

**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 FORME DEVELOPMENT GROUP INC.  
AND THE OTHER COMPANIES LISTED ON SCHEDULE "A"  
HERETO (the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS*  
*ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Estate File No.: 31-2436568

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

IN THE MATTER OF THE PROPOSAL OF 58 OLD KENNEDY  
DEVELOPMENT INC., 76 OLD KENNEDY DEVELOPMENT  
INC. AND 82 OLD KENNEDY DEVELOPMENT INC., ALL  
CORPORATIONS INCORPORATED UNDER THE LAWS OF  
ONTARIO

**FACTUM OF THE MONITOR**  
(Motion returnable February 20, 2020)

February 19, 2020

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Proposal Trustee and not in its personal capacity

## **PART I: INTRODUCTION**

1. On November 30, 2018, Forme Development Group Inc. and certain of its affiliated entities (the "**CCAA Applicants**") obtained an Order of this Honourable Court, as amended and restated on December 6, 2018 (the "**Initial Order**"), granting relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**", with these proceedings being referred to herein as the "**CCAA Proceedings**"). Pursuant to the Initial Order, KSV Kofman Inc. ("**KSV**") was appointed "super" monitor in the CCAA Proceedings (in such capacity, the "**Monitor**").
2. The CCAA Applicants and certain other affiliated companies (collectively, the "**Forme Group**") were in the business of purchasing real estate with the intention of developing commercial real estate projects. At the commencement of the CCAA Proceedings, the Forme Group was indebted to mortgagees in the aggregate amount of approximately \$220 million. At that time, the Forme Group had a combined bank balance of roughly \$230,000.
3. KSV was also appointed Proposal Trustee of three of the CCAA Applicants' affiliated entities (the "**NOI Entities**") in proposal proceedings commenced on October 26, 2018, by the NOI Entities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**").
4. Certain of the Forme Group's companies are not CCAA Applicants or NOI Entities (the "**Non-Applicants**").
5. On January 28, 2020, at the direction of Yuan Hua Wang ("**Mr. Wang**") who remains the sole director of the Non-Applicants, four Non-Applicants, 19 Turff Development Inc., 22 Old Kennedy Development Inc., 35 Thelma Development Inc., and 4550 Steeles Development Inc. (together, the "**Bankrupt Non-Applicants**") filed assignments in bankruptcy (the "**Assignments**") under the BIA.

6. The Monitor brings this motion seeking, among other things, an extension of the Stay Period (as defined below) and an Order under subsection 181(1) of the BIA annulling the Assignments on the grounds that the Bankrupt Non-Applicants are not insolvent persons and/or the Assignments are an abuse of the court process. The Assignments achieve nothing not already accomplished in the CCAA Proceedings, and would undermine the ongoing claims process, exhaust further judicial resources, and delay and reduce creditor recoveries.

7. Although the Monitor also seeks other relief in this motion, its requests for Orders annulling the Assignments and extending the Stay Period are the primary relief that the Monitor understands to be opposed. Accordingly, this factum will only address those two issues.

8. The Non-Applicants served a motion record at 11:34 a.m. today seeking various relief. Given the time it was served, there is insufficient time for the Monitor to respond to it in any substantive manner in this factum. The Monitor did provide certain preliminary responses in its Supplement to the Twelfth Report of the Monitor and Eighth Report of the Proposal Trustee (the "**Supplement**").

## **PART II: FACTS**

9. The facts with respect to this motion are more fully set out in the Twelfth Report of the Monitor and the Eighth Report of the Proposal Trustee dated February 12, 2020 (the "**Report**") and the Supplement.<sup>1</sup> Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Report or the Supplement, as applicable.

### ***The Forme Group***

10. The Forme Group is a commercial and residential real estate development group specializing in low-rise, high-rise, mixed-use and hospitality developments primarily within the Greater Toronto

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<sup>1</sup> Twelfth Report of the Monitor and Eighth Report of the Proposal Trustee KSV Kofman Inc., at 11 [Report]; Supplement to the Twelfth Report of the Monitor and Eighth Report of the Proposal Trustee KSV Kofman Inc. [Supplement].

Area.<sup>2</sup> As at the date the CCAA Proceedings commenced, the Forme Group's mortgage debt was approximately \$220 million, with one or more mortgages on each of the Forme Group's parcels of real property.<sup>3</sup> Many of the mortgages were personally guaranteed by Mr. Wang.

