

**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 CONTRACT PHARMACEUTICALS LIMITED,
CPL CANADA HOLDCO LIMITED, CONTRACT PHARMACEUTICALS
LIMITED CANADA, GLASSHOUSE PHARMACEUTICALS LIMITED
CANADA, AND GLASSHOUSE PHARMACEUTICALS LLC**

Applicants

FACTUM OF THE APPLICANTS

(Application for Initial Order returnable December 15, 2023)

December 14, 2023

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PART I. INTRODUCTION

1. Contract Pharmaceuticals Limited (“**CPL**” and, collectively with its subsidiaries, the “**Company**”)¹ is a Mississauga headquartered company with nearly 300 employees that is in the business of developing, manufacturing, packaging and testing non-sterile liquid and semi-solid pharmaceutical and regulated over-the-counter products.
2. The Company’s core business is that of Contract Pharmaceuticals Limited Canada (“**CPL Canada**”), an industry-leading contract development and manufacturing organization.²
3. The Applicants are commencing these *Companies’ Creditors Arrangement Act* (“**CCAA**”) proceedings with the support of their largest lender to, among other things, (i) obtain urgently required interim debtor-in-possession (“**DIP**”) financing in order to maintain operations in the normal course and fund these CCAA proceedings, (ii) continue the implementation of their restructuring efforts, and (iii) pursue a refinancing, sale and investment solicitation process (“**SISP**”) with a view to identifying and completing a restructuring transaction.
4. The proposed CCAA proceedings will provide the stability, framework and necessary financing for the Company to continue to canvass the market to identify a strategic transaction that provides the best result for the Company and its stakeholders, thereby preserving the business as a going-concern for the benefit of employees, customers, suppliers and end-user patients that rely on the pharmaceutical products CPL helps to produce.

¹ The “**Applicants**” in this proceeding are CPL, and its direct and indirect subsidiaries, being CPL Canada Holdco Limited (“**CPL Canada HoldCo**”), CPL Canada, Glasshouse Pharmaceuticals Limited Canada (“**Glasshouse Canada**”) and Glasshouse Pharmaceuticals LLC (“**Glasshouse America**”).

² All capitalized terms used herein and not otherwise defined have the meaning ascribed to them in the Affidavit of Jan Sahai sworn December 14, 2023 (the “**Sahai Affidavit**”). Unless otherwise stated, all monetary amounts referenced herein are in U.S. dollars.

5. The proposed Initial Order would, among other things, (i) grant a stay of proceedings until and including December 22, 2023, or such later date as this Court may order (the “**Initial Stay Period**”) and certain other customary relief necessary to preserve the Applicants’ business and stakeholder value during the Initial Stay Period, and (ii) authorize the Applicants to enter into the DIP Term Sheet with Deerfield and borrow under the DIP Loan in the maximum principal amount of \$1,500,000 for the Initial Stay Period and approving the related DIP Lender’s Charge that is proposed to rank junior to the existing first lien indebtedness of the Company. It is proposed that KSV Restructuring Inc. act as monitor (the “**Monitor**”) in these proceedings.³

6. The requested relief, including the interim DIP financing, is urgently needed. The Company has less than \$1.5 million of cash on hand and owes approximately \$5.2 million in past-due amounts to its suppliers.⁴

7. The relief sought is limited to what is required for the Initial Stay Period. If the Initial Order is granted, the Applicants intend to seek the following at the Comeback Hearing:
 - (a) an Amended and Restated Initial Order, among other things, (i) extending the stay of proceedings to March 22, 2024, and granting other customary relief under the CCAA, (ii) increasing the maximum amount available under the DIP Loan to \$6 million, (iii) increasing the maximum amounts of the Administration Charge, the Directors’ Charge and the DIP Lender’s Charge, (iv) approving a key employee retention program and a related charge; and (v) approving the engagement of the Financial Advisor and a

³ Sahai Affidavit at para. 82.

⁴ Sahai Affidavit at para. 15.

related charge; and

(b) an order approving the SISP.⁵

8. For the reasons discussed below, the Company believes that the requested relief is appropriate and that the commencement of the CCAA proceedings is in their best interests and those of its stakeholders.

PART II. OVERVIEW

9. Founded more than 30 years ago, the Company is a world-class provider of contract development and full-service commercial manufacturing services for a wide range of non-sterile liquid and semi-solid pharmaceutical products. Sample applications include immunologic disorders, pain management, cough and cold, hair growth, nail infections, chronic allergies, nasal polyps and digestive issues, and creams, ointments and gels for skin conditions, including psoriasis, pain management, wound care and hormone therapy.⁶

10. For years, the Company achieved consistent revenue and profitability from the CPL Business. However, in 2016, the Company shifted its business strategy to focus on top line revenue growth and began exploring new product lines such as generic drugs. Glasshouse Canada and Glasshouse America (collectively, “**Glasshouse**”) were established to operate the Company’s generic pharmaceuticals business. Unfortunately, Glasshouse suffered losses since its inception, which eroded the Company’s margins, distracted from its core business and has left the Company with a significant legacy debt burden.⁷

⁵ Sahai Affidavit at para. 7.

