steel Canada Inc.

**HEARD:** December 15, 2016

**ENDORSEMENT**

[1] The applicant, U.S. Steel Canada Inc. (the "applicant" or "USSC"), seeks an order declaring that Bedrock Industries Canada LLC (the "Purchaser" or "Bedrock") is the Successful Bidder as that term is defined in paragraph 27 of the sales and investment solicitation process order of the Court dated January 21, 2016 (the "SISP Order"). In addition, it seeks authorization to enter into an agreement with Bedrock and Bedrock Industries L.P. dated as of December 9, 2016 referred to as the "CCAA Acquisition and Plan Sponsor Agreement" (the "PSA"). The applicant also seeks related ancillary relief as described below. At the conclusion of the hearing, the Court advised the parties that it was prepared to grant the requested relief for written reasons to follow. This Endorsement sets out the written reasons of the Court for its determination.

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**Background**

[2] On September 16, 2014, the applicant obtained an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") (as amended and restated from time to time, the "Initial Order").

[3] Over the course of more than 18 months, the applicant conducted extensive sales and marketing efforts within these CCAA proceedings. The initial marketing exercise was conducted pursuant to an order of the Court dated April 2, 2015, which authorized the applicant to commence a sale and restructuring/recapitalizing process (the "SARP"). The applicant did not receive any viable offers for a transaction or series of transactions under the SARP. By order of the Court dated October 9, 2015, the applicant was authorized to discontinue the SARP.

[4] Pursuant to the SISP Order, the applicant was authorized to commence a new sales and investment solicitation process (the "SISP"). The course of the SISP is set out in the various reports of the Monitor, Ernst & Young Inc. (the "Monitor"), including its most recent report, the thirty-third report dated December 13, 2016 (the "Monitor's Report"), and the affidavit sworn by the chief restructuring officer of the applicant, William Aziz (the "CRO") on December 13, 2016.

[5] In summary, as with the SARP, more than 100 strategic and financial parties were contacted to solicit potential interest. The first phase of the SISP ended on February 29, 2016. After that date, the applicant, the financial advisor to the applicant, and the CRO assessed the bids received and selected a number of bidders as "Phase 2 Qualified Bidders" after obtaining input from key stakeholders and with the concurrence of the Monitor. The deadline for Phase 2 Qualified Bidders to submit a binding offer was May 13, 2016. After that date, the applicant, together with its financial advisor, the CRO and the Monitor, evaluated the offers received, discussed the offers with the key stakeholders, and facilitated numerous meetings and negotiations between the bidders and various key stakeholders.

[6] At the end of July 2016, as a result of this review and the various meetings and negotiations, the applicant, with the assistance of the financial advisor and the support of the Monitor, concluded that the proposal of Bedrock was the most promising bid and designated the proposal as a "Qualified Bid" for the purposes of the SISP Order.

[7] Since that time, Bedrock has held discussions and negotiations with the principal stakeholders of the applicant, being the United Steelworkers International Union ("USW"), the USW Locals 8782 and 1005, the Province of Ontario (the "Province"), United States Steel Corporation ("USS") and Representative Counsel on behalf of the non-unionized salaried employees and retirees ("Representative Counsel").

[8] On September 21, 2016, the Province announced that it had entered into a memorandum of understanding with Bedrock (the "Province/Bedrock MOU"). On November 1, 2016, USS announced that it had agreed to proposed terms regarding the sale and transition of ownership of USSC to Bedrock, which are reflected in a term sheet (the "USS/Bedrock Term Sheet"). On November 22, 2016, USW Locals 8782 and 8782(b) (collectively, "Local 8782") delivered a letter to Bedrock confirming that the executive of these locals had approved a form of collective bargaining agreement to be entered into upon completion of Bedrock's purchase of USSC (the "Local 8782 Letter of Support"). The letter indicated that the executive was prepared to recommend the agreement to their respective memberships, conditional on satisfaction of certain arrangements relating to the funding of other post-employment benefits ("OPEBs") and the legacy and future pension plans of USSC.

[9] In addition, as a result of direct discussions between Bedrock and USSC during this period, the parties reached agreement on the principal terms of a proposed transaction by which Bedrock would acquire the business and operations of USSC (the "Proposed Transaction"). These terms of the Proposed Transaction are set out in the PSA. The PSA is largely consistent with the terms of the Province/Bedrock MOU, the USS/Bedrock Term Sheet and the understanding between Bedrock and USW Local 8782. The PSA provides that it is not binding on USSC until USSC obtains an order of this Court authorizing it to enter into the PSA and to pursue the Proposed Transaction in accordance with the PSA (the "Authorization Order").

[10] In connection with the PSA, USSC and Bedrock also requested the Province to enter into an agreement with USSC in respect of the Proposed Transaction. To this end, the Province and USSC have entered into an agreement dated December 9, 2016 (the "Province Support Agreement"). The Province Support Agreement also provides that it does not become effective unless and until the Authorization Order is granted.

**The Proposed Transaction**

[11] The basic structure of the Proposed Transaction is summarized in the Monitor's Report as follows:

> (a) the Purchaser will acquire substantially all of USSC's operating assets and business on a going concern basis and the outstanding shares of USSC through a CCAA plan of arrangement. Substantially all of the existing operations at both the Hamilton Works and the Lake Erie Works will continue;

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(b) the Purchaser will not acquire USSC's real property in Hamilton (the "HW Lands") and at Lake Erie (the "Lake Erie Lands") but will cause USSC to lease the part of the real property needed to continue steel operations. USSC's real property will be contributed to a Land Vehicle (as defined below) to be sold, leased or developed for the benefit of USSC's five main registered pension plans (the "Stelco Plans") and OPEBs. There is an expectation that these lands will have value when redeveloped. The Land Vehicle will initially be funded by a $10 million secured revolving loan from the Province, and an amount to be agreed upon from USSC. Any proceeds generated from these lands would be available to:

(i) fund the operations of the Land Vehicle in an agreed amount;

(ii) provide reimbursement to the Ontario Ministry of the Environment and Climate Change ("MOECC") for costs, if actually incurred, to test, monitor and investigate environmental conditions on the land; and

(iii) provide additional funding to be distributed equally towards the benefit of the Stelco Plans and OPEBs;

(c) the Purchaser will provide an equity contribution to implement the Transaction and will arrange new debt financing in an amount with borrowing availability not less than $125,000,000 after satisfying all exit costs and the payment of other amounts associated with USSC's emergence from protection under the CCAA;

(d) a new administrator will be appointed for the Stelco Plans and USSC's ongoing obligations with respect to the legacy liabilities under the Stelco Plans will be fixed as described below. The Stelco Plans will continue to be covered by the Pension Benefits Guarantee Fund. In addition to any funding received by the Stelco Plans from the Land Vehicle, USSC will make various lump sum and ongoing contributions into these pension plans including:

(i) a $30 million upfront payment upon the closing of the Proposed Transaction;

(ii) a $20 million payment prior to any dividend distribution by USSC to Bedrock; and

(iii) 10% of USSC's Free Cash Flow (as defined in the PSA), subject to a minimum of $10 million per year for the first five years, and a minimum of $15 million for the next 15 years. Bedrock will guarantee $160 million of these total annual contributions required from USSC;

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(e) one or more entities (the "OPEB Entity") satisfactory to USSC, the USW and the Province will be established for the purpose of receiving, holding and distributing funds on account of OPEBs. In addition to any funding received by the OPEB Entity from the Land Vehicle as referred to above, USSC will make various lump sum and ongoing contributions to the OPEB Entity, including:

(i) $15 million annual fixed payments (the "OPEB Fixed Contribution");

(ii) 6.5% of USSC's Free Cash Flow, subject to a maximum of $11 million per year; and

(iii) $30 million (the "Advance OPEB Payment") on the earlier of the date on which USSC first pays a dividend, redeems any capital stock, or makes any distribution to Bedrock or its affiliates, investors or funds, or the date that is three years after the closing of the Proposed Transaction. The Advance OPEB Payment is to be amortized in the fourth through ninth years following the closing date and applied against the OPEB Fixed Contribution described above for those years in accordance with a formula as set out in the OPEB Term Sheet (as defined below);

(f) USS will receive full payment for its secured claims and will assign its unsecured claims to the Purchaser;

(g) the Province will receive US$61 million and the MOECC will provide releases of certain legacy environmental liabilities associated with USSC's real property. The US$61 million would be used:

(i) to reimburse the professional fees of the Province related to USSC's restructuring;

(ii) as financial assurance, held by the MOECC, to cover any costs that may be incurred by the MOECC in connection with environmental conditions on USSC's real property; and

(iii) for any portion of the amount held as financial assurance that is not required by the MOECC, to be equally distributed towards the benefit of USSC's OPEBs and the Stelco Plans;

(h) USSC will be required to continue to comply with all environmental laws and regulations going forward and to enter into an environmental management plan with the MOECC going forward. USSC will fund the costs of any environmental baseline testing and monitoring;

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(i) all other secured claims, as determined in accordance with the claims process order of the Court made November 13, 2014 (the "Claims Process Order"), will be paid in full or as otherwise agreed by the Purchaser and USSC; and

(j) the remaining unsecured claims will receive a distribution pursuant to the CCAA plan from a distribution pool in an amount to be determined.

[12] The Monitor believes that, if the Proposed Transaction is completed, USSC will emerge as a stand-alone steel manufacturer with a restructured balance sheet and sufficient liquidity such that it will have stability and be able to compete in challenging steel market conditions. A successful completion of the Proposed Transaction is expected to result in the preservation of jobs, ongoing business for suppliers, and ancillary economic benefits for the communities in which USSC operates its business.

**The Plan Sponsor Agreement**

[13] The following summarizes the significant terms of the PSA and is based on the description thereof in the Monitor's Report.

[14] The principal commitments of USSC and Bedrock are set out in sections 2.01(1) and (2) of the PSA which read as follows:

2.01 Transaction

(1) The Corporation and the Purchaser will each use commercially reasonable efforts to give effect to a restructuring of the Corporation by way of a plan of arrangement under the CCAA (the "CCAA Plan") and the Stakeholder Agreements prior to the Outside Date, on the terms set out in and consistent in all material respects with the Term Sheets and this Agreement (the "Transaction").

(2) The Corporation and the Purchaser agree to cooperate with each other in good faith and use commercially reasonable efforts to complete the following steps in accordance with the following timeline in support of the Transaction:

(a) obtain the Authorization Order by December 31, 2016;

(b) obtain the Meeting Order [being an order of the court for the convening of a meeting or meetings of the creditors to consider and vote on the CCAA Plan] by January 31, 2017 ;

(c) obtain the Sanction Order [being an order of the court for the approval of the CCAA Plan] by March 10, 2017; and

(d) implement the CCAA Plan and close the Proposed Transaction by the Outside Date [being March 31, 2017 or such later date as USSC and the Purchaser may designate by mutual agreement].

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[15] The PSA attaches term sheets setting out the principal terms of the Proposed Transaction agreed to between USSC and Bedrock regarding the following matters (collectively, the "Term Sheets"):

1. the CCAA Plan contemplated to implement the Proposed Transaction;

2. the arrangements pertaining to the environmental conditions at the Hamilton Works and the Lake Erie Works;

3. the arrangements pertaining to the ownership of the HW Lands and the Lake Erie Lands after completion of the Proposed Transaction by a newly established entity (the "Land Vehicle");

4. the lease arrangements pertaining to the lands to be owned by the Land Vehicle that USSC will require for its operations at the Hamilton Works and the Lake Erie Works;

5. proposed terms for OPEBs, including the funding thereof (the "OPEB Term Sheet");

6. proposed terms regarding the Stelco Plans including the funding thereof (the "Pension Term Sheet"); and

7. arrangements concerning the tax aspects of the Proposed Transaction.