11. Pursuant to the Initial Order, the CCAA Applicants were granted protection under the CCAA and KSV was appointed as "super" Monitor with enhanced powers. The Monitor's enhanced powers were required by mortgagees as a condition of the CCAA Proceedings. Under the Initial Order, Mr. Wang was also granted certain protections including the benefit of the stay of proceedings which is currently in place until February 28, 2020 (the "**Stay Period**").

12. KSV is also the Proposal Trustee of the NOI Entities.

13. Mr. Wang is the sole shareholder of the CCAA Applicants and the NOI Entities. Mr. Wang is also the sole shareholder of the Non-Applicants, 14 affiliated real estate development companies that are not the CCAA Applicants or the NOI Entities, and which include the Bankrupt Non-Applicants.<sup>4</sup>

14. The Non-Applicants have either sold or are in the process of marketing for sale their real estate development projects.<sup>5</sup> In the case of the Bankrupt Non-Applicants, each has sold its owned real estate and repaid its mortgagees in full. Each of the Bankrupt Non-Applicants now has a material amount of cash, the sum of which totals just less than \$11 million, which is being held in trust in accordance with the undertaking described immediately below.

### ***The Court-Approved Voluntary Undertaking***

15. Following the Monitor having concerns that the Non-Applicants and/or Mr. Wang might put \$12 million out of the reach of stakeholders and serving a motion to address those concerns,

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<sup>2</sup> First Report of the Monitor KSV Kofman Inc., at 7 [First Monitor's Report].

<sup>3</sup> *Ibid* at 9.

<sup>4</sup> Report, *supra* note 1 at 2.

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

negotiations ensued between the Monitor, Mr. Wang and the Non-Applicants. Those negotiations resulted in Mr. Wang and the Non-Applicants (including the Bankrupt Non-Applicants) executing an undertaking in favour of the Court on March 11, 2019 (the "**Undertaking**"). The Undertaking was approved pursuant to a Court Order made on March 18, 2019.<sup>6</sup>

16. Among other things, the Undertaking facilitates the marketing and sale of the Non-Applicants' real property in a commercially reasonable manner in order to maximize its realizable value.<sup>7</sup> Pursuant to the Undertaking, any surplus funds realized from the sale of the Non-Applicants' real property after satisfying all related mortgage debt (the "**Surplus**") is to be held in a trust account of the Non-Applicants' legal counsel for the benefit of all creditors.<sup>8</sup>

17. The Undertaking further provides that prior to the distribution of the Surplus, the Monitor will conduct a claims process for the CCAA Applicants, the NOI Entities, the Non-Applicants and Mr. Wang.<sup>9</sup> Any dispute arising out of the Undertaking is to be determined by this Court on a motion in the CCAA Proceedings.<sup>10</sup> No such motion has been brought.

#### ***The Court-Approved and Uncontested Claims Procedure***

18. On October 22, 2019, as contemplated by the Undertaking, the Monitor sought and obtained an Order (the "**Claims Procedure Order**") authorizing it to undertake a claims process (the "**Claims Process**") to solicit and identify any and all Pre-filing Claims, D&O Claims, NOI Claims, Non-

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<sup>6</sup> Supplement to the Third Report of the Monitor KSV Kofman Inc., at 2.

<sup>7</sup> *Ibid* at 3.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid* at 4.

Applicant Claims, Wang Claims, and/or Restructuring Claims (each as defined in the Claims Procedure Order, each a "**Claim**").

19. The Claims Process allows the Monitor to determine the potential scope and nature of Claims that may exist against the CCAA Applicants, the NOI Entities, the Non-Applicants, Mr. Wang (in certain capacities), and their directors or officers where applicable. With respect to Non-Applicant Claims and Wang Claims, the Claims Procedure Order contemplates that the Non-Applicants and Mr. Wang, respectively, have a major role to play in the Claims Process.<sup>11</sup>

20. The Monitor and the Monitor's counsel, Bennett Jones LLP ("**Bennett Jones**"), consulted extensively with Mr. Wang's then counsel, Lerner LLP ("**Lerner**"), on the Claims Process and incorporated many of its requests in the Claims Procedure Order. Lerner attended the motion to approve the Claims Procedure Order and did not contest it. The Monitor and Bennett Jones similarly attempted to consult with the Non-Applicants' then counsel, Cassels Brock & Blackwell LLP, but despite repeated promises for comments, none were received.