⁶ Sahai Affidavit at para. 30.

⁷ Sahai Affidavit at para. 12.

11. Over the past year, the Company has pursued operational restructuring efforts (including winding-down the Glasshouse Business and divesting related assets) that, coupled with the financial support of its shareholders (who injected \$7.05 million of additional equity financing in 2022 and 2023), has returned the Company to its historic positive EBITDA levels.⁸ However, the Company remains burdened by the interest expense of its debt obligations and suppressed availability under its operating line of credit, which has led to increasingly constrained liquidity.⁹
12. In addition to its liquidity issues, the Company has funded debt obligations totaling in excess of \$38 million, most of which have now either matured, are in default or are payable on demand.¹⁰
13. In light of these issues, beginning in February 2023, the Company, with the assistance of its financial advisors, began to explore strategic alternatives.¹¹ To date, the Company's efforts have not identified a transaction satisfactory to its stakeholders, or one that could be implemented in the timeframe available to the Company having regard to its liquidity position. Accordingly, the Company, following consultation with its professional advisors and with the support of Deerfield as proposed DIP Lender, has commenced these CCAA proceedings with a view to pursuing a SISP to identify the best available transaction to the Company.¹²

⁸ Sahai Affidavit at para. 14.

⁹ Sahai Affidavit at para. 15.

¹⁰ Sahai Affidavit at para. 64.

¹¹ Sahai Affidavit at para. 17.

¹² Sahai Affidavit at para. 5.

PART III. SUMMARY OF FACTS

A. Background Regarding the Company

14. As described in further detail in the Sahai Affidavit, the Company is headquartered in Mississauga, Ontario, where it undertakes all of its commercial activities from its state of the art laboratory and production facilities where its 289 full-time employees work.¹³ The CPL Business is the core operating business of the Company, with the Glasshouse business having been wound-down save for certain residual activities.¹⁴ The registered head office of each of the Applicants is located in Mississauga, Ontario and, with the exception of CPL and Glasshouse America, each of the Applicants are Ontario corporations.¹⁵
15. CPL, the parent company of the Applicants, is a holding company incorporated in Delaware. In addition to holding the shares of its subsidiaries, CPL maintains a bank account in Canada with approximately \$140,000 on deposit and holds a loan receivable from an employee of CPL Canada based in Canada.¹⁶ The other Delaware incorporated Applicant, Glasshouse America, also maintains bank accounts in Canada.¹⁷
16. CPL Canada, the main operating entity of the Company, has long-standing relationships with a diverse customer base of global, mid-size, and growth stage pharmaceutical companies.¹⁸ As a sole source product supplier for more than 70% of its customers, CPL Canada is strategically important to its customers' supply chains. In addition, the Company relies heavily on its own suppliers, certain of whom are the sole supplier of a particular input the Company

¹³ Sahai Affidavit at paras. 9 and 33.

¹⁴ Sahai Affidavit at paras. 27 and 28.

¹⁵ Sahai Affidavit at paras. 25-29.

¹⁶ Sahai Affidavit at para. 25.

¹⁷ Sahai Affidavit at para. 29.

¹⁸ Sahai Affidavit at para. 37.

requires.¹⁹ Given the regulatory environment the Company operates in and proprietary considerations, in many cases the Company is unable to source such inputs from alternative suppliers. Further, certain key suppliers of the Company are located overseas. In light of the foregoing, any disruptions to the provision of pharmaceutical products to CPL Canada's customers, or to the supply of goods and services to the Company, will (in addition to harming the Company's business) risk delaying patient access to important prescription medications.²⁰

B. The Applicants are Insolvent

17. The Company's consolidated financial statements for each of 2022 and 2023 reflect that the book value of its liabilities exceeds the book value of its assets.²¹ Of particular note, the Company has over \$38 million of total outstanding funded debt obligations, summarized in the table below, most of which are now due, in default or repayable on demand.²²

Debt Obligation	Principal Amount Outstanding as at Nov. 30, 2023 (approximately)	Maturity	Secured	Priority
RBC Operating Facility	\$5,311,373	Demand facility	Yes	1 st on all assets of CPL Canada (excluding equipment) 1 st on equity of CPL Canada held by CPL Canada HoldCo 2 nd on equipment of CPL Canada
EDC Facility	\$4,968,632	December 10, 2025	Yes	1 st on equipment of CPL Canada 3 rd on assets other than equipment of CPL Canada
Deerfield Term Loan	\$24,319,118	December 6, 2023	Yes	1 st on assets of CPL, Glasshouse Canada and

¹⁹ Sahai Affidavit at para. 37.

²⁰ Sahai Affidavit at paras. 37 and 81.

²¹ Sahai Affidavit at para. 64.

²² Sahai Affidavit at para. 46.

