

**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

**FACTUM OF THE MONITOR  
(Motion Returnable July 2, 2019)**

June 26, 2019

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its capacity as Court-appointed monitor  
and not in its personal capacity

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**PART I – INTRODUCTION**

1. On November 30, 2018, Forme Development Group Inc. and the affiliated entities listed on Schedule "A" (the "**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**"). KSV Kofman Inc. was appointed monitor (in such capacity, the "**Monitor**"). The Initial Order approved a sale process (the "**Sale Process**") in respect of the real property and all of the assets and undertakings of the Applicants acquired for or in relation to the real property.
2. The Sale Process has been completed and four sales resulting from the Sale Process have already been approved by this Honourable Court. The Monitor now seeks Orders, among other things, approving the sales of the Danforth Property (as defined below) and the Kingston Property (as defined below).

## **PART II – THE FACTS**

3. The facts with respect to this motion are more fully set out in the Monitor's Seventh Report dated June 21, 2019 (the "**Seventh Report**"). Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Seventh Report.

### **A. THE APPLICANTS' CCAA PROCEEDINGS**

4. Details regarding the CCAA Proceedings are set out in the Seventh Report, the Proposed Monitor's Report and the Supplemental Reports and, unless critical to the present motion, are not repeated herein.
5. As described in the Seventh Report, the Applicants are part of a commercial and residential real estate group of 29 companies comprising 18 projects (the "**Forme Group**") which develops low-rise, high-rise, mixed-use and hospitality projects and operates primarily in the Greater Toronto Area ("**GTA**").<sup>1</sup>

### **B. THE SALE PROCESS**

6. The Initial Order approved a listing agreement with TD Cornerstone Commercial Realty Inc. ("**TD**") and the Sale Process, to be conducted under the supervision of the Monitor. The bid deadline for the Sale Process was March 27, 2019 (the "**Bid Deadline**").<sup>2</sup>
7. On or around April 2, 2019, TD provided the Monitor with a letter summarizing the procedures it performed while carrying out the Sale Process and the feedback that it received from the market during the process (the "**Sale Process Letter**"). The Sale Process Letter detailed, among other things, that:
  - (a) the offering summary and confidentiality agreement ("**CA**") were distributed to approximately 2,000 market participants;

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<sup>1</sup> Seventh Report at section 2.0 para 1, Monitor's Motion Record Tab 2.

<sup>2</sup> Seventh Report at section 3.1 paras 1 and 2, Monitor's Motion Record Tab 2.

- (b) all properties, including the Danforth Property and Kingston Property, were listed on the Toronto Multiple Listing Service system ("**MLS**");
  - (c) print advertisements were placed in *The Globe and Mail* on two occasions;
  - (d) advertisements were placed in two online development focused publications; and
  - (e) TD also discussed the opportunity with numerous developers and other parties that it believed would have an interest in the properties.
8. The Applicants, at the outset of the Sale Process, owned several properties comprising seven developments. The Court has, to date, approved four transactions resulting from the Sale Process.<sup>3</sup>
9. Paragraph 45 of the Initial Order reserved a mortgagee's right to credit bid if the offers generated in the Sale Process were insufficient to repay in full the amount owing to the mortgagee (the "**Credit Bid Right**")<sup>4</sup>:

45. **THIS COURT ORDERS** that without limiting the terms of the Sale Process as set out in the Third Supplemental Report, to the extent that a mortgagee will not be paid in cash in full through bids received through the Sale Process, such mortgagee will be entitled to credit bid its indebtedness and purchase the Property over which it has a mortgage provided that such mortgagee pays any prior ranking indebtedness in full in cash (or such other arrangement to which a prior ranking creditor may in its sole discretion agree).

10. On or about January 11, 2019, prior to the commencement of the Sale Process, the Monitor sent a letter to each mortgagee providing them with, among other things, an opportunity to receive updates subject to executing a non-disclosure agreement ("**NDA**") confirming that those mortgagees who executed the NDA would not submit a bid in the Sale Process and confirming each mortgagee's Credit Bid Right.<sup>5</sup>

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<sup>3</sup> Seventh Report at section 6.0 para 1, Monitor's Motion Record Tab 2.