### ***The Assignments into Bankruptcy***

21. On January 28, 2020, the Bankrupt Non-Applicants filed the Assignments. Grant Thornton LLP ("**GT**") was appointed the trustee in bankruptcy of the Bankrupt Non-Applicants.<sup>12</sup> The Monitor first learned that the Assignments had been made on January 31, 2020, upon receipt of an email from GT. The Monitor notes that it was not advised about the Assignments until after the Non-Applicants attended at an *ex parte* chambers appointment to, among other things, amend the Undertaking.

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<sup>11</sup> Eleventh Report of the Monitor KSV Kofman Inc. at 2.

<sup>12</sup> Report, *supra* note 1 at 10.

22. On February 6, 2020, at the Monitor's request, the Monitor and Bennett Jones participated in a conference call with GT and Miller Thomson LLP ("**Miller Thomson**"), GT's proposed counsel, principally to determine the purpose of the Assignments. Unbeknownst to the Monitor in advance of the call, Gardiner Roberts LLP ("**Gardiner Roberts**"), the Non-Applicants latest counsel, was invited to the call by GT and/or Miller Thomson. Despite several requests by the Monitor to advise as to the purpose of the Assignments, GT, Miller Thomson, and Gardiner Roberts did not provide an answer.<sup>13</sup>

23. On February 9, 2020, Miller Thomson sent an email to Bennett Jones purporting to advise as to the purpose of the Assignments.<sup>14</sup> According to Miller Thomson, the reasons provided by the Bankrupt Non-Applicants for their Assignments included, among others, that:

- (a) the Assignments were viewed as being in the best interest of all of the stakeholders;
- (b) the Bankrupt Non-Applicants have already liquidated their principal assets, and their remaining tasks are to determine claims, make tax and other filings and review and realize on tax and intangible assets that would benefit the estates;
- (c) the Bankrupt Non-Applicants' access to funding to carry out their remaining tasks was insufficient as the Monitor has not permitted the Bankrupt Non-Applicants to adequately fund their existing or future obligations; and
- (d) there is a potential conflict between the administration of the CCAA Proceedings and the Non-Applicants because the CCAA Applicants may have intercompany claims

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<sup>13</sup> *Ibid* at 11.

<sup>14</sup> *Ibid*.

against the Non-Applicants and the Bankrupt Non-Applicants may have claims against the CCAA Applicants.<sup>15</sup>

24. On February 10, 2020, Bennett Jones identified numerous inconsistencies and/or issues with the reasons provided and made further inquiries including, among others, that:

- (a) the Monitor is not aware of any consultative process with stakeholders and has only received negative feedback from stakeholders in respect of the Assignments;
- (b) the Court-approved Claims Process that was not opposed by the Bankrupt Non-Applicants already addresses claims against the Bankrupt Non-Applicants;
- (c) the Bankrupt Non-Applicants have not sought any Order from the Court for funding and the Monitor is not aware of any remaining tasks or existing or future obligations of the Bankrupt Non-Applicants; and
- (d) the suggestion of an alleged conflict in respect of intercompany claims is belied by the Bankrupt Non-Applicants' own logic – it would be equally problematic for a trustee in bankruptcy to act as trustee for each of the Bankrupt Non-Applicants as they may have claims against one another.<sup>16</sup>

25. To date, neither the Monitor nor Bennett Jones has received a substantive response to any of the issues identified above. In that time however, Bennett Jones has received a factum and motion record from GT and Gardiner Roberts respectively.

26. On February 18, 2020, Gardiner Roberts sent an email to the Service List in the CCAA Proceedings advising that the Non-Applicants will be opposing the relief sought by the Monitor

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<sup>15</sup> *Ibid* at Appendix "I".

<sup>16</sup> *Ibid*.

including, among other things, the annulment of the Assignments and the extension of the Stay Period (as discussed below), and would be serving a motion record that day. In response, Bennett Jones asked Gardiner Roberts to provide the name of the affiant and the time that the affiant will be available to be examined. Gardiner Roberts never responded to the email from Bennett Jones and served its motion record, which included affidavit evidence, in respect of same at 11:34 a.m. on February 19, 2020, leaving no time to conduct an examination.<sup>17</sup>

27. Since the Assignments, the Monitor has received numerous enquiries from the Forme Group's stakeholders expressing concerns about the further delay, duplication of costs, and confusion in the Claims Process, that will be caused by the Assignments.<sup>18</sup>

28. In light of the above, the Monitor has brought this motion seeking an Order under subsection 181(1) of the BIA annulling the Assignments.