Debt Obligation	Principal Amount Outstanding as at Nov. 30, 2023 (approximately)	Maturity	Secured	Priority
				Glasshouse America 1 st on equity of Glasshouse Canada held by CPL Canada HoldCo 2 nd on assets of CPL Canada (excluding equipment) 2 nd on equity of CPL Canada held by CPL Canada HoldCo 3 rd on equipment of CPL Canada
Fed Dev Loan	\$4,259,427	June 1, 2027	No	
TOTAL	\$38,858,550			

18. The Company has limited remaining liquidity to operate its business (less than \$1.5 million of cash on hand) and has stretched its trade payables, with the result that certain vendors have begun to restrict shipments and require pre-payment.²³
19. While the Company's shareholders have provided additional capital over the course of the past year to assist with its liquidity and fund restructuring efforts, they have indicated that they are not prepared to provide additional funding at this juncture.²⁴
20. Although the Company has CA\$4 million (or more) of suppressed availability under the RBC Operating Facility, RBC has not permitted it to borrow additional funds, and the Company has not been able to identify alternative financing (save for potential DIP financing).²⁵ Absent

²³ Sahai Affidavit at paras. 15 and 62.

²⁴ Sahai Affidavit at para. 15.

²⁵ Sahai Affidavit at para. 48.

obtaining additional financing in the near term, the Company will be unable to meet its obligations as they fall due in the normal course.²⁶

C. Stay of Proceedings

21. In light of its financial circumstances and cash position, the Company is concerned that there could be an immediate and significant erosion of value to the detriment of stakeholders if the relief sought on the CCAA application is not granted. In particular, the Applicants are concerned about the following risks, which could materialize without the benefit of a stay of proceedings and other protective relief under the CCAA and the proposed Initial Order: (a) suppliers ceasing to supply or tightening payment terms in a manner that further exacerbates liquidity challenges; (b) suppliers and debtholders taking legal action to recover amounts owing to them; (c) customers terminating existing agreements or exploring alternative potential suppliers; (d) the potential termination of other agreements that are critical to the operations of the Applicants; and (e) disruptions to patient supply in light of the foregoing operational risks.²⁷

D. Payments During the CCAA Proceedings

22. During the CCAA proceedings, the Applicants intend to make payments for goods and services contracted for and supplied to them post-filing in the ordinary course, as set out in the Cash Flow Forecast and requested in the proposed Initial Order.²⁸
23. The proposed Initial Order also authorizes the Applicants to make payments to critical suppliers and service providers, with the consent of the Monitor and the DIP Lender, for goods

²⁶ Sahai Affidavit at para. 65.

²⁷ Sahai Affidavit at para. 67.

²⁸ Sahai Affidavit at para. 79.

and services actually supplied to the Applicants prior to the CCAA proceedings being commenced.²⁹

E. DIP Loan

24. As set out in the Cash Flow Forecast, the Applicants require additional funding by way of the DIP Loan in order to continue operations and also to fund their restructuring efforts, both in the immediate term and during the proposed course of these CCAA proceedings.³⁰

25. In addition to continuing to explore out of Court options, in the lead up to these proceedings, the Company and its professional advisors solicited expressions of interest in providing DIP financing from a variety of prospective DIP lenders, including both current lenders to the Company and new potential lenders.³¹ Ultimately, the Company selected the DIP proposal from Deerfield as representing the best alternative in the situation, including because Deerfield was the only potential DIP lender prepared to provide DIP financing that was junior to the RBC/EDC Security.

26. Deerfield has agreed to provide the DIP Loan in the maximum amount of \$6 million to fund the Applicants' operations and expenses during the CCAA proceedings, subject to the terms and conditions set forth in the DIP Term Sheet. The DIP Term Sheet contemplates an initial advance of \$1,500,000 for the Initial Stay Period, and contemplates additional funding up to the maximum amount of \$6 million thereafter. Given their financial circumstances, the

²⁹ Sahai Affidavit at para. 80.

³⁰ Sahai Affidavit at para. 69.

³¹ Sahai Affidavit at para. 70.

Applicants believe that obtaining the DIP Loan is necessary to provide critical immediate liquidity to allow operations to continue.³²

27. The economic terms of the DIP Term Sheet are reasonable. The interest rate is 12.5% per annum with a payment-in-kind commitment fee of 3%, and the structure and terms of the DIP Term Sheet provide significant flexibility for the Company to continue operations and pursue its restructuring efforts, including the SISP.³³

F. Charges

(i) Administration Charge

28. KSV has agreed to act as Monitor in these CCAA proceedings, subject to Court approval of its appointment. KSV became involved with the Company in November 2023, and has assisted in reviewing the Company's financial and liquidity position (including the Cash Flow Forecast) and restructuring and financing options.³⁴

29. KSV and the other beneficiaries of the Administration Charge, including KSV's counsel (Cassels, Brock & Blackwell LLP), the Company's counsel (Goodmans LLP) and the Financial Advisor (for its monthly work fee and disbursements) have contributed, and will continue to contribute, to the Company's restructuring efforts.³⁵

(ii) Directors' Charge

30. The directors and officers of the Applicants have been involved in the Applicants' efforts to address their challenging circumstances, including with respect to the preparation and

³² Sahai Affidavit at para. 6.