[16] The Proposed Transaction is subject to a number of important conditions, which are for the benefit of the Purchaser and USSC and must be complied with at or prior to the closing of the Proposed Transaction. Such conditions include, among others:

(a) *Competition Act* compliance and *Investment Canada Act* approval will have been obtained;

(b) the Sanction Order of the court will have been obtained;

(c) amendments to the collective agreements with USW Local 1005, USW Local 8782 and USW Local 8782(b) shall have been executed and ratified;

(d) the closing conditions to implement the arrangements described in the Term Sheets will have been satisfied on terms and conditions acceptable to the Purchaser and USSC;

(e) implementation of arrangements satisfactory to the Purchaser and USSC regarding the following:

(i) the payment in full to USS of its secured claim;

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(ii) the assignment to the Purchaser of the USS unsecured claims and the issued and outstanding shares in the capital of USSC;

(iii) the execution of a transitional services agreement between USS and USSC;

(iv) the execution of an agreement with respect to intellectual property and trade secrets between USS and USSC; and

(v) the execution of an ore supply agreement between USS and USSC;

(f) the execution and delivery of a new loan agreement, security and related documentation with not less than $125,000,000 of credit available, after satisfying all exit costs and other amounts associated with USSC's emergence from protection under the CCAA, to the Purchaser and USSC by the lenders and to be available at or prior to closing of the Proposed Transaction;

(g) the execution and delivery of all other agreements contemplated by the Term Sheets, or required to satisfy the closing conditions described above, that are required to be executed prior to the time of closing between Bedrock or USSC or both, as applicable, with one or more stakeholders as applicable;

(h) the execution and delivery of all releases among each of the key stakeholders and USSC; and

(i) the satisfaction or waiver of the conditions to the implementation of the CCAA Plan giving effect to the Proposed Transaction as described in the PSA.

**Preliminary Matter**

[17] The relief sought in this proceeding is opposed by three parties: USW Local 1005 ("Local 1005"), the City of Hamilton ("Hamilton"), and Robert J. Milbourne and Sharon P. Milbourne (collectively, the "Milbournes"). These parties (collectively, the "Objecting Parties") each raise a common issue, the short service of the motion materials, which I will address first.

[18] The notice of motion and motion record in this matter were served on the service list on Friday, December 9, 2010 after the close of business. The Objecting Parties say that this effectively gave them three business days' notice of the motion. In paragraph 55, the Initial Order contemplates eight business days' notice of a motion, subject to further order of the Court in respect of urgent motions. To the extent necessary, the applicant seeks leave of the Court to bring this motion on short service on the grounds that it is an urgent motion.

[19] The Objecting Parties seek dismissal of the motion or, in the alternative, an adjournment of this motion for five business days. Counsel for Local 1005 and for Hamilton say that a delay would permit their clients to better understand the terms of the Proposed Transaction. In

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addition, Hamilton and the Milbournes suggest that such an adjournment might permit resolution of their respective issues.

[20] It would have been preferable for the applicant to have provided the full notice contemplated by the Initial Order for motions in the ordinary course. However, I am prepared to grant leave to shorten the service to that actually provided in this case for the following reasons.

[21] First, there is real urgency to this motion in several respects. After almost two years of marketing USSC, the Proposed Transaction is not only the only viable proposal but also the best offer for USSC's stakeholders generally. However, Bedrock is not currently legally obligated to proceed with any transaction. Moreover, the economic circumstances generally, and the economics of the steel industry in particular, are subject to great uncertainty. In addition, there are no currently operating timelines for the resolution of the outstanding issues necessary to finalize the Proposed Transaction. Time does not normally improve the prospects for a successful restructuring. It is therefore imperative that Bedrock be committed to using commercially reasonable efforts to complete the Proposed Transaction at the present time.

[22] Second, there is no evidence whatsoever of any prejudice to the Objecting Parties that would result from granting the requested relief. As discussed below, none of their rights are affected by the Authorization Order. Further, there is no indication that any of them has been unable to understand the PSA in the time available or to represent their clients properly in this hearing. Indeed, they have very ably presented the principal issues of their clients. I would observe as well that Local 1005 has had knowledge of the principal terms of the Proposed Transaction in respect of pensions and OPEBs since early September through its participation in discussions regarding the Proposed Transaction.

[23] Lastly, there is no reasonable likelihood that a delay of five business days will result in the resolution of any of the claims of the Objecting Parties that require negotiation. As all of the parties acknowledge, this is a highly complex restructuring with a number of inter-related issues. I would also note that, to the extent that the position of the Milbournes under the Proposed Transaction is a matter of clarification rather than negotiation, there is no need for any delay in hearing this motion.

**Declaration of Bedrock as the Successful Bidder**

[24] As mentioned, the applicant seeks a declaration that Bedrock is the Successful Bidder as defined in paragraph 27 of the SISP Order with the result, among other things, that all other bids and proposals made by any other person are deemed to be rejected.

[25] Paragraph 27 of the SISP Order reads as follows:

> USSC and the Financial Advisor, in consultation with and with the approval of the Monitor, (a) will review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated among USSC, in consultation with the Financial Advisor and the Monitor, and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations, and (b) identify the highest or otherwise best bid (the

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> "Successful Bid", and the Phase 2 Qualified Bidder making such Successful Bid, the "Successful Bidder") for any particular Property or the Business in whole or part. The determination of any Successful Bid by USSC, with the assistance of the Financial Advisor, and the Monitor shall be subject to approval by the Court.

[26] The applicant, with the assistance of its financial advisor and the Monitor, has determined that Bedrock is the Successful Bidder and that the Proposed Transaction is the Successful Bid. Such determination is therefore now subject to the approval of the Court.

[27] The applicant says that such determination is, in effect, governed by the business judgment rule. On this basis, the determination of the applicant's board of directors should be respected absent evidence of negligence, fraud or patent unreasonableness. There is no such evidence filed in opposition to the motion, notwithstanding the objections discussed below.

[28] I am inclined to agree with the standard proposed by the applicant. In any event, however, there are the following additional considerations which weigh in favour of the granting of the Court's approval if, instead, the Court is required to address the reasonableness of the applicant's determination.

[29] First, the Proposed Transaction is the outcome of an extended search for a buyer or investor pursuant to which USSC has been very extensively marketed. There is no other viable bid or proposal before the Court which would provide as much value to the stakeholders generally. The Monitor is of the view that the Proposed Transaction is the best option for USSC and its stakeholders in the present circumstances.

[30] Second, on the evidence before the Court in the earlier reports of the Monitor, and in the opinion of the Monitor as expressed in the Monitor's Report, the SISP process which resulted in the Proposed Transaction was transparent, robust, fair and reasonable and considered all available alternatives.

[31] Third, despite the fact that the Proposed Transaction does not meet the objectives of all parties, it creates a number of benefits for stakeholders. These include the maintenance of USSC as a going concern with the attendant preservation of employment and related social benefits. In addition, the Proposed Transaction would provide significant funding for USSC's pensions and OPEBs, including through the Land Vehicle created to hold the lands not required for the operations of the Hamilton Works. It also provides for a distribution to the applicant's unsecured creditors as well as repayment of its secured creditors.

[32] Fourth, as a related matter, there is considerable support for the PSA from principal stakeholders of USSC. While Local 1005 argues that support for the Proposed Transaction has not reached "the tipping point", because of the opposition to the PSA of the Objecting Parties addressed below, the reality is the opposite. The Authorization Order is supported by the applicant's board of directors, the Province and USW Local 8782. While USS, the USW and Representative Counsel take no position on the motion, they are not raising any objections. In particular, USS is not opposed to the terms of the Proposed Transaction as set out in the PSA but is withholding its consent until the remaining issues are resolved to its satisfaction. In addition, Representative Counsel stated on behalf of his clients that his clients take reassurance from the

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fact that the Authorization Order does not purport to affect the legal rights of the parties and that negotiations will continue regarding the matters of significance to his clients. Further, the board of directors of USSC is supportive of the PSA, notwithstanding the fact that an important issue to them personally remains an unresolved issue, being the operation of existing indemnities in their favour from USS. Lastly, the CRO of the applicant also recommends that Bedrock be approved as the Successful Bidder.

[33] Fifth, the Objecting Parties submit that particular provisions are intrinsically unfair and, on this basis, urge the Court to reject the Proposed Transaction, or to withhold its approval of Bedrock as the Successful Bidder. In so doing, they are implicitly urging the Court to apply its own view of fairness. I do not think that the Court's view of the fairness of the Proposed Transaction is the appropriate standard at this stage of the proceedings for the following reasons.

[34] First, the Proposed Transaction is not yet finalized. It would therefore be premature to reach any conclusion regarding the terms of the Proposed Transaction. In addition, while the Objecting Parties raise legitimate concerns regarding particular issues of importance to them or their members and retirees, such issues cannot be examined in a vacuum. They must be measured for present purposes against the alternative. In this case, as mentioned, there is no alternative transaction against which to assess these provisions of the Proposed Transaction. The only alternative would appear to be a liquidation scenario.

[35] Further, to the extent that the Court must address the fairness of a transaction, it must do so having regard to the entirety of the transaction, including the pre-existing rights of the stakeholders and the manner in which the interests of the parties are resolved given the need for concessions on the part of the stakeholders to achieve a successful restructuring. In this context, a significant consideration in assessing the fairness of any transaction is whether or not it has received the approval of the affected stakeholders. In other words, the fairness of the issues raised by Local 1005, which are important issues, are more properly addressed by the members and retirees of Local 1005 themselves in the creditors' meeting or otherwise after the Proposed Transaction and CCAA Plan are finalized.

[36] Sixth, as discussed below, the Monitor has provided a strong recommendation in favour of the Court granting approval of the Authorization Order. The Monitor is of the view that the Proposed Transaction represents the best available option for USSC and its stakeholders in the present circumstances.

[37] Accordingly, I am satisfied that the Court should approve the Proposed Transaction as the Successful Bid for the purposes of the SISP Order.

**Authorization to Enter into the PSA and the Province Support Agreement**

[38] The applicant also seeks the authorization of the Court to enter into the PSA and the Province Support Agreement. I will address this matter by dealing first with the authority of the Court to grant such authorization, then with the reasons for the Court's determination to authorize the applicant to sign these agreements, next with two particular terms of the PSA for which the applicant has sought specific authorization, and finally with the objections of the Objecting Parties.

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**Authority of the Court to Authorize the Execution of the PSA and the Province Support Agreement by the Applicant**

[39] Section 11 of the CCAA provides the Court with broad powers to "make any order that it considers appropriate in the circumstances" and section 11.02(2) provides specific authority to vary a stay of proceedings. The Court therefore has the authority to authorize a debtor company in CCAA proceedings to enter into an agreement to facilitate a prospective restructuring.

[40] The issue of the authority of a court was addressed in *Re Stelco* (2005), 78 O.R. (3d) 254 (C.A.). In that case, the Court of Appeal upheld an order of the motion judge authorizing the debtor company to enter into three agreements with the provincial government, the USW and a proposed financing party. The three agreements were said to be "intrinsic to the success" of the proposed plan of arrangement. The debtor company had negotiated those agreements "in an attempt to successfully emerge from CCAA protection." They established the framework for the proposed transaction which would in turn form the basis of the proposed plan of arrangement. It appears that these agreements served a similar purpose in that case as the Province/Bedrock MOU, the USS/Bedrock Term Sheet and the Local 8782 Letter of Support in the present proceeding.