### ***Extending the Stay Period***

29. The Monitor is also seeking an extension of the Stay Period until and including May 31, 2020, principally, to allow the Monitor to continue to discharge its duties and obligations and to facilitate the Court-approved Claims Process with a view to maximizing stakeholder recovery.

30. The Monitor expects there to be sufficient liquidity to manage the CCAA Applicants' estate and fund their obligations until May 31, 2020.

### **PART III: ISSUES**

31. The issues addressed in this factum are whether the Court should:

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<sup>17</sup> Supplement, *supra* note 1 at 5.

<sup>18</sup> Report, *supra* note 1 at 11.

- (a) annul the Assignments; and
- (b) grant an extension of the Stay Period.

#### **PART IV: LAW AND ARGUMENT**

##### **The Assignments Ought Not to Have Been Filed**

32. Subsection 181(1) of the BIA vests this Court with wide discretion to annul the Assignments.<sup>19</sup>

33. The type of party entitled to bring a motion under subsection 181(1) of the BIA is not closed and continues to evolve. In any event, courts have consistently held that a creditor has standing to bring such a motion.<sup>20</sup> Having filed proofs of claims against the Bankrupt Non-Applicants, the Monitor has standing, as a creditor of the Bankrupt Non-Applicants, to bring a motion under subsection 181(1) of the BIA. Further, in these unique CCAA Proceedings where the Monitor is the Court-appointed officer in respect of the Claims Process over the Bankrupt Non-Applicants as well, the Monitor has a clear and direct interest in the Assignments and is thus, a proper party to bring the motion.<sup>21</sup>

34. Pursuant to subsection 181(1) of the BIA:

**181(1) Power of court to annul bankruptcy** – If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.<sup>22</sup>

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<sup>19</sup> *Wale, Re*, [1996] OJ No. 4489 at para 26 [*Wale*], Book of Authorities of the Monitor at Tab 1 [BOA]; *Terry, Re* (2009), OJ No. 3447 at para 12 [*Terry*], BOA at Tab 2; *Hydra-Dyne Industrial Cleaning Services Ltd, Re*, 2002 CarswellOnt 5111 at paras 11, 14, BOA at Tab 3.

<sup>20</sup> *Gaffney, Re*, 2007 BCCA 182 at para 25 citing *Develox Industries Ltd., Re*, [1970] 14 CBR (NS) 132 (Ont. S.C.), BOA at Tab 4; *American Bullion Minerals Ltd., Re*, 2007 BCSC 1083 at para 20 [*Bullion Minerals*], BOA at Tab 5.

<sup>21</sup> *Bullion Minerals, ibid*, BOA at Tab 5.

<sup>22</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 s 181(1) [BIA].

35. While the BIA does not set out a test as to when the discretion under subsection 181(1) is to be exercised, courts have consistently held that an annulment will be granted where it is shown that:

- (a) the debtor was not an insolvent person when it made the assignment; or
- (b) the debtor abused the process of the court or committed a fraud on its creditors by filing an assignment in bankruptcy.<sup>23</sup>

36. In exercising its discretion under subsection 181(1), a court must "examine the full background of the facts surrounding the assignment"<sup>24</sup> and "take into consideration and balance all of the interests of the creditors, the bankrupt, and third parties".<sup>25</sup>

37. There is "no single test or principle to be applied" but "the debtor's motive is the primary consideration in determining abuse of process".<sup>26</sup>

38. If either (a) or (b) above are found, the annulment will be granted. In this case, both of the above are satisfied. Here, the facts make clear that the Assignments ought not to have been filed, as each of the Bankrupt Non-Applicants, subject to certain intercompany claims presently being reviewed, appears to be solvent and filed the Assignments to abuse the process of the court.

**A. The Bankrupt Non-Applicants were not Demonstrably Insolvent Persons**

39. As the Ontario Court of Appeal affirmed in *Kormos v Fast*, "Bankruptcy is reserved for 'clear cut situations where the liabilities on which the petition is founded and the act of bankruptcy are clearly established by sound and convincing evidence'".<sup>27</sup> This is not the case here. The Bankrupt

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<sup>23</sup> *Wale, supra* note 18 at paras 17, 26, BOA at Tab 1; *Kormos v Fast*, 2019 ONCA 430 at para 11 [*Fast*], BOA at Tab 6.