<sup>4</sup> Seventh Report at section 3.3 para 4, Monitor's Motion Record Tab 2.

<sup>5</sup> Seventh Report at section 3.2 paras 1 and 2, Monitor's Motion Record Tab 2.

11. Community Trust Company ("**Community Trust**") and First Source Financial Management Inc. ("**First Source**") were the only mortgagees on the Danforth Property and Kingston Property to execute the NDA.<sup>6</sup> Community Trust and First Source are the first ranking mortgagees on the Danforth Property and the Kingston Property.
12. The Monitor was aware of significant discrepancies between the value of certain of the offers received in the Sale Process and the values set out in the appraisals that the Forme Group retained Cushman & Wakefield Ltd. to prepare in order to secure financing (the "**Cushman Appraisals**"). In an effort to reconcile those differences, the Monitor engaged Altus Group Limited ("**Altus**") to review the Cushman Appraisals.<sup>7</sup>
13. Altus prepared reports which identified several significant problems with the Cushman Appraisals. Additionally, Altus prepared a market overview analysis discussing the residential housing market in the GTA, which found, among other things, that there had recently been a significant decrease in unit sales and pricing, and that new home unit sales had declined.<sup>8</sup>

*(a) The Danforth and Kingston Properties*

14. The property municipally known as 250 Danforth Road East, Scarborough, Ontario, including adjacent lands on Dairy Road and Bamblett Drive (the "**Danforth Property**") is owned by 250 Danforth Development Inc.<sup>9</sup>
15. The property municipally known as 3310, 3312 and 3314 Kingston Road, Scarborough, Ontario (the "**Kingston Property**") is owned by 3310 Kingston Development Inc.<sup>10</sup>
16. As a result of the Sale Process, one or more offers were received for each of the Danforth Property and the Kingston Property. The highest offer on the Danforth Property was conditional, and if completed, would fully repay the first mortgage but only provide a small

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<sup>6</sup> Seventh Report at section 3.2 para. 3, Monitor's Motion Record Tab 2.

<sup>7</sup> Seventh Report at section 3.6 paras 1 and 2, Monitor's Motion Record Tab 2.

<sup>8</sup> Seventh Report at section 3.6 paras 3 and 4, Monitor's Motion Record Tab 2.

<sup>9</sup> Seventh Report at section 1.1 para 1, Monitor's Motion Record Tab 2.

<sup>10</sup> Seventh Report at section 1.1 para 1, Monitor's Motion Record Tab 2.

recovery to the second mortgagee. The highest offer on the Kingston Property was insufficient to repay the first mortgagee, was conditional and was not submitted on the Monitor's template form of agreement of purchase and sale.<sup>11</sup>

17. On or around May 22, 2019, the lead bidder on the Danforth Property reduced its offer to an amount significantly less than the amount owing to Community Trust and First Source under their first ranking mortgage (the "**Danforth Bid Reduction**").<sup>12</sup>
18. Based on the results of the Sale Process in respect of the Danforth Property and the Kingston Property, on or around March 28, 2019, the Monitor commenced discussions with each of the mortgagees to determine whether they intended to exercise their Credit Bid Right. Subsequent to these discussions, First Source advised the Monitor that given the Danforth Bid Reduction, the value of the next best offer and the potential for further delay, it intended to exercise its Credit Bid Right in respect of the Danforth Property.<sup>13</sup>
19. In respect of the Danforth Property, the Monitor continued to engage extensively with certain of the second ranking syndicated mortgage investors (the "**Syndicated Mortgage**") and the trustee, Yuce Baykara (in such capacity, the "**Trustee**"), about the process of exercising the Syndicated Mortgage Credit Bid Right in respect of the Danforth Property. Despite several representations from the Trustee and certain of the Syndicated Mortgage investors that offers were forthcoming, no offers materialized.<sup>14</sup>
20. In respect of the Kingston Property, the Monitor spoke with First Source and legal counsel to Ferina Construction Limited ("**Ferina**"), the second ranking mortgagee in respect of the Kingston Property, concerning their respective Credit Bid Right. Ferina advised the Monitor that it was in discussions with First Source regarding a potential transaction that would result in First Source being paid out.<sup>15</sup>

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<sup>11</sup> Seventh Report at section 3.3 para. 3, Monitor's Motion Record Tab 2.