[41] In reaching its decision, the Court of Appeal expressed the following test at paras. 18 and 19, which I think is equally applicable in the present context:

> In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the CCAA provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, s.11(4) [the predecessor of section 11.02] includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the status quo. The point of the CCAA process is not simply to preserve the status quo but to facilitate restructuring so that the company can successfully emerge from the process. This point was made by Gibbs J.A. in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at para. 10:
>
> [Excerpt omitted.]
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

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**Authorization of the PSA and the Province Support Agreement**

[42] I will address the authorization of the applicant's execution of the PSA first and will then briefly address authorization of the Province Support Agreement.

***Authorization of the Plan Sponsor Agreement***

[43] The following sets out the four principal reasons of the Court for its determination to authorize the applicant to enter into the PSA.

[44] First, the Authorization Order does not alter or otherwise affect any legal rights of any of the creditors. As it is not a plan sanction order, it does not alter the right of creditors to approve or reject a plan of arrangement, based on a finalized Proposed Transaction, when it is presented to the creditors. Nor does it constitute approval of a plan of arrangement. For that, the applicant requires a finalized Proposed Transaction upon which to base such a plan. It does not even constitute approval of a final Proposed Transaction. It constitutes no more than authorization to USSC to enter into the PSA and thereby commit to use commercially reasonable efforts to pursue finalization of a transaction based on the framework of the Proposed Transaction described therein, as well as an authorization to enter into the Province Support Agreement.

[45] In order to finalize a binding agreement for the Proposed Transaction that is capable of being completed, the applicant will have to negotiate the final terms of the agreement and take the necessary actions to be in a position to satisfy the conditions of closing contemplated in the PSA. The former requires resolution of a number of outstanding issues among the stakeholders who have already been involved as well as consultation and negotiation with other stakeholders who have not been involved to date, including Hamilton and the Milbournes, among others, regarding the treatment of their claims and interests. The latter requires negotiation of a number of agreements giving effect to the arrangements contemplated by the Term Sheets as well as new collective agreements with each of Local 1005 and Local 8782. There is nothing in the Authorization Order that prohibits USSC from continuing negotiations with its creditors on these matters. Rather, the PSA expressly contemplates that such discussions and negotiations are necessary to finalize all of the terms of the Proposed Transaction and of the proposed plan of arrangement.

[46] Second, while the Objecting Parties' concern that granting the Authorization Order will limit or constrain their bargaining power in such negotiations is understandable, the fact is that the Order itself does not affect the bargaining power or "leverage" of any of the creditors. Nor is it correct to say that future negotiations will take place in a "take it or leave it" atmosphere.

[47] On the one hand, there is scope for negotiations between the stakeholders and USSC and Bedrock. As mentioned, the PSA itself expressly contemplates serious negotiations on a large number of issues that are important to various stakeholders and that ultimately require their approval or consent. It does not predetermine or foreclose the outcome of these negotiations, which are integral to the proposed restructuring of USSC. Further, as mentioned above, the extent to which particular creditors are able to achieve their priorities or objectives in such negotiations will continue to depend, among other factors, on the overall economics of the

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Proposed Transaction and the willingness of other parties to make concessions or tradeoffs to complete a transaction, rather than on the existence of the Authorization Order.

[48] On the other hand, and more significantly, while the terms of the Authorization Order grant exclusivity to Bedrock while the necessary consultations and negotiations are proceeding, this merely reflects the reality of the current situation even without the Order. To the extent that any of the creditors believe themselves to be constrained in some manner in future negotiations, that is a reflection of the circumstances in which the parties find themselves quite apart from the Order. The Court's authorization of the applicant's request to enter into the PSA does not alter the environment in which future negotiations will take place if there is to be a successful restructuring of USSC. While that could be the case if the effect of the Authorization Order were to prevent stakeholders from negotiating simultaneously with two or more potential purchasers, this is no longer a realistic possibility. The SISP has run its course and the stakeholders must now address its outcome. The Proposed Transaction is not only the option that provides the most value to the stakeholders of USSC, it is the only viable option. There is no competing offer for the business and operations of USSC on a going concern basis. The only alternative to proceeding to finalize the Proposed Transaction is a liquidation of USSC on a controlled or an uncontrolled basis.

[49] Third, there are real benefits that will flow from execution of the PSA. In general terms, the commitments of the applicant and Bedrock in the PSA will increase the likelihood of a successful restructuring to the benefit of all of the stakeholders. In this regard, the present circumstances are very similar to those in *Re Stelco*. The PSA is a necessary step in the progression toward finalization of a plan of arrangement for submission to the creditors. The PSA establishes the framework for the Proposed Transaction which would, in turn, form the basis of a proposed plan of arrangement. As in *Re Stelco*, the PSA is therefore intrinsic to the success of the prospective plan of arrangement and it is doubtful that the proposed plan could proceed if the Authorization Order were not granted.

[50] More particularly, the execution of the PSA provides a binding commitment of Bedrock to use commercially reasonable efforts to finalize a restructuring of USSC based on the terms of the Proposed Transaction. As Bedrock is not otherwise obligated in respect of the Proposed Transaction, this commitment, even with the qualifications in the PSA, is important to maintain the confidence of the applicant's employees, suppliers and customers in the continued progress of the restructuring. As mentioned, it provides a framework for future negotiations among stakeholders as well as transparency regarding the interests of the other stakeholders, which will facilitate such negotiations. In addition, it provides some momentum to the process of finalizing the Proposed Transaction by bringing the creditors who have not been involved to date into the consultations and negotiations on an informed basis. Lastly, the PSA sets timelines for completion of a finalized Proposed Transaction and a plan of arrangement based on such Proposed Transaction, which are critical if there is to be successful restructuring.

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[51] Fourth, an important consideration for the Court is the strong recommendation of the Monitor that the Court grant the Authorization Order. The Monitor's recommendation is based on the following:

- the integrity of the SISP process used to arrive at the Proposed Transaction;
- the Monitor's judgment that the Proposed Transaction set out in the PSA is the best available option for USSC and its stakeholders in the circumstances and has only been possible to achieve after two marketing processes that took more than 18 months;
- the Monitor's view that the Proposed Transaction provides a foundation upon which a successful restructuring of USSC can be built; and
- the Monitor's belief that approval of the PSA should assist in focusing the efforts of the key stakeholders towards completing the negotiations of the definitive agreements and arrangements contemplated by the PSA.

***Authorization of the Province Support Agreement***

[52] At the hearing of this motion, the focus of the arguments of all parties was on approval of the PSA, with little attention paid to the related issue of the request for the Court's authorization for the applicant to enter into the Province Support Agreement. I have proceeded on the basis that the opposition of the Objecting Parties also extended to opposition to authorization of the Province Support Agreement, given that it was also necessary in order to progress the Proposed Transaction.

[53] In any event, to the extent that there is any opposition to this relief, the Court is satisfied that the applicant should be authorized to enter into the Province Support Agreement for the same reasons as it authorized the applicant to enter into the PSA.

**Non-Solicitation and Expense Reimbursement Provisions of the PSA**

[54] The applicant also seeks approval of the Court of the non-solicitation provision in section 5.06 of the PSA and the expense reimbursement provision in section 7.02(2) of the PSA.

[55] The non-solicitation provision runs in favour of Bedrock until such time as the PSA is terminated. Given the Court's approval of the applicant's determination of Bedrock as the Successful Bidder and the Court's authorization of the PSA, this is a commercially reasonable provision. It would be unreasonable to expect that Bedrock would commit the time and resources necessary to finalize and implement the Proposed Transaction, and a plan of arrangement giving effect to the Proposed Transaction, without the assurance that it could not be displaced by a subsequent offer. In addition, the significant level of stakeholder support in favour of the Authorization Order described above also weighs in favour of authorization of this covenant.

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[56] The expense reimbursement provision contemplates reimbursement of Bedrock's transaction-related expenses up to a maximum of $4 million in the event Bedrock terminates the PSA under section 7.01(a) thereof. However, this provision relates only to termination in the event of a material breach of any representation, warranty, covenant, obligation or other provisions of the PSA by the other party — i.e. by the applicant. Accordingly, Bedrock is only entitled to reimbursement of its expenses in the event of a material breach of the PSA by the applicant.

[57] In my view, given the complexity and attendant cost of the Proposed Transaction, including the remaining actions required to complete a successful transaction, this is an eminently reasonable provision from a commercial perspective.

[58] Based on the foregoing, the Court is satisfied that both provisions should be approved as commercially reasonable, given the context in which the PSA has been negotiated and executed. In addition, each of these provisions enhances the prospects for a successful restructuring of USSC and, as such, are consistent with the purposes of the CCAA.

## **The Objections**

[59] In reaching the Court's determination to authorize the applicant to enter into the PSA, the Court considered the following substantive objections to the Authorization Order and rejected them for the reasons expressed below.

### ***The City of Hamilton***

[60] Hamilton objects to the declaration of Bedrock as the Successful Bidder and to the authorization of USSC to enter into the PSA. Hamilton says it has been excluded from meaningful consultation and negotiation regarding the Proposed Transaction. It says such consultation was due given its status as a creditor of the applicant and its role as the approval authority for land use and development on the HW Lands.

[61] In its Notice of Objection dated December 13, 2016, Hamilton says it has three main areas of concern: (1) pension and benefits for retirees of USSC; (2) payment of past (accrued and unpaid) and future property taxes; and (3) the future of the HW Lands.

[62] Of these matters, its principal objection pertains to the uncertainty regarding the treatment of the accrued and unpaid past property taxes on the HW Lands as well as the payment of future property taxes. It asks the Court to order, as a condition of the authorization of the PSA, that the PSA confirm that USSC will pay its accrued past taxes and all future property taxes on the HW Lands.

[63] It is not entirely clear that the City has been excluded from negotiations with Bedrock, as counsel for the City suggests. However, the more important point is that on each of the two issues that are of direct concern to the City — payment of its accrued and future taxes and the regime pertaining to the HW Lands — the effect of the relief granted is to permit consultations and negotiations to take place among Bedrock, Hamilton and the other parties involved in these issues. It is inappropriate for the Court to order that Hamilton's rights be enshrined in the

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provisions of the PSA pending the outcome of such discussions and negotiations. Moreover, the Authorization Order does not impair or otherwise affect its rights in any manner whatsoever. Among other things, Hamilton retains the right to oppose the prospective CCAA Plan, both at the creditors' meeting and in the sanction hearing, if it believes that the Proposed Transaction is not fair to it given its legal rights.

***The Milbournes***

[64] The Milbournes have filed an objection dated December 14, 2016. The Milbournes say that they object to the Authorization Order because the PSA "fails to provide for treatment of the pension benefits and OPEBs for individuals in uniquely situated positions", including, in particular, themselves. They say the resulting uncertainty is prejudicial to their interests, given that these benefits stand to be compromised under the proposed plan of arrangement.

[65] In addition to registered pension benefits, the Milbournes receive non-registered pension benefits under a retirement compensation agreement. They submit that, if the Authorization Order is granted, the Court should require that the PSA confirm their continued entitlement to these benefits.

[66] The circumstances of the Milbournes, and any other parties who currently receive similar benefits, are not before the Court, although the Court understands that there may be a trust established to fund some or all of these benefits. In any event, it would be premature to address the treatment of these benefits at the present time.