<sup>24</sup> *Blaxland v Fuller*, [1990] BCJ No. 2555 at para 10 [*Fuller*], BOA at Tab 7.

<sup>25</sup> *Re Assaly*, 2018 ONSC 4882 at para 53, BOA at Tab 8.

<sup>26</sup> *Wale, supra* note 18 at para 26, BOA at Tab 1; *Milaniak, Re* (2006), OJ No. 290 at para 7 [*Milaniak*], BOA at Tab 9.

<sup>27</sup> *Fast, supra* note 22 at para 13, BOA at Tab 6.

Non-Applicants are not demonstrably insolvent persons, and in fact appear at this time to have significant value beyond their liabilities.

40. Pursuant to section 2 of the BIA, "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.<sup>28</sup>

41. Each Bankrupt Non-Applicant has sold its real property, generating sufficient proceeds to repay its mortgage debt in full and to fund the Surplus.<sup>29</sup> Although the Claims Process is still ongoing, it appears to the Monitor, subject to the results of the intercompany claims review and the resolution of the claims filed against the Bankrupt Non-Applicants, that each Bankrupt Non-Applicant will have sufficient funds to repay all of its secured and unsecured debt in full. There is no evidence from the Bankrupt Non-Applicants to the contrary, and to the extent there was such evidence, it would mean that Mr. Wang (as shareholder of the Bankrupt Non-Applicants and the only stakeholder known to the Monitor who supports the Assignments) has no economic interest in the Bankrupt Non-Applicants.

42. The only evidence before this Court is that the value of the Bankrupt Non-Applicants' assets presently exceeds their liabilities. The only reason the Bankrupt Non-Applicants cannot satisfy all of their current obligations at this time is because of the Undertaking voluntarily entered into by the

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<sup>28</sup> BIA, *supra* note 21 s 2 "insolvent person".

<sup>29</sup> Report, *supra* note 1 at 11.

Bankrupt Non-Applicants, which restricted their use of the Surplus until the Claims Process is completed.

43. The Statements of Affairs filed in support of the Assignments suggesting that the Bankrupt Non-Applicants have liabilities in excess of their assets omit the Surplus from each of the Bankrupt Non-Applicants' assets.<sup>30</sup> If the Surplus were to have been included, the Bankrupt Non-Applicants' assets would exceed their liabilities.

44. The facts of this case do not meet the threshold of a 'clear cut situation' of insolvency that is 'clearly established by sound and convincing evidence'.

**B. The Assignments are an Abuse of Process**

45. While a debtor's motive in making an assignment is generally not relevant, where the conduct is tainted by bad motives, the Court can annul the assignment.<sup>31</sup> In *Wale, Re*, the Ontario Court of Justice (General Division) considered the following questions to determine the debtor's motives for filing an assignment in bankruptcy:

- (a) is the debtor's financial situation overwhelming or could it have been managed;
- (b) was bankruptcy inevitable in the near future or was the timing of the assignment related to another agenda;
- (c) was the debtor forthcoming in revealing its situation to its creditors or did it hide assets or prefer some creditors to others;

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<sup>30</sup> First Report of the Trustee Grant Thornton Ltd. at Appendix "E", Appendix "F", Appendix "G", Appendix "H".

<sup>31</sup> *Wale, supra* note 18 at para 25, BOA at Tab 1; *Fuller, supra* note 23 at para 6, BOA at Tab 7.

- (d) did the debtor convert money or assets which would otherwise have been assets in the bankruptcy to itself;
- (e) what had been the debtor's relationship with its creditors? Was it such that they might have assisted the debtor if the debtor had approached them or had any goodwill been destroyed by past unfulfilled promises; and
- (f) are there other relationships – business partnerships, shareholder agreements, competitors for an asset, or simply personal associations which cast light on a possible bad faith motive for making the assignment.<sup>32</sup>

46. At their core, the *Wale* inquiries aim to determine whether the bankruptcy process is being perverted to achieve an improper purpose other than that intended by the BIA.<sup>33</sup> This is precisely the case here.