³³ Sahai Affidavit at paras. 74-75.

³⁴ Sahai Affidavit at para. 84.

³⁵ Sahai Affidavit at para. 87.

commencement of these proceedings. The Applicants require the active and committed involvement of their directors and officers during these CCAA proceedings.³⁶

31. The Company maintains the D&O Policy. However, the D&O Policy contain exclusions and limitations to the coverage provided, and there is the potential for coverage limits to be exhausted and for there to be insufficient coverage. The directors and officers of the Applicants have expressed the desire for certainty with respect to any potential personal liability arising from their respective roles.³⁷

(iii) DIP Lender's Charge

32. As discussed above, the Applicants require the DIP Loan to fund their operational needs and expenses incurred in connection with these CCAA proceedings, both in the immediate term and during the contemplated course of these proceedings. Deerfield is prepared to provide the DIP Loan, provided that the obligations of the Applicants outstanding from time to time in connection with the DIP Loan are secured pursuant to the DIP Lender's Charge on the terms and priority set forth in the DIP Term Sheet. Deerfield has indicated that it is not prepared to advance additional funds to the Company without the security of the DIP Lender's Charge, including the proposed priority thereof.³⁸ As previously referenced, the DIP Lender's Charge is proposed to rank junior to the RBC/EDC Security.³⁹

G. Foreign Proceedings

33. As indicated above, two of the Applicants – CPL and Glasshouse America – are incorporated in the United States and have certain residual commercial activities there. The Applicants are

³⁶ Sahai Affidavit at para. 92.

³⁷ Sahai Affidavit at para. 91.

³⁸ Sahai Affidavit at para. 73.

³⁹ Sahai Affidavit at para. 70.

therefore seeking authorization (i) for CPL to act as the foreign representative for the purpose of having these CCAA proceedings recognized and approved in a jurisdiction outside of Canada, and (ii) for CPL, in its capacity as foreign representative, to apply for foreign recognition and approval of these CCAA proceedings, including in the United States pursuant to chapter 15 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”), to the extent considered necessary by the Applicants.

34. The Applicants do not intend to file under chapter 15 of the Bankruptcy Code at this time. They are seeking this relief as a precautionary measure in the event that unexpected actions are taken against CPL and Glasshouse America prior to the Comeback Hearing.

PART IV. ISSUES AND THE LAW

35. The issues to be considered on this application are whether:
- (a) the Applicants are entitled to protection under the CCAA;
 - (b) the Court should grant the stay of proceedings;
 - (c) the Court should permit (but not require) the Applicants to make payments to suppliers on account of pre-filing obligations with the consent of the Monitor and the DIP Lender;
 - (d) the Court should grant the Administration Charge and Directors’ Charge;
 - (e) the Court should approve the DIP Term Sheet and grant the DIP Lender’s Charge; and
 - (f) the Court should authorize CPL to act as foreign representative and to apply for foreign recognition of these CCAA proceedings, as determined necessary by the Applicants.

36. The Applicants submit that they have demonstrated that the foregoing relief is required and appropriate in the circumstances, and that the Court should grant the Initial Order.

A. The Applicants are Entitled to Seek Protection Under the CCAA

(i) *Each of the Applicants are Debtor Companies to which the CCAA Applies*

37. The CCAA applies to a “debtor company” or affiliated debtor companies where the total claims against the debtor or its affiliates exceeds CA\$5 million. Pursuant to Section 2 of the CCAA, a “debtor company” means, among other things, a “company” that is “insolvent”.⁴⁰

(a) *Each of the Applicants is a “Company”*

38. The CCAA defines a “company” as “any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated.”⁴¹ Each of the Applicants are “companies” under the CCAA because, among other reasons, (i) CPL Canada, CPL Canada HoldCo and Glasshouse Canada are companies incorporated or formed under the legislature of a province (Ontario), and (ii) CPL and Glasshouse America are incorporated companies having assets in Canada.⁴²

39. The test for “having assets or doing business in Canada” is disjunctive, meaning that either “having assets” in Canada or “doing business in Canada” is sufficient for a foreign corporation to qualify as a “company” within the meaning of the CCAA.⁴³ This Court has held that having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a

⁴⁰ CCAA, Sections 2(1) (“debtor company”) and 3(1).

⁴¹ CCAA, Section 2(1) (“company”).

⁴² Sahai Affidavit at paras. 25-29.

⁴³ *Cinram International Inc., Re*, [2012 ONSC 3767](#) at Sch. C, para. 46 [*Cinram*].

foreign incorporated company within the definition of “company” under the CCAA.⁴⁴ As CPL and Glasshouse America have funds on deposit in bank accounts in Canada, they qualify for protection under the CCAA.