[67] As with the issues raised by Hamilton, the intended treatment of these benefits under the Proposed Transaction will be the subject of discussion and negotiation, depending, among other things, upon the extent to which such benefits are currently entitled to the benefit of a trust. Further, the Milbournes' rights are not affected in any way by the Authorization Order. They retain the right to oppose the fairness of any plan of arrangement in the sanction hearing to the extent they consider that their rights have been unfairly affected by such plan.

***Local 1005***

[68] I have addressed above the principal objections of Local 1005 to approval of Bedrock as the Successful Bidder for purposes of the SISP Order. Local 1005 also opposes authorizing the applicant to enter into the PSA. It says that, if the PSA is authorized, significant issues outstanding among the parties will essentially be presented to stakeholders on a "take it or leave it basis". I do not agree with this characterization of the situation for the reasons set out above.

[69] The Proposed Transaction is a multiparty transaction. The principal stakeholders have reached agreement on governing principles regarding a number of critical issues. However, Local 1005 is not bound by those arrangements as a legal matter. They are free to negotiate based on their own priorities. As mentioned, the extent to which they are able to achieve those priorities or objectives will depend, among other factors, on the overall economics of the Proposed Transaction and the willingness of other parties to make concessions or tradeoffs in order to complete a transaction. However, in the present circumstances, it will not be affected by the execution of the PSA and the exclusivity that the SISP Order and the PSA grant Bedrock.

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[70] Local 1005 also refers to the fact that the PSA and the CCAA Term Sheet stipulate that changes to Local 1005's collective agreement must be agreed to, as well as changes to the pension and OPEB arrangements. It says that, if the PSA is authorized, these conditions will have a significant impact on collective bargaining and contractual rights. The CCAA Term Sheet does contemplate amendments to existing arrangements affecting employees and retirees of USSC. I do not agree, however, that the authorization of the PSA has a significant impact by itself on the negotiation process.

[71] After a lengthy search process, this is the transaction that is on the table. It reflects what Bedrock is prepared to offer and, in a larger sense, what the market assesses as the value of USSC. There remains considerable scope for negotiations between the parties. However, the scope of such negotiation is defined by the financial limitations imposed by the broad terms of the Bedrock offer and, in a larger sense, by the market. Any sense of constraint in this negotiating process is a reflection of these economic realities, not the authorization of the PSA. Moreover, the consequences of not approving the PSA would establish constraints of a more immediate and draconian nature.

[72] Lastly, Local 1005 objects that certain provisions are, in its opinion, unfair to its members and retirees. This includes their treatment in respect of OPEBs relative to the treatment of members and retirees of Local 8782. Local 1005 also says the arrangements regarding the pension plans and OPEBs are unfair in that they do not provide retirees and beneficiaries, as well as future retirees and future beneficiaries, with any security regarding their pensions and benefits.

[73] It is premature to address these issues at this time. They remain the subject of further negotiations among the stakeholders. They will also be addressed in the context of negotiations regarding satisfaction of the conditions to implementation of the Proposed Transaction. Concerns of this nature are also more properly addressed, as mentioned, by the creditors in the creditors' meeting or in the sanction hearing before the Court if a plan of arrangement is approved.

## Sealing Order

[74] The applicant also requests a sealing order regarding the un-redacted versions of the PSA and the Province Support Agreement. These versions differ from the redacted versions in only one respect: disclosure of the minimum equity contribution of Bedrock.

[75] It is my understanding that none of the parties oppose this relief. In any event, I am satisfied that the requirements for sealing the un-redacted versions of the PSA and the Province Support Agreement contemplated by the test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, 211 D.L.R. (4th) 193, at para. 53, have been met at this stage of the CCAA proceedings. The minimum equity figure is commercially sensitive information, disclosure of which could be prejudicial to Bedrock and/or USSC and, ultimately, to the prospects for a successful restructuring. The benefits of protecting this information in furthering the restructuring far outweigh any negative impact from its redaction. More generally, there is no obvious reason why the other stakeholders should know the position taken by their counterparty, Bedrock, in its negotiations with the applicant. Accordingly, the ability of stakeholders to

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negotiate the remaining outstanding issues is not reasonably affected in any manner by the non-disclosure of this information.

Wilton-Siegel, J.

**Date:** December 22, 2016

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# TAB 30

**CITATION:** *Validus Power Corp. et al. and Macquarie Equipment Finance Limited*, 2023 ONSC 6367
**COURT FILE NO.:** CV-23-0070521500CL and CV-2300703754-00CL
**DATE:** 20231102

2023 ONSC 6367 (CanLII)

**ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**RE:** Macquarie Equipment Finance Limited, Applicant

**AND:**

Validus Power Corp., Iroquois Falls Power Corp., Bay Power Corp., KAP Power Corp., Validus Hosting Inc., Kingston Cogen Limited Partnership and Kingston Cogen GP Inc., Respondents

CV-23-00705215-00CL

**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 VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY THEIR COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.**

**BEFORE:** Peter J. Osborne J.

**COUNSEL:** *Jennifer Stam*, for the Monitor, Moving Party

*Catherine Francis*, for Validus Power Corp., Iroquois Falls Power Corp., Bay Power Corp., KAP Power Corp., Validus Hosting Inc., Kingston Cogen Limited Partnership and Kingston Cogen GP Inc., Respondents

*Scott Bomhof, Jeremy Opolsky and Mike Noel*, for Macquarrie Equipment Finance Limited, Respondent

*Edward Park*, for Attorney General of Canada

*Jesse Mighton*, for Hut 8 Mining Corp. / Far North Power Corp.

**HEARD:** November 1, 2023

## ENDORSEMENT

### The Motions

[1] KSV Restructuring Inc. brings motions in each of these two companion proceedings. I heard both of these motions yesterday, and this Endorsement applies to both motions in both proceedings.

[2] KSV, as Court-appointed Monitor of the Validus Entities in the CCAA Proceeding, seeks an order:

a. approving a SISP for the Validus Entities;

b. authorizing the Monitor to implement the SISP;

c. approving the Transaction Agreement between the Validus Entities by KSV as Monitor, and Kingston LP, and Macquarie Equipment Finance Ltd. ("Macquarie") and Far North Power Corp. ("Far North") as Assignee (Macquarie and Far North together referred to as the "Stalking Horse Bidder"), solely for the purpose of constituting the Stalking Horse Bid in the SISP;

d. authorizing the Monitor to enter into the Break Fee Agreement and approving the Break Fee and the Expense Reimbursement;

e. granting the Bid Protections Charge on the Property in favour of Macquarie as security for the Break Fee and the Expense Reimbursement;

f. approving the Unknown Contract Bar Process;

g. approving the Pre-Filing report of the Monitor dated August 23, 2023, the First Report dated September 1, 2023, and the Second Report dated October 19, 2023; and

h. extending the Stay Period to December 31, 2023.

[3] KSV, as court-appointed Receiver of the Validus Entities in the Receivership Proceeding, seeks an order amending paragraph 23 of the Receivership Order to increase the Receiver's borrowing limit under the Receiver's Borrowing Charge by $500,000 from $1 million to $1.5 million.

[4] Defined terms in this Endorsement have the meaning given to them in the motion materials, the Reports of the Monitor/Receiver or earlier Endorsements made in these proceedings, unless otherwise stated.

[5] All of the relief sought in both proceedings is unopposed by any party, except for the Validus Entities, who do not oppose approval of a SISP but oppose certain terms of this proposed SISP, and who oppose approval of the Stalking Horse Offer. The relief sought by the

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Monitor/Receiver is strongly supported by Macquarie, the largest secured creditor of the Validus Entities, and Hut 8 Mining Corp., now known as Far North Power Corp.

[6] The Validus Entities do not agree with the calculation of the quantum of the obligations owing to Macquarie. Since the proposed Stalking Horse Offer is essentially a credit bid by Macquarie based on the amounts owing to it, the Validus Entities oppose approval of that Stalking Horse Offer.

[7] In the alternative, and if the calculation is correct, the Validus Entities submit that the amount owing to Macquarie is unconscionable and violates the anti-deprivation rule.

[8] Finally, the Validus entities oppose, although the points were not pressed vigourously in argument, other terms of the SISP including the quantum of the break fee and the tight timing for the receipt of bids.

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**BACKGROUND, the MACQUARIE AGREEMENTS and the DEFAULTS**

[9] A more detailed background to, and context for, these motions is set out in earlier Endorsements.

[10] The Validus Entities are a group of privately held companies that own and operate power generation plants located in North Bay, Kapuskasing, Iroquois Falls and Kingston, Ontario. They sell capacity and power to the Independent Electricity System Operator ("IESO") as a participant in the IESO's capacity auction market.

[11] Macquarie is the senior secured lender of the Validus Entities. In April 2022, Iroquois Falls Power Corp. ("IFPC"), one of the Validus Entities, entered into a sale-leaseback transaction with Macquarie pursuant to several transaction agreements which work together and are all part of the relationship between Macquarie and the Validus Entities.

[12] Those transaction agreements include an Amended and Restated Lease Agreement (the "Lease Agreement"), an Amended and Restated Participation Agreement (the "Participation Agreement") and certain guarantees and security provided by the Validus Entities (collectively the "Lease Transaction Documents").

[13] In summary, and as part of that transaction, IFPC sold certain Leased Property to Macquarie pursuant to the Participation Agreement, and that Leased Property was then leased back to IFPC pursuant to a Lease Agreement. Macquarie was granted security for the amounts owing to it.

[14] The first ranking security held by Macquarie includes a pledge of the interests of the Validus Parent in certain of the power generation plants, general security and mortgages on substantially all real and personal property of the Validus Entities in respect of the four power plants except for turbines, plant and equipment that is owned by Macquarie and leased to IFPC under the Lease Agreement, and a pledge of various material agreements.

[15] As is further explained below, it is important to understand that the Macquarie transaction was a sale lease-back transaction, and not simply a loan.

[16] Macquarie calculates its claim as at September 22, 2023 to be $57,218,822, to which amount it adds costs and overdue interest accruing after that date.

**THE PROPOSED SISP, STALKING HORSE AGREEMENT and RELATED RELIEF**

[17] A SISP was contemplated from virtually the outset of the CCAA Proceeding. The particulars and full terms of the proposed SISP are set out in the Second Report and I have not summarized all of them here unless they are contested or centrally relevant to the disposition of the motions.

[18] In summary, the SISP contemplates a relatively tight timeframe for the commencement of a marketing process by the Monitor, the receipt and evaluation of Bids and Qualified Bids, the conduct of an Auction (if any), followed by a motion for approval of the transaction reflected in the Successful Bid (whatever Bid that may be), which approval will likely include a reverse vesting order structure.

[19] A reverse vesting order structure is contemplated since the Validus Entities hold numerous permits and licences that allow them to operate in a highly regulated industry. The Stalking Horse Bidder requires such a structure to minimize uncertainty related to the transferability of those licences and permits in any commercially reasonable time frame. The Monitor anticipates that other bidders would require the same terms.

[20] It is also important to note that approval of any transaction, including but not limited to the transaction reflected in the Stalking Horse Offer, and approval of any reverse vesting order structure, is not being sought today (and to be very clear, nor is it being granted). Rather, and as discussed below, approval of the Stalking Horse Offer is sought as just that: a stalking horse bid as a term of the proposed SISP to provide a "floor" or minimum initial bid only.

[21] The proposed SISP include some significant flexibility to give the Monitor the latitude and discretion to conduct the process in a manner that is likely to maximize recovery for stakeholders, but to do so pursuant to a process that is transparent, fair and efficient.