47. The BIA bankruptcy regime is intended to, among other things:

- (a) permit an honest but unfortunate debtor to obtain a discharge from its debts subject to reasonable conditions;
- (b) protect the interest of a debtor's creditors while ensuring an orderly realization, disposition and distribution of the debtor's assets on a *pari passu* basis;

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<sup>32</sup> *Wale*, *ibid* at para 26, BOA at Tab 1; *Milaniak*, *supra* note 25 at para 13, BOA at Tab 9; *Terry*, *supra* note 18 at para 19, BOA at Tab 2.

<sup>33</sup> See *Moss, Re*, [1999] MJ No. 261 at para 35 for its definition of an abuse of process in the context of subsection 181(1) of the BIA as "a term used to describe an improper use of the judicial proceedings and may arise if jurisdiction were exceeded. It arises when a legal process with some legitimacy is used for some ulterior motive, other than that for which it was intended. It is invoked to protect against harassment, or the perversion of the process to accomplish an improper result", BOA at Tab 10. See also, *Swain, Re*, [1998] 2 WWR 456 at para 11 [*Swain*], BOA at Tab 11.

- (c) facilitate the bankrupt's rehabilitation; and
- (d) allow an investigation of the bankrupt's affairs.<sup>34</sup>

48. The Monitor submits that, in the circumstances, the Assignments do not withstand scrutiny under the *Wale* inquiries and do not achieve the purposes of the BIA. Namely, that:

- (a) With all of their assets sold and mortgagees satisfied, and with significant surpluses remaining, the Bankrupt Non-Applicants cannot be said to have been dealing with unmanageable financial situations or an inevitable bankruptcy. There is an ongoing Court-approved Claims Process to address remaining claims against the Bankrupt Non-Applicants, and distributions will not require a bankruptcy. Through the Claims Process (which the Bankrupt Non-Applicants did not object to), the Bankrupt Non-Applicants' financial situation is already being managed. The Assignments are therefore entirely duplicative and serve no valid purpose, highlighting what appears to be improper motives leading to the Assignments.
- (b) The timing of the Assignments suggests it is related to another agenda. The claims of the Bankrupt Non-Applicants' mortgagees were repaid in full many months ago and the only remaining claims have been submitted and are subject to review by the Monitor and the Bankrupt Non-Applicants in accordance with the Claims Procedure Order.<sup>35</sup>

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<sup>34</sup> *Leard, Re*, [1993] OJ No. 3274 at para 32, BOA at Tab 12; *Swain, ibid* at para 12, BOA at Tab 11; *Arrangement relatif à Ferreira*, 2018 QCCS 3891 at para 53, BOA at Tab 13.

<sup>35</sup> Report, *supra* note 1 at 11, Appendix "I".

- (c) The Bankrupt Non-Applicants' creditor relationships are already being managed by the CCAA Proceedings and the Court-supervised Claims Process. Each of the claims filed in the bankruptcies to date were already filed in the Claims Process. Thus, there can be no concern regarding whether the Bankrupt Non-Applicants' have exhausted their good will with their creditors. In fact, the only comments received by the Monitor from creditors express concern for the duplication of professional costs and potential delays resulting from the bankruptcies.
- (d) The Bankrupt Non-Applicants (and their principal) have not been forthcoming throughout these proceedings, including as to their financial circumstances and the purposes of the bankruptcies.<sup>36</sup>
- (e) Notwithstanding that he did not oppose the Undertaking or the Claims Procedure Order, the Assignments were made at the direction of Mr. Wang, the sole director of each of the Bankrupt Non-Applicants.
- (f) At this time, there are no proven claims against the Bankrupt Non-Applicants not capable of being satisfied that require discharge under the BIA.<sup>37</sup>
- (g) The Assignments do not afford the Bankrupt Non-Applicants' creditors any protection not provided by the CCAA Proceedings and paradoxically would delay and reduce their recovery by creating duplicative processes and increasing professional fees.

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

49. In the circumstances, it is clear that the BIA's purposes are not achieved by the Assignments. If not annulled, the Assignments will achieve their ulterior motive of staying the Court-approved Claims Process<sup>38</sup> at the expense of creditors and this Court without accomplishing anything not already achieved by these unique and heavily negotiated CCAA Proceedings.

50. The Court-approved Claims Process is one of several integral "building blocks" in the CCAA Proceedings and like all court orders made during CCAA proceedings must "be respected".<sup>39</sup> The Bankrupt Non-Applicants' assignments should not be permitted to undermine this 'building block'.