(b) *The Applicants are Insolvent*

40. The CCAA does not define insolvency. Thus, in interpreting the meaning of “insolvent”, courts look to the definition of “insolvent person” in Section 2(1) of the *Bankruptcy and Insolvency Act (Canada)*⁴⁵ (the “BIA”), and the expanded concept of insolvency developed by this Court in *Stelco*.⁴⁶
41. With respect to the BIA test, the BIA definition of “insolvent person” includes a person (i) who is not bankrupt; (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is “insolvent” under one of the following tests: (a) is for any reason unable to meet their obligations as they generally become due; (b) has ceased paying their current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of their 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 their obligations, due and accruing due. This test is disjunctive. A company satisfying any one of the above criteria is considered insolvent for the purposes of the CCAA.⁴⁷

⁴⁴ [Cinram](#) at Sch. C, para. 47; *Re Global Light Telecommunications Inc. et al.*, [2004 BCSC 745](#), at [para. 17](#) [*Global Light*]; *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72, [2009 CanLII 55114](#) at [para. 30](#) [*Canwest Global*].

⁴⁵ R.S.C. 1985, c. B-3.

⁴⁶ BIA, Section 2 (“insolvent person”); *Stelco Inc., Re.*, [\(2004\), 48 C.B.R. \(4th\) 299](#) (Ont. Sup. Ct. J. [Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, at [para. 22](#) [*Stelco*].

⁴⁷ [Stelco](#), *supra* at paras. [26](#) and [28](#).

42. A company is insolvent under the *Stelco* approach if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would lead to the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.⁴⁸

43. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test based on a looming liquidity condition as a result of the following:⁴⁹

- (a) the book value of the Company's liabilities exceeds the book value of its assets;
- (b) the vast majority of the Company's liabilities are its funded debt obligations, most of which have either matured, are in default or are payable on demand. The Company is not presently able to repay these debts, and there is no realistic prospect of refinancing them outside of a formal restructuring process given the Company's liquidity position and unsuccessful attempts to do so to date; and
- (c) the Company has less than \$1.5 million of remaining cash on hand and, absent the DIP financing, will exhaust its cash resources in the near term.

(c) *The Applicants are Affiliated Companies with Claims Outstanding in Excess of CA\$5 Million*

44. Each of the Applicants (other than CPL) are direct or indirect wholly-owned subsidiaries of CPL.⁵⁰ The Applicants are therefore "affiliated companies" for the purpose of the CCAA.⁵¹

⁴⁸ *Stelco*, supra at paras. 4 and 40.

⁴⁹ Sahai Affidavit at paras. 62 and 64.

⁵⁰ Sahai Affidavit at para. 3.

⁵¹ CCAA, Section 3(2) ("affiliated companies").

45. As at October 31, 2023, the Company had total consolidated liabilities of approximately \$52.3 million.⁵² Accordingly, the total outstanding obligations of the Applicants readily exceeds the CA\$5 million threshold amount under the CCAA. The CCAA therefore applies to each of the Applicants.

(ii) *Ontario Court Has Jurisdiction*

46. Subsection 9(1) of the CCAA provides that a debtor company may bring an application under the CCAA in the province in which the head office or chief place of business of the company in Canada is situated.⁵³ The head office and chief place of business of each of the Applicants is in Mississauga, Ontario.⁵⁴ Accordingly, this Court is the appropriate forum for these CCAA proceedings.

B. The Stay of Proceedings is Appropriate and Necessary

47. Subsection 11.02 of the CCAA permits the Court to grant an initial stay of up to 10 days on an application for an initial order, provided circumstances exist that make the order appropriate.⁵⁵ The threshold for a stay is low and a debtor company only has to satisfy this Court that a stay of proceedings would “usefully further” its efforts to reorganize.⁵⁶

48. The Initial Stay Period sought by the Applicants is necessary for the Applicants to preserve stability while pursuing their restructuring efforts, with a view to eventually completing a

⁵² Sahai Affidavit at para. 45.

⁵³ CCAA, Section 9(1); *Target Canada Co., Re*, [2015 ONSC 303](#) at paras. [29-30](#) [*Target*].

⁵⁴ Sahai Affidavit at paras. 25-29.

⁵⁵ CCAA, Sections 11.02(1) and 11.02(3)(a).

⁵⁶ *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#) at para. [70](#) [*Century Services*]; *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, [2018 SKCA 36](#) at para. [21](#).

transaction in respect of the Company.⁵⁷ Jurisprudence from the Supreme Court of Canada and this Court is clear that a transaction under the CCAA is an appropriate use of the CCAA.⁵⁸

C. Payments to Critical Suppliers for Pre-Filing Obligations Should be Permitted

49. The purpose of the CCAA is “to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.”⁵⁹ To meet this purpose, this Court has allowed debtor companies to pay pre-filing obligations where appropriate, particularly where failure to do so could frustrate the debtor company’s ongoing operations.⁶⁰

50. To preserve normal course operations, the Applicants are seeking authorization to make certain pre-filing payments, including in respect of pre-filing goods or services contracted for and supplied to the Applicants if, in the opinion of the Applicants and with the consent of the Monitor and the DIP Lender, such payment is necessary to maintain the operation of the CPL Business.⁶¹

51. The Court has exercised its jurisdiction on numerous occasions to grant similar relief.⁶² The decision in *Index Energy Mills Road Corporation* outlined the factors 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

⁵⁷ Sahai Affidavit at para. 67.