[22] For example, interested parties may submit Bids for individual assets or plants, and multiple Bids may be aggregated to form together a Qualified Bid, including in conjunction with the Stalking Horse Offer to form an Alternative Bid.

[23] In order to be considered a "Qualified Bid" under the SISP, a Bid must meet the criteria clearly set out in the SISP. Those criteria include a minimum aggregate consideration of $60,228,822. That figure represents the sum of:

a. the Macquarie Claim Amount referred to above of $57,218,822 (as of September 22, 2023);

b. the Priority Payments Closing amount of $1.5 million;

c. the Bid Protections of $2.26 million; and

d. a $750,000 minimum overbid.

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[24] In addition, Qualified Bids must also provide for the purchase of the interest of Macquarie in the Receiver's Certificates which are projected to be approximately $1.3 million - $1.5 million plus fees and interest: see the Second Report of the Monitor, Cash Flow Forecast Appendix.

[25] The Stalking Horse Offer has been structured to be what is referred to colloquially as a "sign and close" transaction with the intention that Macquarie and Far North are not deemed to control IFPC for income tax purposes prior to the time that the applicable Stalking Horse Bidder actually acquires control at closing (if in fact that occurs).

[26] Macquarie and Far North have advised the Monitor that there is a risk that such deeming for income tax purposes would occur if the bid provided for a closing date that did not occur contemporaneously with the execution by the parties of the Transaction Agreement.

[27] Importantly, however, the Stalking Horse Offer is irrevocable subject to its Terms and Conditions. It contemplates a transaction pursuant to which Macquarie and Far North would acquire (in summary):

a. the shares/units of Validus Parent held in the Validus Entities except for IFPC;

b. newly issued shares of IFPC; and

c. certain assets of Validus Parent that are not subject to the Macquarie Security, as fully described in the motion materials and the Second Report.

[28] The Stalking Horse Offer is effectively a credit bid. The consideration payable would be comprised of:

a. payment by the Assignee of $1.5 million in respect of certain estimated "priority payments" owing by Validus Parent in respect of unremitted employee source deductions (and an indemnity with a corresponding charge to secure those priority amounts);

b. payment by the Assignee of an amount to be determined by the Monitor prior to closing in respect of administrative expenses;

c. Macquarie releasing the Validus Entities from all outstanding obligations under the Lease Transaction Documents and security; and

d. Macquarie transferring to IFPC the Leased Property (pursuant to a contemplated reverse vesting order structure).

[29] The Stalking Horse Offer also contemplates the opportunity for ongoing employment opportunities for employees of the Validus Entities as well as the assumption of all pre-and post-filing liabilities relating to Continuing Contracts and liabilities for municipal taxes.

[30] It contemplates an Outside Date of December 29, 2023. If it is Terminated (i.e., not selected as the Successful Bid or not approved by the Court, among other things), a break fee would be payable. Pursuant to the proposed Break Fee Agreement, the Monitor has agreed to a Break Fee

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of $1.25 million plus an expense reimbursement of up to $1 million (collectively, the (Bid Protections") together with a Bid Protections Charge on the Property as security for the payment of the Bid Protections, which would be payable only out of the proceeds of sale on the closing of another Qualified Bid.

[31] As observed above, no party opposes the approval of a SISP. I am satisfied that the particular SISP proposed here should be approved.

[32] Courts have recognized that the broad, remedial nature of the CCAA, and the discretion in s.11 in particular, conferred the power to approve a SISP in respect of CCAA debtors and their property: *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169, 2009 CanLII 39492 (ONSC) ("*Nortel*") at para. 36.

[33] This Court has held that when considering a sales solicitation process, including the use of a stalking horse bid, the Court should assess the following factors (See: *CCM Master Qualified Fund v. Bluetip Power Technologies*, 2012 ONSC 1750 at para. 6):

a. the fairness, transparency and integrity of the proposed process;
b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; 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.

[34] The British Columbia Supreme Court recently surveyed the Canadian authorities relevant to consideration of stalking horse bids, including those referred to above, and expressed the relevant factors as follows (See: *Re Freshlocal Solutions Inc.*, 2022 BCSC 1616 at paras. 24-32):

a. how did the stalking horse agreement arise?
b. what are the stability benefits?
c. does the timing support approval?
d. who supports or objects to the stalking horse agreement?
e. what is the true cost of the stalking horse agreement? and
f. is there an alternative?

[35] In my view, these authorities are entirely consistent with one another and, while articulating the factors in a slightly different manner, each approaches the analysis in the same way and with the same objectives. The slightly more detailed list of factors set out by Justice Fitzpatrick in *Freshlocal* are in my view all subsumed, or they should be, in the three factors set out by Justice Brown in *CCM*.

[36] Moreover, both of those authorities are also consistent with the approach of the Québec Superior Court which set out a list of non-exhaustive factors relevant to the approval of stalking horse bids in *Boutique Euphoria Inc. (Re)*, 2007 QCCS 7129 at para. 37 (as well as with the approach taken in *DCL Corporation, (Re)*, 2023 ONSC 3686 (CanLII), at para. 19).

[37] These analyses distill, essentially, to this question: taking into account the support for and opposition to the terms of the proposed SISP and stalking horse agreement, while recognizing whether and how those parties supporting or opposing it are economically affected by the outcome,

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will the proposed process (including its stalking horse bid component and all other material terms), if approved and approved at this time, likely result in the best recovery on the assets being sold pursuant to a fair and transparent process?

[38] 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. (See *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
b. the interests of all parties;
c. the efficacy and integrity of the process by which the party obtained offers; and
d. whether the working out of the process was unfair.

[39] In *Nortel*, Morawetz, J. (now Chief Justice Morawetz) described several factors to be considered in a determination of whether to approve a proposed sales process, including:

a. is a sale transaction warranted at this time?
b. will it benefit the whole economic community?
c. do any of the debtor's creditors have a *bona fide* reason to object to a sale? and
d. is there a better viable alternative?

[40] Subsequent to that decision, the *CCAA* was amended in 2009 to clarify the jurisdiction of this Court to authorize a sale of assets of the debtor outside a plan of arrangement according to the non-exhaustive list of factors set out in s. 36 of the *CCAA*. The s. 36 factors apply to approval of a sale rather than a sale process, but Chief Justice Morawetz' *Nortel* factors continue to apply post-2009 amendments: *Brainhunter Inc*., 2009 62 CBR ($5^{th}$) 41.

[41] Notwithstanding that the s. 36 factors are not directly applicable to the relief sought on this motion, in my view they should be kept in mind since they will be considered when this Court is asked to approve a sale resulting from the very process now under consideration.

[42] The use of stalking horse bids to set a baseline for a sales process can be a reasonable and useful approach. As observed by Justice Penny of this Court, they can maximize value of a business for the benefit of stakeholders and enhance the fairness of the sales process as they establish a baseline price and transactional structure for any superior bids. (See *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20).

[43] The challenge in this particular proceeding, as is often the case, is one of stability and time: the former is required, and the latter is lacking.

[44] If recovery here is to be maximized, the business must be stabilized, and stabilized in a manner that is apparent to those inside such as employees, and to those outside the business such as potential bidders, future debt lenders or equity investors, and regulators.

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[45] This means, among other things, that the preservation of value in the Validus Entities depends in large part on the ability of those entities or their successors to participate in the upcoming IESO capacity auction. The bid deadline for participating in the IESO capacity auction is November 29, 2023 (just over two weeks from now) and there are corresponding milestones to be met in advance of that bid deadline towards the achievement of which the Monitor, on behalf of the Validus Entities, is already working.

[46] It is therefore critical for the SISP (any SISP) to start as soon as possible to permit participation in the IESO's capacity auction and also continue the work streams that require the development of a comprehensive business plan for the Validus Entities more broadly. It follows that the timing is necessarily extremely limited.

[47] The SISP has been developed and will be conducted by the Court-appointed Monitor. To state the obvious, that Court Officer has, and I am certain will fulfil, the obligation to conduct that process in a fair and transparent manner.

[48] The proposed SISP contemplates and facilitates possible transactions with greater value than the Stalking Horse Offer if one is identified. The Monitor is of the view that the 35-day bid period is sufficient in the circumstances to allow interested parties to perform due diligence (there will be a virtual data room).

[49] I observe that the Monitor has been mindful of the sales process conducted by Ernst & Young Corporate Finance earlier this year (discussed in the Monitor's Reports and my earlier Endorsements in this proceeding), which did not yield any material unconditional offer for IFPC, and it is considered to be one of the two most valuable powerplants. In addition, the Validus Entities attempted without success to arrange alternative financing transactions at or about the time the Receivership Order was made (which they had opposed).

[50] Moreover, I am satisfied that the opportunity presented by the SISP is unlikely to take the market of potential bidders, (which is limited and highly sophisticated, given the nature of the business of the Validus Entities), by surprise. Hut 8 issued a press release on August 11, 2023, announcing the execution of the Transaction Support Agreement which effectively telegraphed to the market the very process for which approval is now being sought.

[51] I also note that the consideration contemplated by the Stalking Horse Offer exceeds materially the aggregate value that Validus Power Corp. paid when it acquired plants in 2021/2022, of approximately $45 million.

[52] I am also satisfied that the inclusion in the SISP of the Stalking Horse Offer is appropriate in the particular circumstances of this proceeding. The Monitor considered one of the obvious questions; namely, whether a stalking horse bid was required at all or whether the process might be just as effective if those parties simply participated in the sales process by submitting whatever offer they might consider appropriate.

[53] I accept and agree with the recommendation of the Monitor that the Stalking Horse Offer provides an important degree of certainty to the employees of the Validus Entities and other stakeholders who may take some comfort that there is a possible going-concern solution for the business.

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[54] As reflected in the Second Report, employees of the Validus Entities have communicated to the Monitor that they are encouraged by the steps taken to date in these proceedings and were further encouraged to learn that a stalking horse bid was being prepared and would likely be submitted by a prospective purchaser who is substantive and reputable. The Pre-Filing Report referenced the risk of significant employee resignations, and the consequent effect on the continued operation of the Validus Entities and the preservation of their value. That risk is further mitigated by the Stalking Horse Offer.

[55] This is contrasted with the risks of conducting a SISP without a stalking horse, which risks include the absence of support from Macquarie as the senior secured creditor, the possible resignation of the employees and consequent shutdown of all plants, and the virtual certain detrimental, yet material, impact on value.

[56] As stated at the beginning of this Endorsement, the Validus Entities oppose certain terms of the Stalking Horse Offer.

[57] Leaving aside the issue raised by Macquarie as to what interests the Validus Entities are in fact advancing and for whose benefit, given that those Entities are currently being operated by the Receiver, I have considered the objections they have raised.

[58] First, as stated above and as was confirmed repeatedly in both written and oral submissions by the Receiver, the Monitor and the Stalking Horse Bidders (Macquarie and Far North), this Court is not being asked to approve today, and nor is it approving, the Stalking Horse Offer other than for the limited and exclusive purpose of having it serve as a stalking horse in the SISP.

[59] If, and only if, the Stalking Horse Offer is the Successful Bid in the SISP, further approval of the Court will be sought and required for the approval of such Successful Bid and the transaction contemplated thereby. This includes approval of its terms, the proposed reverse vesting order structure and the proposed tax treatment, including HST issues, and the inclusion or exclusion of assets.