<sup>12</sup> Seventh Report at section 3.3.1 at para 2, Monitor's Motion Record Tab 2.

<sup>13</sup> Seventh Report at section 3.3 at para 5, Monitor's Motion Record Tab 2; Seventh Report at section 3.3.1 paras 1-3, Monitor's Motion Record Tab 2.

<sup>14</sup> Seventh Report at section 2.1 at para 6, Monitor's Motion Record Tab 2.

<sup>15</sup> Seventh Report at section 3.3.2 at paras 1-3, Monitor's Motion Record Tab 2.

21. In early May 2019, the Monitor was advised that negotiations between First Source and Ferina had discontinued and that First Source intended to exercise its Credit Bid Right in respect of the Kingston Property.<sup>16</sup>
22. On May 9, 2019, First Source submitted separate offers for the Danforth Property and the Kingston Property (the "**First Source Credit Bids**"). On May 23, 2019, the First Source Credit Bids were accepted by the Monitor.<sup>17</sup>

**C. UNSOLICITED OFFERS POST BID DEADLINE**

23. On or about May 8, 2019, the Monitor was contacted by Cassels Brock & Blackwell LLP ("**CBB**"), counsel to 13 affiliated real estate development companies in the Forme Group which are not subject to these CCAA Proceedings, that it was aware of offers that may be forthcoming for certain properties that were the subject of the Sale Process.<sup>18</sup>
24. On or about May 9, 2019, offers in this regard were submitted by Caishen Capital Group Ltd. (the "**Purchaser**") (the "**Initial Caishen Offers**"). Given the timing of the Initial Caishen Offers, and that it had already accepted the First Source Credit Bids, the Monitor advised CBB that it would first confer with First Source to determine whether it would consent to the transactions.<sup>19</sup>
25. After certain discussions, First Source advised the Monitor of certain concerns with the Initial Caishen Offers, including their conditionality.<sup>20</sup>
26. After further discussions between the Purchaser, the Monitor, CBB and First Source, the Purchaser submitted unconditional offers for the Kingston Property and the Danforth Property (the "**Revised Caishen Offers**"). First Source advised that it was prepared to

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<sup>16</sup> Seventh Report at section 3.3.2 at para 4, Monitor's Motion Record Tab 2.

<sup>17</sup> Seventh Report at section 3.3.1 at para 3, Monitor's Motion Record Tab 2; Seventh Report at section 3.3.2 at para 5, Monitor's Motion Record Tab 2.

<sup>18</sup> Seventh Report at section 3.4 at para 1, Monitor's Motion Record Tab 2.

<sup>19</sup> Seventh Report at section 3.4 at paras 1 and 2, Monitor's Motion Record Tab 2.

<sup>20</sup> Seventh Report at section 3.3.1 at para 3, Monitor's Motion Record Tab 2.

consent to the Revised Caishen Offers, despite the First Source Credit Bids, subject to payment of the deposits contemplated by the Revised Caishen Offers.<sup>21</sup>

27. On or about June 6, 2019, the Monitor accepted the Revised Caishien Offers (the "**Transactions**"). The deposits were received by the Monitor on June 10, 2019.<sup>22</sup>
28. The only remaining condition to closing the Transactions is Court approval.

### **PART III – ISSUES AND THE LAW**

29. The sole issue addressed in this Factum is whether this Court should grant the Approval and Vesting Orders for the Danforth Property and the Kingston Property.