### **The Stay Period Should be Extended**

51. The Monitor seeks an extension of the Stay Period up to and including May 31, 2020.<sup>40</sup> In order to extend the Stay Period, the Court must be satisfied that circumstances exist that make the order appropriate and the CCAA Applicants have acted, and are acting, in good faith and with due diligence.<sup>41</sup>

52. In determining whether "circumstances exist that make the order appropriate", the Court may examine whether the stay extension furthers the purposes of the CCAA – including by avoiding the "devastating social and economic effects of bankruptcy".<sup>42</sup> To this end, stays of proceedings are appropriate where they provide the debtor with breathing room 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".<sup>43</sup>

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<sup>38</sup> *Ibid* at 10.

<sup>39</sup> *Target Canada Co, Re*, 2016 ONSC 316 at para 81 [*Target*], BOA at Tab 14.

<sup>40</sup> Report, *supra* note 1 at 20.

<sup>41</sup> *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 s 11.02(2)-(3); *Cline Mining Corp, Re*, 2015 ONSC 622 at para 30, BOA at Tab 15; *Re Canada North Group Inc*, 2017 ABQB 508 at para 36, BOA at Tab 16.

<sup>42</sup> *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60 at para 70 [*Century*], BOA at Tab 17.

<sup>43</sup> *Target Canada Co*, 2015 ONSC 303 at para 8, BOA at Tab 18; *Century, ibid* at para 14, BOA at Tab 17.

53. Extending the Stay Period until May 31, 2020, is appropriate and furthers the purposes of the CCAA. Specifically, the extension to the Stay Period will permit the Monitor to advance the interests of the CCAA Applicants and maximize stakeholder recovery by:

- (a) effecting the Transaction (as defined in the Report), subject to Court approval;
- (b) continuing to carry out the Court-approved Claims Process in accordance with the Claims Procedure Order as contemplated by the Undertaking;
- (c) continuing to perform its obligations under the Undertaking, including monitoring the sale of the remaining Non-Applicants' properties; and
- (d) remaining apprised of the Non-Applicants' use of the net proceeds generated from real property transactions, as contemplated by the Undertaking.<sup>44</sup>

54. Declining to extend the Stay Period will undermine an ongoing and Court-approved Claims Process, an integral step in these CCAA Proceedings. In this regard, Morawetz R.S.J.'s (as he then was) holding in *Target Canada Co., Re*, is apropos.

55. In *Target*, the applicant's plan for filing was rejected, in part, because it required the court to "completely ignore the background that led" to the issuing of the order the plan sought to vary and departed from "the agreed upon course of action".<sup>45</sup> Morawetz R.S.J.'s reasons for rejection the plan bear repeating:

The CCAA process is one of building blocks. In [these] proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made [a] number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an

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<sup>44</sup> Report, *supra* note 1 at 20.

<sup>45</sup> *Target*, *supra* note 39 at paras 77-78, BOA at Tab 14.

order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.<sup>46</sup>

56. The circumstances here are similar. These CCAA Proceedings have been heavily negotiated. This Court has approved the product of these negotiations at every stage of the CCAA Proceedings, including the Initial Order, the Undertaking and the Claims Procedure Order. The Claims Procedure Order, and the corresponding Claims Process are each essential 'building blocks' in these CCAA Proceedings that stakeholders have relied upon in choosing their course of conduct.

57. As "super" Monitor in these CCAA Proceedings, it is the Monitor's view that the good faith and due diligence standard should focus on the Monitor's conduct. The Monitor has and continues to discharge its duties under the Initial Order and other orders made in the CCAA Proceedings in good faith and with due diligence.<sup>47</sup> To the extent relevant, the CCAA Applicants (at the direction of the Monitor) have also acted and continue to act in good faith and with due diligence.

58. The Monitor expects there to be sufficient liquidity to manage the CCAA Applicants' estate and fund their obligations until May 31, 2020.<sup>48</sup>

59. No creditor will be prejudiced by the extension of the Stay Period. However, creditors, who have already submitted proofs of claims pursuant to the Claims Procedure Order (which include claims against the Bankrupt Non-Applicants) and who have relied upon the building blocks of the CCAA Proceedings since its inception in 2018 will be prejudiced if the stay is not extended.

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<sup>46</sup> *Ibid* at para 81, BOA at Tab 14.

<sup>47</sup> Report, *supra* note 1 at 20.

<sup>48</sup> *Ibid*.