⁵⁸ 9354-9186 *Quebec inc. v. Callidus Capital Corp.*, [2020 SCC 10](#) at paras. [42-43](#); *Re First Leaside Wealth Management Inc.*, [2012 ONSC 1299](#) (S.C.J.) at para. [32](#). See also *North American Tungsten Corporation Ltd., Re*, [2015 BCSC 1376](#) at paras. [27](#) and [30](#).

⁵⁹ *Century Services*, supra at paras. [15](#) and [59](#).

⁶⁰ See *Cinram* at para. [37](#), where this Court accepted the submission that it had “ample authority” to authorize such payments and set out a number of factors in deciding whether to exercise its jurisdiction to grant same. See also *McEwan Enterprises Inc.*, [2021 ONSC 6453](#) at paras. [32-33](#); *Clover Leaf Holdings Company, Re*, [2019 ONSC 6966](#) at para. [25](#).

⁶¹ Sahai Affidavit at para. 80.

⁶² See, for example, *2496750 Ontario Inc. (Re)*, [2023 ONSC 753](#) at paras. [72-74](#); *Target*, supra at paras. [62-65](#).

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.⁶³

52. In the present case, payment for certain pre-filing goods and services supplied to the Company is expected to be necessary to preserve key vendor relationships and the timely supply of products to the Company, particularly given that, owing to regulatory and proprietary considerations, in certain situations the Company is not in a position to source products from alternative suppliers and that certain of the Company's key suppliers are located overseas. Any disruption to the provision of goods and services in this regard could jeopardize the value of the CPL Business, and the viability of the SISP or any transaction in respect of the Company.

53. The Applicants submit that it is appropriate in the present circumstances for the Court to exercise its jurisdiction to grant this relief, subject to the terms and conditions of the proposed Initial Order. The proposed Monitor and the DIP Lender support this relief.⁶⁴

D. The Administration Charge and Directors' Charge Should be Approved

54. The Company is seeking approval of the Administration Charge, the Directors' Charge, and the DIP Lender's Charge (collectively, the "Charges"). At the Initial Order stage, the proposed Charges are not proposed to rank in priority to any secured creditor who was not provided with notice of this proceeding.

⁶³ *Index Energy Mills Road Corporation (Re)*, [2017 ONSC 4944](#) at para. 31; *JTI Macdonald Corp., Re*, [2019 ONSC 1625](#) at paras. 24-25.

⁶⁴ The Pre-Filing Report of the Monitor at para. 3.

(i) *Administration Charge*

55. Section 11.52 of the CCAA provides the court with the jurisdiction to grant a priority charge over a debtor company's assets for professional fees and disbursements on notice to affected secured creditors.⁶⁵ This Court has recognized that, unless professional advisor fees are protected with the benefit of an administration charge, the objectives of the CCAA would be frustrated as it is not reasonable to expect professionals to take the risk of not being paid for their services.⁶⁶
56. The factors to be considered are well established in the caselaw. Courts have considered: (i) the size and complexity of the business being restructured; (ii) the proposed role of the beneficiaries of the charge; (iii) whether there is an unwarranted duplication of roles; (iv) whether the quantum of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; and (vi) the position of the Monitor.⁶⁷
57. The Applicants seek the Administration Charge against the Property in the maximum initial amount of CA\$375,000 to secure the fees and disbursements incurred both before and after the commencement of these proceedings by legal counsel for the Applicants, the proposed Monitor, legal counsel for the proposed Monitor (Cassels Brock & Blackwell LLP) and the Financial Advisor (only for the purposes of securing its monthly work fee and disbursements).
58. The Applicants submit that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge given that: (i) the beneficiaries of the Administration Charge will

⁶⁵ CCAA, Section 11.52.

⁶⁶ *Timminco Limited (Re)*, [2012 ONSC 506](#) at para. 66.