*(a) The Court has the Jurisdiction to Approve the Transactions and Vest the Purchased Assets in the Purchaser, and the Monitor has the Authority to Enter into the Transactions*

30. It is well established that the Court has jurisdiction to make an order for a sale of a debtor company's assets in a CCAA proceeding.<sup>23</sup> Pursuant to subsection 36(1) of the CCAA:

**36 (1) Restriction on disposition of business assets** - A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.<sup>24</sup>

31. The Initial Order expressly set out the process for such a sale, by, among other things:
  - (i) approving the Sale Process, as described in Section 3.0 of the Third Supplemental Report; and

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<sup>21</sup> Seventh Report at section 3.4 at para 4, Monitor's Motion Record Tab 2.

<sup>22</sup> Seventh Report at section 3.4 at para 4, Monitor's Motion Record Tab 2.

<sup>23</sup> *Nortel Networks Corp., Re.*, [2009] O.J. No. 3169 (Ont. S.C.J. [Comm. List]) at paras 35-40 and 48, Book of Authorities of the Monitor at Tab 1.

<sup>24</sup> CCAA, s.36(1)

(ii) providing that the Monitor and TD were authorized and directed to perform their obligations under and in accordance with the Sale Process, and to take such further steps as they considered necessary or desirable in carrying out the Sale Process, subject to prior approval of this Court being obtained before completion of any transactions under the Sale Process.

32. Paragraph 24 of the Initial Order also provides the Monitor with powers beyond those contemplated by the model Initial Order (i.e., creating a "Super Monitor").

33. The Monitor has complied with the Initial Order and was, with the assistance of TD, authorized to underwrite, market, review, negotiate and enter into the Transactions.<sup>25</sup> The Court has the authority to approve the Transactions if it considers it advisable.

***(b) The Transactions Satisfy the Applicable Legal Tests***

34. Subsection 36(3) of the CCAA sets out a non-exhaustive and non-cumulative list of factors a court may consider when deciding whether to approve a sale of assets:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

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<sup>25</sup> Seventh Report at section 3.1 at paras 1 and 2, Monitor's Motion Record Tab 2.

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.<sup>26</sup>

35. Where a court is being asked to approve a sales transaction under the CCAA, courts also consider the following principles which largely correspond with the section 36 criteria (collectively, the "***Soundair Principles***"):

(a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which the party obtained offers; and

(d) whether the working out of the process was unfair.<sup>27</sup>

36. The Transactions satisfy subsection 36(3) of the CCAA and each of the *Soundair Principles* and are in the best interests of the Applicants' stakeholders generally, and should therefore be approved:

(a) ***Sufficient effort was made to obtain the best price.*** The Sale Process, and the subsequent post Bid Deadline process leading up to the Transactions, was reasonable. The Sale Process was approved by the Court and was carried out in accordance with its terms. In addition, the Court has to date approved four transactions resulting from the Sale Process. Despite the Sale Process, in which the market was canvassed extensively and parties were given a reasonable opportunity to review the properties, conduct due diligence and make an offer, the process did not generate unconditional offers sufficient to pay out the first mortgages on the Danforth Property and Kingston Property. The Transactions provide the greatest recovery available in the circumstances and have been entered into with the consent of Community Trust and First Source (in respect of the

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<sup>26</sup> CCAA, s.36(3)

<sup>27</sup> *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para 16, Book of Authorities of the Monitor, Tab 2.