[60] This Court has previously held that it is not in all cases necessary for the full terms of the stalking horse bid to be considered at the time of approval of a SISP: *Kingsett Mortgage Corporation et al. v. Stateview Homes (Minu Towns) Inc., et al.*, July 19, 2023, Ontario Superior Court of Justice (Commercial List) at paras. 7, 12 and 17; and *Fire & Flower Holdings Corp. et al.*, 2023 ONSC 4048 (CanLII) at para. 23.

[61] I agree with that approach. That is not to say, however, that the terms of a stalking horse bid, including its overall economic value or the consideration payable if the transaction is approved, are irrelevant at the time of approval of a SISP. They are not. In my view, there is no purpose served by approving a stalking horse bid even if for the limited purpose of acting as such in a sales process, if it is clear from the outset that it would not be approved at the conclusion of the sales process even if no other bid, or no superior bid, were made. That sets up the process for failure and would likely result in a waste of time and financial resources all to the detriment of stakeholders and to the ultimate outcome achieved.

[62] To be clear, the value of the consideration to be paid in a stalking horse bid is a relevant consideration at the time of SISP approval. It is by no means determinative and is not the exclusive

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factor, but it is a relevant factor. This is particularly so, where, as here, the Stalking Horse Offer is a credit bid. That in turn means that the value of that credit (or really, debt) that is being bid, is a relevant consideration at the SISP approval stage.

[63] What all of this means is that the economically affected stakeholders, including in this case Macquarie who is the senior secured creditor and also the Stalking Horse Offer sponsor (with Far North), and also including the Court-appointed Officers (being the Receiver and the Monitor in making their recommendations to this Court), must go into the SISP process fully armed with the knowledge that even if the Stalking Horse Offer turns out to be the Successful Bid, there is a risk that it may not be approved by the Court. That determination is for another day, but the parties need to understand and recognize now the risk that a SISP with the Stalking Horse Offer has the possibility of not succeeding just as does a SISP without any stalking horse bid.

[64] I am satisfied that all parties understand this here; indeed, it is expressly recognized by the Receiver, the Monitor and the Stalking Horse Bidders as stated above. Appropriate parties will have the opportunity to oppose approval of the transaction contemplated by the Stalking Horse Offer, including the reverse vesting order structure, on the approval motion if it is the Successful Bid.

[65] Having considered all of the factors, I am satisfied that in the circumstances of this case, the SISP with the Stalking Horse Offer is the far preferable alternative to a SISP without a stalking horse.

**The Objections Raised**

[66] I have not set out in this Endorsement every particular of the objections raised by the Validus Entities, nor every particular of the points raised in answer to the objections by the Monitor and by Macquarie.

[67] In summary, the principal objections of the Validus Entities to approval of the Stalking Horse Offer, even for the limited purposes of the SISP as stated above, are three-fold:

a. it overstates the quantum of the amounts owing to Macquarie which forms the basis of the credit bid, with the result that the consideration that must be offered by any alternative bidder to be deemed to be a Superior Bid is artificially inflated;

b. in the alternative, if it does not overstate the quantum owing pursuant to the Lease Transaction Documents, that quantum is unconscionable and violates the anti-deprivation rule, with the result that the effect on the SISP and alternative bids is the same as above; and

c. it contemplates a structure which should never be approved even if it is the Superior Bid since it would mean that the Validus Entities, through the Monitor, pay to Macquarie material amounts in respect of HST for remittance to the CRA, but the input tax credits generated by the HST payments are unavailable to offset outstanding HST liabilities to the CRA, all of which is to the detriment of the CRA and all other creditors of the Validus Entities.

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[68] I am satisfied that the Stalking Horse Offer should be approved notwithstanding these objections, whether considered separately or in the aggregate.

**The Quantum Owing to Macquarie**

[69] First, I am satisfied that the amount owing to Macquarie is correct for the purposes of this motion and accords with the Lease Transaction Documents and the calculation of that amount in the event of a default, as has occurred here.

[70] I draw significant comfort from the very strong support of the Court-appointed Monitor, having conducted its own extensive analysis and calculations, that the quantum is correct.

[71] In my view, much of the disagreement results from the issue foreshadowed at the outset of this Endorsement: the Lease Transaction Documents set out the terms not of a simple loan from Macquarie secured by equipment, but rather of a much more nuanced sale and lease-back transaction.

[72] The Validus Entities argue that the quantum that Macquarie says is outstanding and on which the credit bid is based materially exceeds the aggregate of all amounts advanced by Macquarie, net of repayments, as a result of double-counting of certain components of that quantum.

[73] I am satisfied for the purposes of this motion that it does not do so. Without question, the quantum sought by Macquarie is greater than the net amount advanced plus accrued interest. But that is not the end of the analysis given the conceptual structure of the transaction in the first place and the application of the specific provisions of the Lease Transaction Agreements in particular.

[74] Counsel to the Monitor has provided an opinion that, subject to the standard assumptions and qualifications, the security granted by each of the Validus Entities to Macquarie is valid and enforceable.

[75] Pursuant to the terms of the Participation Agreement, the purchase price for the Leased Property was $45 million plus $5.85 million in HST. Of that $45 million purchase price, the amount of $9 million was agreed by the parties to be paid to IFPC upon it and other Validus Entities meeting a certain condition, failing which such amount was to be used to prepay rent under the Lease Agreement.

[76] Ultimately, the condition was not met, with the result that as contemplated by the parties and provided for in the Participation Agreement, that $9 million was applied to pre-pay rent under the Lease Agreement.

[77] Pursuant to the Lease Agreement, IFPC agreed to make monthly rent payments to Macquarie in the amount of $1.25 million (the “Base Rent”) plus HST during the 36-month base term of the Lease. IFPC also agreed to pay all other amounts and obligations it was required to pay under the Lease Transaction Documents.

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[78] In the event of default, Macquarie had various contractual remedies provided, including the right to demand from IFPC liquidated damages in an amount equal to the sum of three components:

a. any unpaid Base Rent in arrears;

b. the Stipulated Loss Value ("SLV") for the Leased Property; and

c. interest on both of those amounts.

[79] The SLV is not a fixed value but rather, according to the terms of the Lease Transaction Documents, is determined as provided for in Schedule 3 to the Lease Agreement. Initially, the SLV was $54 million, but was reduced with each rent payment made by IFPC. As provided for in the Lease Transaction Documents, however, the relationship between the quantum of each rent payment, and the reduction in the-then amount of the SLV, is not linear (i.e., the two amounts do not reduce on a dollar-for-dollar basis at the same time).

[80] The amount of the SLV payable by IFPC in the event of a default was the SLV as of the date of written notice that Macquarie was exercising its remedies. Upon payment of these amounts, pursuant to s. 13.1(f) of the Lease Agreement, IFPC would become the owner of the Leased Property.

[81] IFPC failed to make required payments under the Lease Agreement as due on each of May 31, 2023, June 7, 2023 and July 7, 2023. Pursuant to amendments made to the Lease Agreement on February 24, 2023, Macquarie provided IFPC a four-month "rent holiday" by amending the rent payment schedule (Schedule 3).

[82] As a result, IFPC was relieved of the obligation to pay rent from February through April, but was instead required to make a single, larger, rent payment in May (the "balloon payment"), followed by regular monthly payments in June and beyond. The total rent payable during that period was increased by $1 million as is clear from a plain reading of the terms of the Lease Agreement.

[83] In other words, the parties agreed that a premium was to be paid for the rent holiday. In my view, therefore, it is not a fair characterization of the operation of the provisions of the relevant agreements to say that the aggregate rent payments due and owing exceed the sum of the original rent payments due monthly that were forgiven in exchange for the four-month rent holiday and the balloon payment thereafter. There has been no overstatement of rent arrears.

[84] Similarly, I am satisfied that there has not been a double-counting, as alleged by the Validus Entities, of $8.5 million in the calculation of the SLV.

[85] The Lease Agreement specifies that the quantum of the SLV is determined upon reference to the "number of Base Rents paid … at the relevant time". The basis for the SLV is described above. I recognize that the operation of the Lease Transaction Documents results, given the default, in a contractual entitlement of Macquarie to collect both the rental arrears and an SLV that is not calculated in a manner that accounts for those rental payments. The Monitor is satisfied, however, that it is calculated exactly in accordance with the language of s. 13.1(f) of the Lease Agreement.

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[86] Finally, I am also satisfied that there has been no failure to credit the $9 million in prepaid rent. Pursuant to the Lease Agreement, the Pre-Paid Rent is to be applied to the last payments of the Base Term. Macquarie submits, and the Monitor agrees, that the quantum sought gives credit for these payments when determining the quantum of the SLV.

[87] Macquarie gave notice that it was exercising its right to terminate the Lease Agreement on July 24, 2023. It demanded payment pursuant to s. 13.1(f) of the Lease Agreement of $55,598,575, comprised of:

a. $8.5 million of unpaid Base Rent;

b. $40.5 million in respect of the SLV;

c. $6,370,000 in respect of HST payable on the above amounts; and

d. $228,575 in respect of interest on the Base Rent.

[88] That quantum has increased, and continues to increase, as interest accrues (see paragraph 16 above).

[89] For all of these reasons, I am satisfied that the amount claimed is appropriate for the purposes of this motion and flows from the operation of the bargain made by the parties as reflected in the Lease Transaction Documents.

**The Anti-Deprivation Rule**

[90] Even if I am right in accepting the recommendation of the Monitor that the calculation is correct, the Validus Entities submit that such a calculation violates the anti-deprivation rule and would result in the unjust enrichment of Macquarie, to the detriment of other creditors and the Validus Entities.

[91] The anti-deprivation rule has its origins in the common law. It is intended to prohibit contracts that frustrate statutory insolvency schemes and was originally directed against fraudulent conduct.

[92] The Supreme Court of Canada considered the anti-deprivation rule in *Chandos Construction Ltd. v. Deloitte Restructuring Inc*., [2020] 3 S.C.R. 3, 2020 SCC 25 ("*Chandos*"), and shifted the focus from the nature of the conduct to the nature of the result and rejected an intention-based test in favour of a result-based test.

[93] The Validus Entities argue that Macquarie invoked the SLV provision after issuing demands for repayment and serving a Notice pursuant to s. 244 of the *BIA*, with the result that the anti-deprivation rule is engaged and should operate here to prohibit the operation of that contractual provision.

[94] The Supreme Court stated in *Chandos* that the rule renders void any provision in an agreement which provides that upon an insolvency (or bankruptcy), value is removed from the

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reach of the insolvent person's creditors which would otherwise have been available to them, and places that value in the hands of others.

[95] In *Chandos*, that is exactly what happened. A general construction contractor entered into a construction subcontract which provided, in relevant part, that the subcontractor would pay the general contractor 10% of the subcontract price as a fee for the inconvenience or for monitoring the work in the event of a bankruptcy of the subcontractor.

[96] The fee was triggered and indeed was expressly conditional upon the event of bankruptcy. It was not payable otherwise in the event of a default or indeed in any circumstance absent a bankruptcy. It was a clear example of a provision that was triggered by an event of insolvency or bankruptcy. In fact, it could not have been clearer, as it stated that: "in the event that [subcontractor] commits any act of bankruptcy, [subcontractor] shall forfeit 10% of the subcontract price".

[97] The present case is distinguishable. In my view, the anti-deprivation rule is not engaged in the circumstances of this case so as to prevent operation of the agreements according to their terms. The entitlements pursuant to the SLV provision (and the related provisions discussed above) did not arise as a result of the insolvency of the Validus Entities (and there has been no bankruptcy). They arose, as intended by the parties in making their bargain, on the default by the Validus Entities of their contractual obligation to make the rent payments when due.