⁶⁷ *Canwest Publishing Inc. / Publications Canwest Inc., Re*, [2010 ONSC 222](#) at para. 54 [*Canwest Publishing*].

play a critical role in assisting the Applicants with maintaining stability and operations, implementing the SISP and other restructuring initiatives and advancing the overall progression of these CCAA proceedings; (ii) there is no unwarranted duplication of roles; (iii) the quantum of the proposed charge is reasonable having regard to administration charges granted in other CCAA proceedings of this nature; (iv) the amount of the Administration Charge has been determined with guidance from the proposed Monitor and is limited to what is necessary for the Initial Stay Period; and (v) the proposed Monitor and Deerfield support the Administration Charge.⁶⁸

(ii) Directors' Charge

59. Section 11.51 of the CCAA provides the court with the jurisdiction to grant a priority charge to indemnify a debtor company's directors and officers on notice to its secured creditors.⁶⁹ Directors' charges encourage directors and officers to remain in place, providing continuity and stability for the company. In deciding whether to grant a director's charge, the court must be satisfied that: (i) notice has been given to the likely affected secured creditors; (ii) the amount is appropriate; (iii) the debtor company could not obtain adequate indemnification insurance for the directors and officers at a reasonable cost; and (iv) the charge does not apply to obligations incurred by a director or officer as a result of their gross negligence or wilful misconduct.⁷⁰
60. The Applicants seek approval of the Directors' Charge in the amount of CA\$1,801,000 until the Comeback Hearing. The initial Director's Charge was sized in consultation with the proposed Monitor based on potential statutory liabilities of the directors for employment and

⁶⁸ Sahai Affidavit at paras. 87-88.

⁶⁹ CCAA, Section 11.51.

⁷⁰ [Canwest Global](#) at paras. [46-48](#).

tax related amounts and is to rank behind the Administration Charge.⁷¹ Importantly, the Directors' Charge would apply only to the extent liabilities are not covered by the D&O Policy and the related indemnity is subject to the usual carve-out pertaining to gross negligence or wilful misconduct.

61. While the directors and officers of the Applicants have insurance coverage under the D&O Policy, the D&O Policy has limits of coverage and is subject to various exclusions and limitations. It is therefore possible that the D&O Policy would not provide sufficient (or any) coverage for potential liabilities that the directors and officers of the Applicants could incur in these CCAA proceedings. The value of indemnities in favour of the directors and officers is also uncertain given the financial circumstances of the Applicants. In light of these limitations, the continued service and involvement of the directors and officers in this proceeding is conditional upon the granting of the Directors' Charge. The Directors' Charge is necessary so that that Company can continue to benefit from the directors' and officers' experience and familiarity with the Company's business as they guide restructuring efforts, including the implementation of the SISP and the eventual completion of a transaction.

E. The DIP Loan and the DIP Lenders' Charge Should be Approved

62. As referenced above and demonstrated by the Cash Flow Forecast, the Applicants urgently require additional financing to continue their operations. Additional financing is also required to facilitate restructuring efforts, including the contemplated SISP which is being pursued to achieve the highest or otherwise best transaction in respect of the Company in order to maximize value for all stakeholders.⁷²

⁷¹ Sahai Affidavit at para. 93.

⁷² Sahai Affidavit at para. 110.

63. In furtherance of the foregoing, the Applicants are requesting that this Court:
- (a) approve the DIP Term Sheet entered into by CPL Canada, as borrower, each of the other Applicants, as guarantors, and Deerfield, as the DIP Lender;
 - (b) authorize CPL Canada to borrow under the DIP Term Sheet up to \$1,500,000 during the Initial Stay Period; and
 - (c) grant the DIP Lender's Charge in favour of the DIP Lender to secure the obligations under the DIP Term Sheet. The DIP Lender's Charge will rank subordinate to the Administration Charge and the Directors' Charge, and in priority to all other Encumbrances (other than secured creditors who did not receive notice), provided that the DIP Lender's Charge shall be subordinate to the RBC/EDC Security.
64. Section 11.2 of the CCAA provides the Court with the express jurisdiction to approve the DIP Term Sheet and the DIP Lender's Charge. Section 11.2(4) lists the factors Courts must consider in deciding whether to approve a priming charge in connection with interim financing:
- 11.2(4) Factors to be considered** – 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.⁷³

65. In *Canwest Publishing*, Justice Pepall highlighted the importance of meeting the criteria set out in subsection 11.2(1) in addition to those found in subsection 11.2(4), namely: (i) whether notice has been given to secured creditors likely to be affected by the security or charge; (ii) whether the amount to be granted under a DIP facility is appropriate and required having regard to the debtors' cash-flow statement; and (iii) whether the DIP charge secures an obligation that existed before the order approving the DIP was made.⁷⁴

66. The Applicants submit that consideration of the foregoing criteria support approval of the DIP Lender's Charge as:

- (a) the DIP Loan is required to provide the Applicants with the necessary liquidity to fund its business and restructuring efforts during the Initial Stay Period and preserve the value of the CPL Business. Without the DIP Loan, the Company will not be able to fund its business and restructuring efforts;
- (b) the amount of the DIP Loan to be made available to the Applicants pursuant to the Initial Order is limited to what is necessary to maintain operations during the Initial Stay Period;
- (c) the Applicants have been unable to obtain incremental financing outside of the CCAA proceedings, and the DIP Lender has indicated that it is not prepared to advance

⁷³ CCAA, Sections 11.2(1) and 11.2(4).