Danforth Property) and First Source (in respect of the Kingston Property), who, in the case of First Source, had exercised its Credit Bid Right as evidenced by the First Source Credit Bids.<sup>28</sup>

- (b) *The interests of all parties have been attended to.* All parties are interested in maximizing recoveries from the sale of the properties. The Transactions provide the greatest recovery available in the circumstances for all parties with an economic interest. Mortgagees that are not being paid in full have a Credit Bid Right, which has not been exercised.<sup>29</sup>
- (c) *The process has been run with integrity and efficacy.* The properties were extensively marketed and widely canvassed by TD in accordance with the Court-approved Sale Process.<sup>30</sup> All interested parties were given the opportunity to submit bids and were provided with access to the data room upon executing a CA.<sup>31</sup> The Sale Process has resulted in four court-approved transactions to date.<sup>32</sup> The Transactions were negotiated in good faith and with the view of maximizing recovery despite being submitted after the execution of the First Source Credit Bids. The offers were only accepted after First Source's consent was obtained.<sup>33</sup>
- (d) *No unfairness from the working out of the process.* As mentioned, pursuant to the Sale Process, the market was widely canvassed by TD using several sale strategies commonly used to sell real property.<sup>34</sup> The Monitor directly engaged with several mortgagees on several occasions in an effort to determine whether they intended to exercise their Credit Bid Right.<sup>35</sup> Despite these efforts and the Sale Process results generally, only First Source exercised its Credit Bid Rights.<sup>36</sup> The Monitor, with the consent of First Source in light of the First Source Credit Bids, accepted the Revised Caishen Offers, which yield the greatest recovery

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<sup>28</sup> Seventh Report at section 4.2 at para 1, Monitor's Motion Record Tab 2; Seventh Report at section 6.0 at para 1, Monitor's Motion Record Tab 2.

<sup>29</sup> Seventh Report at section 4.2 at para 1, Monitor's Motion Record Tab 2.

<sup>30</sup> Seventh Report at section 4.2 at para 1, Monitor's Motion Record Tab 2.

<sup>31</sup> Seventh Report at section 3.1 at para 3, Monitor's Motion Record Tab 2.

<sup>32</sup> Seventh Report at section 6.0 at para 1, Monitor's Motion Record Tab 2.

<sup>33</sup> Seventh Report at section 3.4 at paras 1-4, Monitor's Motion Record Tab 2.

<sup>34</sup> Seventh Report at section 4.2 at para 1, Monitor's Motion Record Tab 2.

<sup>35</sup> Seventh Report at section 3.3 at para 5, Monitor's Motion Record Tab 2.

<sup>36</sup> Seventh Report at section 3.2 at para 3, Monitor's Motion Record Tab 2.

available in the circumstances, and a value which exceeds the value of the First Source Credit Bids.<sup>37</sup>

37. As the results of the Sale Process did not result in transactions acceptable to the first mortgagee, the negotiation of the Transactions was also reasonable in light of its engagement with First Source, as the then successful bidder. Perfection is not required in respect of the sale process.<sup>38</sup> As stated by the Court in *Re Bloom Lake*: "[...] it is sufficient to note that the sale process must be reasonable but is not required to be perfect. Even if the initial list of eighteen potential buyers and strategic partners omitted some potential buyers, this is not a basis for the Court to intervene, provided that the sellers [...] took reasonable steps".<sup>39</sup> Additionally, Justice Morawetz stated in *Terrace Bay Pulp Inc.* that the test cannot be whether a certain individual was aware of the sales process, rather, it is "[...] what can be reasonably expected of a court officer is that it undertake reasonable steps to ensure that the opportunity comes to the attention of prospective purchasers".<sup>40</sup> In this case, in addition to certain targeted marketing, the opportunity was posted on the MLS, sent to over 2,000 contacts of TD, and advertised in the *Globe and Mail* and in other relevant publications. Additionally, TD contacted numerous parties that it believed would have an interest in these opportunities.<sup>41</sup> The Sales Process broadly canvassed the market.
38. If a sale process leading up to a proposed asset sale is determined to be fair and reasonable, "a court will not lightly interfere with the exercise of [...] commercial and business judgment in the context of an asset sale."<sup>42</sup>
39. The Transactions are appropriate, fair and reasonable. The Monitor and TD conducted the Sale Process with integrity and in compliance with the Initial Order and this Court has previously approved four transactions resulting from the Sale Process. The Monitor, acting providently, made additional efforts beyond the scope of the Sale Process in an attempt to generate the best outcome for all stakeholders. The Monitor did not rush to close the Transactions as is evidenced by the amount of time between the Bid Deadline and the

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<sup>37</sup> Seventh Report at section 3.4 at para 4, Monitor's Motion Record Tab 2.