60. For the above reasons, the Monitor believes the extension of the Stay Period is appropriate in the circumstances.

**PART V: RELIEF REQUESTED**

61. The Monitor submits that it has established that the Bankrupt Non-Applicants are not demonstrably insolvent and that the Assignments are an abuse of the court's process that warrant an Order from this Honourable Court annulling them. Further, the Monitor submits that it has established that an Order extending the Stay Period is appropriate in the circumstances and that the CCAA Applicants (through the Monitor) have acted, and are acting, in good faith and with due diligence.

62. The Monitor respectfully requests the costs of this motion against Mr. Wang personally on a substantial indemnity basis, plus all applicable taxes.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

February 19, 2020

  
**BENNETT JONES LLP**

## **SCHEDULE A – APPLICANTS**

3310 Kingston Development Inc.  
1296 Kennedy Development Inc.  
1326 Wilson Development Inc.  
5507 River Development Inc.  
4439 John Development Inc.  
2358825 Ontario Ltd.  
250 Danforth Development Inc.  
159 Carrville Development Inc.  
169 Carrville Development Inc.  
189 Carrville Development Inc.  
27 Anglin Development Inc.  
29 Anglin Development Inc.

**SCHEDULE B – LIST OF AUTHORITIES**

*Cases Cited*

1.	<i>American Bullion Minerals Ltd., Re</i> , 2007 BCSC 1083
2.	<i>Arrangement relatif à Ferreira</i> , 2018 QCCS 3891
3.	<i>Blaxland v Fuller</i> , [1990] BCJ No. 2555
4.	<i>Century Services Inc v Attorney General (Canada)</i> , 2010 SCC 60
5.	<i>Cline Mining Corp, Re</i> , 2015 ONSC 622
6.	<i>Gaffney, Re</i> , 2007 BCCA 182
7.	<i>Hydra-Dyne Industrial Cleaning Services Ltd, Re</i> , 2002 CarswellOnt 5111
8.	<i>Kormos v Fast</i> , 2019 ONCA 430
9.	<i>Leard, Re</i> , [1993] OJ No. 3274
10.	<i>Milaniak, Re</i> (2006), OJ No. 290
11.	<i>Moss, Re</i> , [1999] M.J. No. 261
12.	<i>Re Assaly</i> , 2018 ONSC 4882
13.	<i>Re Canada North Group Inc</i> , 2017 ABQB 508
14.	<i>Swain, Re</i> , [1998] 2 WWR 456
15.	<i>Target Canada Co</i> , 2015 ONSC 303
16.	<i>Target Canada Co, Re</i> , 2016 ONSC 316
17.	<i>Terry, Re</i> (2009), OJ No. 3447
18.	<i>Wale, Re</i> , [1996] OJ No. 4489

## SCHEDULE C – STATUTES AND REGULATIONS

### Bankruptcy and Insolvency Act, RSC 1985, c. B-3

#### Section 2

##### **"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;

#### Section 181

##### **Power of court to annul a bankruptcy**

(1) If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

##### **Effect of annulment of bankruptcy**

(2) If an order is made under subsection (1), all sales, dispositions of property, payments duly made and acts done before the making of the order by the trustee or other person acting under the trustee's authority, or by the court, are valid, but the property of the bankrupt shall vest in any person that the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate, or interest or right of the trustee in the estate, on any terms and subject to any conditions, if any, that the court may order.

##### **Final statement of receipts and disbursements**

(3) If an order is made under subsection (1), the trustee shall, without delay, prepare the final statements of receipts and disbursements referred to in section 151.

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

#### Section 11.02

##### **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.

**Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Burden of proof on application**

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**Restriction**

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

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 FORMER DEVELOPMENT GROUP INC. AND THE OTHER  
COMPANIES LISTED ON SCHEDULE "A" HERETO (the "Applicants")

Estate No. 31-2436538

IN THE MATTER OF THE PROPOSAL OF 58 OLD KENNEDY DEVELOPMENT INC.,  
76 OLD KENNEDY DEVELOPMENT INC. AND  
82 OLD KENNEDY DEVELOPMENT INC.,  
ALL CORPORATIONS INCORPORATED UNDER THE LAWS OF ONTARIO

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

Proceeding commenced at Toronto

**FACTUM OF THE MONITOR**  
(Motion Returnable February 20, 2020)

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Proposal Trustee and not in its personal  
capacity