⁷⁴ CCAA, Section 11.2(1); *Target*, at para. 74, citing *Canwest Publishing* at para. 39; *Just Energy Corp. (Re)*, [2021 ONSC 1793](#) at paras. 112-113.

additional funds without the security of a court-ordered priority charge under the CCAA;

- (d) the Company's largest secured creditor, Deerfield, is providing the DIP Loan and supports these proceedings and the Company's restructuring efforts;
- (e) significantly, the Company has been able to obtain the DIP Loan on a junior basis to the existing RBC/EDC Security, with the result that the RBC's and EDC's collateral will not be impaired by the DIP Lender's Charge; and
- (f) the proposed Monitor is of the view that the DIP Term Sheet and the interim DIP Lender's Charge are appropriate and limited to what is reasonably necessary.

F. The Authority for CPL to act as Foreign Representative Should be Granted

- 67. The Initial Order contemplates CPL being authorized to act as the foreign representative and to apply for foreign recognition and approval of these CCAA proceedings, as necessary, in any jurisdiction outside of Canada, including the United States pursuant to chapter 15 of the Bankruptcy Code.
- 68. Pursuant to section 56 of the CCAA, this Court has jurisdiction to make an order that allows an applicant to act as a representative in respect of any proceeding under the CCAA for the purpose of having such proceeding recognized in a jurisdiction outside of Canada.
- 69. While the Company's core business operations are in Canada, two of the Applicants are incorporated in the United States where they maintain certain limited residual commercial activities. Accordingly, authorizing CPL to seek recognition of these CCAA proceedings in

the United States provides the Company with an additional safeguard to be used as needed, which is appropriate in the circumstances and in the best interests of stakeholders.

PART V. CONCLUSION

70. The Applicants have initiated these CCAA proceedings, with the support of their largest secured lender, to obtain the protection and stability necessary to preserve their operations, obtain urgently needed DIP financing, and pursue the implementation of the SISP to identify a sale or other restructuring transaction that maximizes the value of the CPL Business for the benefit of stakeholders. Given the Applicants' liquidity position and their overall financial circumstances, it is imperative that the Applicants obtain the critical DIP financing proposed to be made available during the Initial Stay Period, as well as the other relief sought under the proposed Initial Order.

71. The Applicants therefore respectfully request that this Court grant the proposed Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 14, 2023



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SCHEDULE A
LIST OF AUTHORITIES

1. *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72, [2009 CanLII 55114](#)
2. *Canwest Publishing Inc. / Publications Canwest Inc., Re*, [2010 ONSC 222](#)
3. *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#)
4. *Cinram International Inc., Re*, [2012 ONSC 3767](#)
5. *Clover Leaf Holdings Company, Re*, [2019 ONSC 6966](#)
6. *Index Energy Mills Road Corporation (Re)*, [2017 ONSC 4944](#)
7. *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, [2018 SKCA 36](#)
8. *JTI Macdonald Corp., Re*, [2019 ONSC 1625](#)
9. *Just Energy Corp. (Re)*, [2021 ONSC 1793](#)
10. *McEwan Enterprises Inc.*, [2021 ONSC 6453](#)
11. *North American Tungsten Corporation Ltd., Re*, [2015 BCSC 1376](#)
12. *Re First Leaside Wealth Management Inc.*, [2012 ONSC 1299](#) (S.C.J.)
13. *Re Global Light Telecommunications Inc. et al.*, [2004 BCSC 745](#)
14. *Stelco Inc., Re*, [\(2004\), 48 C.B.R. \(4th\) 299](#) (Ont. Sup. Ct. J. [Commercial List])
15. *Target Canada Co., Re*, [2015 ONSC 303](#)
16. *Timminco Limited (Re)*, [2012 ONSC 506](#)
17. *2496750 Ontario Inc. (Re)*, [2023 ONSC 753](#)
18. *9354-9186 Quebec inc. v. Callidus Capital Corp.*, [2020 SCC 10](#)

**SCHEDULE B
STATUTORY REFERENCES**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Definitions

2. In this Act, ...

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (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; (personne insolvable)

Property of bankrupt

67 (1) The property of a bankrupt divisible among his creditors shall not comprise

- (a) property held by the bankrupt in trust for any other person;

Companies' Creditors Arrangement Act, R.S.C. 1985, c C-36

Definitions

2 (1) In this Act, ...

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

debtor company means any company that

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent;

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

Affiliated companies

3 (2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

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.

...

Burden of proof on application

11.02 (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.

Interim Financing

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

...

Interim Financing – Factors to be considered

11.2 (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.

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

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

Restriction

11.51 (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

11.51 (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.

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

- (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

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

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

Court File No. CV-23-00711401-00CL

**AND IN THE MATTER OF AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF CONTRACT PHARMACEUTICALS LIMITED, CPL
CANADA HOLDCO LIMITED, CONTRACT PHARMACEUTICALS LIMITED
CANADA, GLASSHOUSE PHARMACEUTICALS LIMITED CANADA, AND
GLASSHOUSE PHARMACEUTICALS LLC**

Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**
Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS
(APPLICATION FOR INITIAL ORDER)**

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