<sup>38</sup> Seventh Report at section 3.1 at para 1, Monitor's Motion Record Tab 2.

<sup>39</sup> *Bloom Lake*, 2015 QCCS 1920 at para 39, Book of Authorities of the Monitor, Tab 3.

<sup>40</sup> *Terrace Bay Pulp Inc., Re*, 2012 ONSC 4247 (Ont. S.C.J. [Commercial List]) at para 48, Book of Authorities of the Monitor, Tab 4.

<sup>41</sup> Seventh Report at section 3.1 at para 3, Monitor's Motion Record Tab 2.

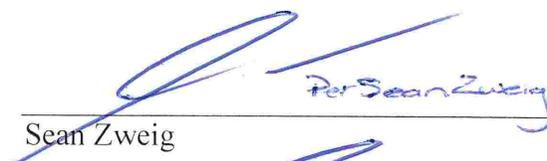
<sup>42</sup> *Re AbitibiBowater Inc.*, 2010 QCCS 1742 (C.S. Que.) at para. 71, Book of Authorities of the Monitor, Tab 5.

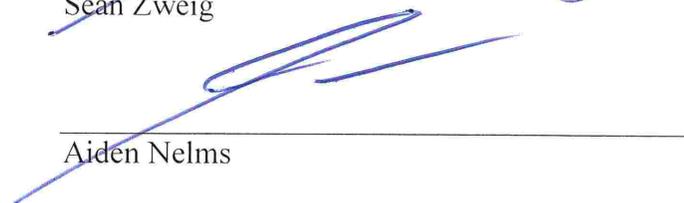
acceptance of the Revised Caishen Offers, which was more than two months. Rather, the Monitor worked with the mortgagees by, among other things, encouraging dialogue amongst the mortgagees in an effort to generate the best recoveries possible. The Transactions provide the greatest recovery for stakeholders in the circumstances and ought to be approved.<sup>43</sup>

#### **PART IV – ORDERS REQUESTED**

40. For the reasons set out above, the Monitor requests that this Honourable Court grant the requested relief in the Danforth Approval and Vesting Order and the Kingston Approval and Vesting Order.

#### **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

  
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Sean Zweig

  
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Aiden Nelms

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<sup>43</sup> Seventh Report at section 3.3.1 at paras 1-3, Monitor's Motion Record Tab 2; Seventh Report at section 3.3.2 at paras 1-5, Monitor's Motion Record Tab 2; Seventh Report at section 4.2 at paras 1, Monitor's Motion Record Tab 2.

**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

1. *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Comm. List]).
2. *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (Ont. C.A.).
3. *Bloom Lake, g.p.l.*, 2015 QCCS 1920.
4. *Terrace Bay Pulp Inc., Re*, 2012 ONSC 4247 (Ont. S.C.J. [Commercial List]).
5. *Re AbitibiBowater Inc.*, 2010 QCCS 1742 (C.S. Que.).

## SCHEDULE "C"

### RELEVANT STATUTES

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

#### Section 36

##### **Restriction on disposition of business assets**

**36 (1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

##### **Notice to creditors**

**(2)** A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

##### **Factors to be considered**

**(3)** In deciding whether to grant the authorization, the court is to consider, among other things,

**(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

**(b)** whether the monitor approved the process leading to the proposed sale or disposition;

**(c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

**(d)** the extent to which the creditors were consulted;

**(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and

**(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

##### **Additional factors — related persons**

**(4)** If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

### **Related persons**

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

### **Assets may be disposed of free and clear**

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

### **Restriction — employers**

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

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SUPERIOR COURT OF JUSTICE  
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Proceeding commenced at Toronto

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**FACTUM OF THE MONITOR  
(Motion Returnable July 2, 2019)**

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Court-appointed monitor and not in its personal capacity