[98] It is irrelevant whether those entities were insolvent, at the time of the defaults, or now when the amounts calculated by operation of the contractual provisions are being claimed. Those amounts did not arise, and were not triggered, by the insolvency. Macquarie would have been no less entitled to the amounts it is now claiming if the Validus Entities were not insolvent at all (then or now) but rather had simply breached the Lease Transaction Agreements in the absence of an insolvency.

[99] Moreover, Macquarie will not have been unjustly enriched if it is found to be entitled to the amounts it is claiming. The Validus Entities cannot meet the requirement of demonstrating that there was no juristic reason for the benefit and the loss, in circumstances where the Lease Transaction Documents, representing the bargain freely made by highly sophisticated parties engaged in an extremely complex transaction and represented by counsel throughout, specifically and expressly contemplated exactly this result.

[100] As observed by the Supreme Court, the anti-deprivation rule is based on the common law public policy against agreements entered into for the unlawful purpose of defrauding or otherwise injuring third parties. The Supreme Court concluded that Parliament intended to prohibit a debtor from contracting with creditors for a different distribution of the debtor's assets in bankruptcy than that provided in the *BIA*. That is not what is happening here. In my view, it was neither the intent of the parties, nor the effect of the agreements, to circumvent the statutory regime that provides that all claims proved in a bankruptcy shall be paid ratably.

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**Unfairness Regarding HST Treatment**

[101] With respect to the payment of HST, I am also satisfied that if an issue exists at all, it is an issue properly argued on the motion for approval of the transaction resulting from the Successful Bid, whether or not that is the Stalking Horse Offer.

[102] The Validus Entities submit, and in fairness to them submitted earlier on the motion to appoint a receiver, that they had concerns about the treatment of certain post-filing input tax credits ("ITCs") which may otherwise serve to reduce the Purchase Price HST.

[103] First, counsel for the Canada Revenue Agency ("CRA") was present in Court on these motions and took no position on the issue. The CRA agrees that the issue is properly addressed at the time of the transaction approval motion, and moreover, the CRA is still in the process of completing its HST audit, with the result that it was not in a position at the hearing to make any submissions with respect to what amounts were owing, what ITCs may be available, or to any other particulars of the HST issue.

[104] The Monitor/Receiver and Macquarie also submit that this issue is properly addressed on a transaction approval motion, since any Successful Bidder will be responsible for HST obligations arising on the transaction and can and should take its own advice as to whether, and the extent to which, ITCs may be available to it, to subsequently set off HST remittance obligations otherwise owing.

[105] Moreover, the Monitor has considered the proposed tax treatment under the Stalking Horse Offer and is unaware as to whether any ITC applications were previously filed by the Validus Entities (largely due to the poor state of the books and records of the business, which has presented a continuing challenge for both the Receiver and the Monitor).

[106] Nonetheless, it is of the view that to the extent that IFPC is entitled to any ITCs in respect of HST on pre-filing base rent payments that were actually made by IFPC to Macquarie pursuant to the Lease Agreement, any such entitlements are Excluded Assets pursuant to the Transaction Agreement which would be vested, if the transaction is approved, in ResidualCo.

[107] In addition, the Monitor has concluded that any HST paid by IFPC in respect of the transaction contemplated by the Stalking Horse Offer is considered to be a post-filing payment of HST, and correspondingly, any ITCs generated as a result of such payment of HST cannot be set off against the prefiling Purchase Price HST obligation in any event. Finally, any ITCs generated from the payment of HST on obligations of Validus Power Corp. during the receivership or CCAA period will continue to be assets of that entity or of ResidualCo, but also cannot be set off against the prefiling Purchase Price HST.

[108] For all of those reasons, the Monitor is of the view that the treatment of any entitlements to ITCs under the transaction and within the course of these proceedings, is appropriately allocated. Even if it is not, the issue can be argued and determined as part of a sale approval motion.

[109] For all of these reasons, I am satisfied that the HST issues have been appropriately allocated to the extent they can be at present, and will in any event be the subject of the sale approval motion

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such that they need not be finally determined today. As stated above, and given the position of the CRA, they could not be determined today in any event.

**Bid Protections**

[110] The Break Fee Agreement includes a Break Fee of $1.26 million and an Expense Reimbursement of up to $1 million for reasonable out-of-pocket third-party expenses incurred by Macquarie.

[111] The Monitor has considered the range of acceptable bid protections in the context of stalking horse bids (see: Comparative Summary of Break Fees, Appendix 'J" to the Second Report). This Court has previously noted that bid protections within the range of 1.8% - 5% may be reasonable: *CCM*, at para. 13. Here, the maximum amount of the Bid Protections represents approximately 3.85% of the proposed consideration.

[112] The Monitor is of the view that the Bid Protections properly recognize the benefit being conveyed to the estate by the Stalking Horse Offer setting the floor for a sales process, as well as the time, effort and resources spent by the stalking horse buyer who may ultimately be outbid in the SISP.

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

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

[115] In the circumstances here, and as I have concluded that the Bid Protections should be approved, I am also satisfied that the Bid Protections Charge, which I note is a condition of the Stalking Horse Offer, should be approved as this Court has done in other cases: see, for example, *In the Matter of LoyaltyOne Co*., (March 20, 2023), Toronto, Superior Court of Justice (Commercial List), CV-23-0069601700CL.

[116] Although the Bid Protections Charge encumbers the Property, the Bid Protections themselves are payable only out of closing proceeds from a different successful transaction. The Monitor believes that such a charge is reasonable in the circumstances.

**Unknown Contract Bar Process**

[117] I am also satisfied that the Unknown Contract Bar Process should be approved. It is perhaps somewhat atypical, but I am satisfied that it is appropriate here. Part of the challenge faced by the

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Receiver and by the Monitor has been the fact that the books and records of the Validus Entities are incomplete and in disarray. The Monitor in particular has struggled to identify even material contracts to which the Validus Entities are parties, and therefore in some cases the counterparties are unknown.

[118] In other cases, the existence of a contractual arrangement and the identity of a counterparty may be known, but the material terms of the contractual arrangement are unknown or unclear. The Monitor has retained the services of a former senior officer of the Validus Entities to assist with its efforts in this regard.

[119] Courts have expressed concern in other cases, and properly so, regarding the notice to contractual counterparties as to the potential effects of a proposed reverse vesting order on the treatment of their contracts with the debtors: see, for example, *Re PaySlate Inc.* 2023 BCSC 608 at paras. 64, 71 and 75, where Justice Walker of the British Columbia Supreme Court declined to approve a proposed reverse vesting order transaction on the basis that, among other things, the debtor had not provided notice of the hearing for approval of the proposed transaction to counterparties in contracts that were proposed to be retained.

[120] In that case, the reverse vesting order transaction was subsequently approved, but only after notice had been given to those counterparties (2023 BCSC 977).

[121] The proposed Unknown Contract Bar Process here will provide for publication of the notice in both national and local publications. In addition, the Monitor is making best efforts to ensure that those known counterparties or possible counterparties are also advised. The Process contemplates that the Monitor will post on its website a list of known contracts, with the exception of employee agreements. Counterparties on that Known Contract List will receive notice of the anticipated reverse vesting order transaction, including notice as to how their contracts will be treated in the context of the Successful Bid.

[122] To identify whether there are any unknown excluded contracts or liabilities that would be affected by a reverse vesting order, the Monitor will post the notices as described above and require any contract counterparty to contact the Monitor by the Unknown Contract Bar Date to advise of the contract and provide an executed copy.

[123] The proposed Process does not bar any party from ultimately submitting unsecured claims, although those claims will be made in ResidualCo, if the anticipated reverse vesting order transaction (or any other reverse vesting order transaction) is approved, with the result that in my view it is very appropriate now that those contractual counterparties be given notice of what is afoot. The Monitor believes that the Proposed Unknown Contract Bar Process provides a fair and reasonable process to identify any unknown contract counterparties.

**Activities of the Monitor**

[124] The activities of the Monitor are set out in detail in the three reports: the Pre-Filing Report, the First Report and the Second Report. Approval of those activities is not opposed by any party, and I am satisfied that the activities are both appropriate and consistent with the exercise of the mandate given to the Monitor pursuant to the Initial Order.

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**Stay Extension**

[125] The stay of proceedings currently in effect expires on December 1, 2023. An extension is clearly appropriate to afford the Monitor sufficient time to conduct the proposed SISP. It makes good practical sense to seek that extension now, albeit approximately three weeks before the current stay expires, to avoid the expense incurred with bringing a separate motion for a stay extension in the very near future.

[126] I am satisfied that the Receiver and Monitor, respectively on behalf of the Validus Entities, have acted and continue to act in good faith and with due diligence.

**Receiver's Borrowing Charge**

[127] Concurrent with the stay extension, the Receiver seeks in the Receivership Proceeding the approval of an increase in the borrowing amount available pursuant to the Receiver's Borrowing Charge of $500,000, from $1 million to $1.5 million. This, too, is unopposed.

[128] The revised cash flow forecast reflects that, provided that the increase in the Borrowing Charge is granted, the Validus Entities are projected to have sufficient liquidity to fund operations through the proposed stay extension period.

[129] The increase is approved.

**Disposition**

[130] For all of these reasons, the motions are granted. I have signed two orders, the first approving the increase in the Receiver's Borrowing Limit in the Receivership Proceeding, and the second approving the SISP, including the Stalking Horse Offer, approving the reports of the Monitor and the activities described therein, and extending the stay, all in the CCAA Proceeding.

[131] Both orders have immediate effect without the necessity of issuing and entering.

Osborne J.

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# TAB 31

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107

Date: 20160126
Docket: S1510120
Registry: Vancouver

2016 BCSC 107 (CanLII)

**In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 as Amended**

**And**

**In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, as Amended**

**And**

**In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"**

Before: The Honourable Madam Justice Fitzpatrick

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioners: | Marc Wasserman<br>Mary I.A. Buttery<br>Tijana Gavric<br>Joshua Hurwitz |
| Counsel for United Mine Workers of America 1974 Pension Plan and Trust: | John Sandrelli<br>Tevia Jeffries |
| Counsel for Steering Committee of First Lien Creditors of Walter Energy, Inc.: | Matthew Nied |
| Counsel for Her Majesty the Queen in Right of the Province of British Columbia: | Aaron Welch |
| Counsel for Morgan Stanley Senior Funding, Inc.: | Kathryn Esaw |

| | |
|---|---|
| Counsel for KPMG Inc., Monitor: | Peter Reardon<br>Wael Rostom<br>Caitlin Fell |
| Counsel for Canada Revenue Agency: | Neva Beckie |
| Counsel for the United States Steel Workers, Local 1-424: | Stephanie Drake |
| Place and Date of Hearing and Ruling given to Parties with Written Reasons to Follow: | Vancouver, B.C.<br>January 5, 2016 |
| Place and Date of Written Reasons: | Vancouver, B.C.<br>January 26, 2016 |

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**Introduction and Background**

[1] On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*").

[2] The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

[3] The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay provisions relating to the partnerships: *Lehndorff General Partner Ltd. (Re)* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.); *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 21.

[4] The timing of the Canadian acquisition could not have been worse. Since 2011, the market for metallurgical coal has fallen dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014. The mines remain in this state today, at an estimated annual cost in excess of $16 million. Similarly, the U.K. mines were idled in 2015. In July 2015, the U.S. companies in the Walter Group filed and sought creditor protection by filing a proceeding under Chapter 11 of the U.S. *Bankruptcy Code*. It is my understanding that the U.S. entities have coal mining operations in Alabama and West Virginia.

[5] From the time of the granting of the initial order, it was apparent that the outcome of the U.S. proceedings would have a substantial impact on the Walter

Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will discuss below.

[6] The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately $22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of $11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

[7] This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

[8] As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

[9] The petitioners now seek relief that will set them on a path to a potential restructuring; essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation

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process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

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[10] For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

[11] The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

[12] Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

[13] The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC § 101, as amended, which is commonly referred to as "*ERISA*".

[14] The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

[15] It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

[16] Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

[17] At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

**The Sale and Investment Solicitation Process ("SISP")**

[18] The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

[19] It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

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[20] Approvals of SISPs are a common feature in *CCAA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750. At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[21] Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a *CCAA* proceeding: see *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 at paras. 17-19.

[22] In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable, particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

[23] The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

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[24] No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

**Appointment of Financial Advisor and CRO**

[25] The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

[26] The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

[27] In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

[28] A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

[29] The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

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[30] Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

[31] In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

[32] The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

[33] In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *Mobilicity Group (Re)*, 2013 ONSC 6167 at para. 17). No question arises as to his extensive qualifications to fulfil this role.

[34] The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his

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involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

[35] The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the *CCAA*: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*., 2007 SKQB 121 at para. 19.

[36] The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

[37] PJT is to receive a monthly work fee of US$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

[38] At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US$75,000. In

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addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to $1 million upon the happening of a "triggering event" (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

[39] To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of $10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

[40] The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*:

> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[41] In *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

[42] In *Canwest Publishing Inc*., 2010 ONSC 222 at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining

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whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

[43] I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

[44] The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

[45] Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept

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the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

[46] The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

[47] Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

[48] In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of $10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

**Key Employee Retention Plan ("KERP")**

[49] The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

[50] The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

[51] I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at

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para. 53; *Sahlin v. The Nature Trust of British Columbia*, 2010 BCCA 516 at para. 6. A sealing order was granted on January 5, 2016.

[52] The proposed KERP must be considered in the context of earlier events. This individual was to receive a retention bonus from the U.S. entities; however, this amount is now not likely to be paid. In addition, just prior to the commencement of these proceedings, this person was given a salary increase to reflect his additional responsibilities, including those arising from the loss of support and the shared services from the U.S. entities. This new salary level has not been disclosed to the court or the stakeholders.

[53] The Walter Canada Group has proposed that this employee be paid a retention bonus on the occurrence of a "triggering event", provided he remains an active employee providing management and other services. The defined triggering events are such that the retention bonus is likely to be paid whatever the outcome might be. In addition, to secure the payment of the KERP to this employee, Walter Energy Canada seeks a charge up to the maximum amount of the retention bonus.

[54] The amount of the retention bonus is large. It has been disclosed in the sealed affidavit but has not been disclosed to certain stakeholders, including the 1974 Pension Plan. The Monitor states in its report:

> The combination of the salary increase and proposed retention bonus … were designed to replace the retention bonus previously promised to the KERP Participant by Walter Energy U.S.

[55] I did not understand the submissions of the 1974 Pension Plan to be that the granting of a KERP for this employee was inappropriate. Rather, the concern related to the amount of the retention bonus, which is to be considered in the context of the earlier salary raise. At the end of the day, the 1974 Pension Plan was content to leave a consideration of the level of compensation to the Court, given the sealing of the affidavit.

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[56] The authority to approve a KERP is found in the courts' general statutory jurisdiction under s. 11 of the *CCAA* to grant relief if "appropriate": see *U.S. Steel Canada* at para. 27.

[57] As noted by the court in *Timminco Ltd. (Re)*, 2012 ONSC 506 at para. 72, KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

[58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

[59] I will discuss those factors and the relevant evidence on this application, as follows:

a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;

b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;

c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume

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that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a "potential" loss of this person's employment is a factor to be considered;

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee's salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and

e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding "yes". As to the amount, the Monitor notes that the amount of the retention bonus is at the "high end" of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person's supervision and the critical nature of his involvement in the restructuring. As this Court's officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

[60] In summary, the petitioners' counsel described the involvement of this individual in the *CCAA* restructuring process as "essential" or "critical". These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor's report states that this individual's ongoing employment will be "highly beneficial" to the Walter Canada Group's restructuring efforts, and that this employee is "critical" to the care and maintenance operations at

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the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the SISP.

[61] What I take from these submissions is that a loss of this person's expertise either now or during the course of the *CCAA* process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the *CCAA*. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

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**Cash Collateralization / Intercompany Charge**

[62] Pursuant to the initial order, the Walter Canada Group was authorized and directed to cash collateralize all letters of credit secured by the 2011 credit agreement within 15 days of any demand to do so from the administrative agent, Morgan Stanley Senior Funding Inc. ("Morgan Stanley"). This order was made on the basis of representations by the Monitor's counsel that it had obtained a legal opinion that the security held by Morgan Stanley was valid and enforceable against the Walter Canada Group.

[63] On December 9, 2015, Morgan Stanley demanded the cash collateralization of approximately $22.6 million of undrawn letters of credit. On December 21, 2015, Morgan Stanley requested that the Walter Canada Group enter into a cash collateral agreement (the "Cash Collateral Agreement") to formalize these arrangements.

[64] The Walter Canada Group seeks the approval of the Cash Collateral Agreement, which provides for the establishment of a bank account containing the cash collateral and confirms Morgan Stanley's pre-filing first-ranking security interest in the cash in the bank account. The cash collateralization is intended to relate to letters of credit issued on behalf of Brule Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership. However, only the Brule Coal Partnership has sufficient cash to collateralize all these letters of credit.

[65] Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other member of the Walter Canada Group in respect of obligations under the letters of credit. The intercompany charge is proposed to rank behind all of the other court-ordered charges granted in these proceedings, including the charges for PJT and the CRO and the KERP.

[66] No objection is raised in respect of this relief. The Monitor is of the view that the intercompany charge is appropriate.

[67] In my view, this relief is simply a formalization of the earlier authorization regarding the trusting up of these contingent obligations. On that basis, I approve the Cash Collateral Agreement. I also approve the intercompany charge in favour of the Brule Coal Partnership, on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of this Partnership's funds. Such a charge will, as stated by the Monitor, protect the interests of creditors as against the individual entities within the Walter Canada Group.

**Stay Extension**

[68] In order to implement the SISP, and further its restructuring efforts in general, the Walter Canada Group is seeking an extension of the stay and other relief granted in the initial order until April 5, 2016.

[69] Section 11.02(2) and (3) of the *CCAA* authorizes the court to make an order extending a stay of proceedings granted in the initial application. In this case, the evidence, together with the conclusions of the Monitor, support that an extension is appropriate and that the petitioners are acting in good faith and with due diligence. No stakeholder has suggested otherwise.

[70] As noted above, it is anticipated that the Walter Canada Group will have sufficient liquidity to continue operating throughout the requested stay period.

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[71] Further, as the Phase 1 deadline in the SISP is March 18 2016, an extension of the stay until April 5, 2016 will provide sufficient time for PJT to solicit, and the CRO (in consultation with the Monitor and PJT) to consider, any letters of intent. At that time, the process may continue to Phase 2 of the SISP, if the CRO, in consultation with the Monitor and PJT, deems it advisable. In any event, at the time of the next court date, there will be a formal update to the court and the stakeholders on the progress under the SISP.

[72] The only issue relating to the extension of the stay arises from the submissions of the Union, who represents the employees at the Wolverine mine owned and operated by the Wolverine Coal Partnership ("Wolverine LP"). The Union wishes to continue with certain outstanding legal proceedings outstanding against Wolverine LP, as follows:

a) In June 2015, the B.C. Labour Relations Board (the "Board") found that Wolverine LP was in breach of s. 54 of the *Labour Relations Code,* R.S.B.C. 1996, c. 224 (the "*Code*"). The Board ordered Wolverine LP to pay $771,378.70 into trust by way of remedy. This was estimated to be the amount of damages owed by Wolverine LP, but the Union took the position that further amounts are owed. In any event, this amount was paid and is currently held in trust;

b) In November 2015, Wolverine LP filed a proceeding in this court seeking a judicial review of the Board's decision on the s. 54 issue. As a result, the final determination of the damages arising from the *Code* breach has not yet occurred and may never occur if Wolverine LP succeeds in its judicial review; and

c) Following layoffs in April 2014, the Union claimed that a "northern allowance" was payable by Wolverine LP to the employees, including those on layoff. This claim was rejected at arbitration, and upheld on review at the Board. In February 2015, the Union filed a proceeding in this court seeking a judicial review of the Board's decision.

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[73] The Union's counsel has referred me to my earlier decision in *Yukon Zinc Corporation (Re)*, 2015 BCSC 1961. There, I summarized the principles that govern applications by a creditor to lift the stay of proceedings to litigate claims:

> [26] There is also no controversy concerning the principles which govern applications by creditors under the *CCAA* to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:
>
> a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;
>
> b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) (Ont. S.C.J.) ("*Canwest* (2009)"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and *505396 B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;
>
> c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest* (2009) at para. 33;
>
> d) relevant factors will include the status of the *CCAA* proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest* (2009) at para. 32;
>
> e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the *CCAA* is to promote a streamlined process to determine claims that reduces expense and delay; and
>
> f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest* (2009); *Azure Dynamics* at para. 28.

[74] I concluded that the Union had not met the "heavy onus" on it to justify the lifting of the stay to allow these various proceedings to continue. My specific reasons are:

a) The Union argues that the materials are essentially already assembled and that these judicial reviews can be scheduled for short chambers matters. As such, the Union argues that there is "minimal prejudice" to Wolverine LP. While this may be so, proceeding with these matters will

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inevitably detract both managerial and legal focus from the primary task at hand, namely to implement the SISP, and as such, potentially interfere with the restructuring efforts;

b) The Union argues that any purchaser of Wolverine LP's mine will inherit outstanding employee obligations pursuant to the *Code*. Accordingly, the Union argues that it will be more attractive to a buyer for the mine to have all outstanding employee claims resolved. Again, while this may come to pass, such an argument presupposes an outcome that is anything less than clear at this time. Such a rationale is clearly premature;

c) The Union argues that it is unable to distribute the $771,378.70 to its members until Wolverine LP's judicial review is addressed. Frankly, I see this delay as the only real prejudice to the Union members. However, on the other hand, one might argue that the Union members are in a favourable position with these monies being held in trust as opposed to being unsecured creditors of Wolverine. In any event, the Union's claim to these monies has not yet been determined and arises from a dispute that dates back to April 2014. Therefore, there is no settled liability that would allow such payment to be made; and

d) The Union claims that these matters must be determined "in any event" and that they should be determined "sooner rather than later". However, the outcome of the SISP may significantly affect what recovery any creditor may hope to achieve in this restructuring. In the happy circumstance where there will be monies to distribute, I expect that a claims process will be implemented to determine valid claims, not only in respect of the Union's claims, but all creditors.

[75] In summary, there is nothing to elevate the Union's claims such that it is imperative that they be determined now. There is nothing to justify the distraction and expense of proceeding with these actions to the detriment of the restructuring

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efforts. If it should come to pass that monies will be distributed to creditors, such as the Union, then I expect that the usual claims process will be implemented to decide the validity of those claims.

[76] In the meantime, if it becomes necessary to determine the validity of these claims quickly (such as to clarify potential successor claims for a purchaser), the Union will be at liberty to renew its application to lift the stay for that purpose.

[77] Accordingly, I grant an extension of the stay of proceedings and other ancillary relief until April 5, 2016.

"Fitzpatrick J."

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