2024

Hfx No 531463

SUPREME COURT OF NOVA SCOTIA

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

AND IN THE MATTER OF A PLAN OR ARRANGEMENT OF SALTWIRE NETWORK INC., THE HALIFAX HERALD LIMITED, HEADLINE PROMOTIONAL PRODUCTS LIMITED, TITAN SECURITY & INVESTIGATION INC., BRACE CAPITAL LIMITED AND BRACE HOLDINGS LIMITED

BETWEEN:

Fiera Private Debt Fund III LP and Fiera Private Date Fund V LP,
each by their general partner, Fiera Private Debt GP Inc.

Applicants

-and-

Saltwire Network Inc., The Halifax Herald Limited, Headline Promotional Products Limited, Titan Security & Investigation Inc., Brace Capital Limited and Brace Holdings Limited

Respondents

BRIEF OF LAW

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To the Honourable Justice Keith, the Applicants submit:

PART I - OVERVIEW

1. The Applicants are bringing this application to seek relief pursuant to the *Companies' Creditors Arrangement Act* (Canada)[1] ("**CCAA**") in respect of Saltwire Network Inc. ("**Saltwire**"), The Halifax Herald Limited ("**The Herald**"), Headline Promotional Products Limited ("**Headline**") Titan Security & Investigation Inc. ("**Titan**"), Brace Capital Limited ("**Brace Capital**") and Brace Holdings Limited ("**Brace Holdings**" and collectively, the "**Companies**"). Specifically, the Applicants are seeking the granting of an initial order (the "**Proposed Initial Order**"), that, among other things: (a) extends a stay of proceedings to the Companies; (b) appoints Resolve Advisory

[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ["**CCAA**"].

Services Ltd., through the services of David Boyd as chief restructuring officer ("**CRO**"); (c) appoints KSV Restructuring Inc., as court-appointed monitor; (d) authorizes the Companies to obtain debtor-in-possession financing pursuant to a Proposed Interim Financing Term Sheet (defined below); and (e) grants an Administration Charge, DIP Lender's Charge and Directors' Charge (all as defined below) on the property of the Companies (the "**Property**").

2. The Companies are insolvent and have outstanding liabilities of over $94 million and, among other things, owes:

(a) Over $32 million of senior secured debt owing to the Applicants;

(b) Over $2.6 million owing by The Herald for missed special payments in respect of its defined benefit pension plan; and

(c) Over $7 million in outstanding HST (prior to accounting for any available tax refunds).

3. Saltwire was recently ordered to pay $500,000 as security for costs in connection with litigation involving Transcontinental (defined below). Saltwire was also recently forced to pay $70,000 after an action was brought against by one of the multi-employer pension plans sponsored by a participating union for failure to make those payments.

4. This Application, by its right, should be without opposition from the Companies who have signed a written consent to the Lenders commencing creditor-led CCAA proceedings (the "**Consent**"). However, the Lenders find themselves in the unfortunate position of having to spend tens of thousands of dollars in legal fees to fight a competing application being brought by the Companies, with a different proposed monitor, in breach of their obligations under the Forbearance Agreements and the Consent.

5. The Companies' competing application should be dismissed and this application be granted.

PART II - FACTS

6. Capitalized terms used in this brief and not otherwise defined herein have the meaning given to them in the affidavit of Russell French affirmed March 8, 2024 (the "**French Affidavit**").

A. The Applicants

7. The Applicants are Fiera Private Debt GP Inc., who is the general partner of both Fiera Private Debt Fund III LP ("**Fund III**") and Fiera Private Debt Fund V LP ("**Fund V**" and together with Fund III, the "**Applicants**"). Fund III and Fund V are limited partnership funds which have invested in a diversified portfolio of private placed fixed rate loans to Canadian midmarket companies. The Applicants are managed by Fiera Private Debt Inc. ("**Fiera Private Debt**"), an indirect subsidiary of Fiera Capital Corporation, an independent global asset management firm. As of December 31, 2023, Fiera Private Debt had over $1.1 billion of assets under management.[2]

B. The Companies

8. Each of the Companies are incorporated pursuant to the laws of Nova Scotia. All of the Companies are owned, indirectly by Mark Lever and Sarah Dennis, through their respective family trusts.

9. The Herald and Saltwire own and operate the largest media and newspaper business in Atlantic Canada, with titles that include The Chronicle Herald, the Cape Breton Post, The Telegram (St. John's) and The Guardian (Charlottetown). The Herald and Saltwire offer print and

[2] French Affidavit, paras 1 and 22.

online sources of news throughout the region and are an important part of Atlantic Canada. The history of The Herald can be traced back to 1824.[3]

10. Titan is a full services security and health care services company.[4] Headline is a small promotional products company that procures branded novelty and other products for corporate buyers.[5] Brace Capital and Brace Holdings are holding companies.[6] Brace Capital is the direct shareholder of Titan and Headline. Brace Holdings is the direct shareholder of The Herald, Saltwire and Brace Capital.[7]

C. Liabilities

Fiera Credit Facilities

11. Each of The Herald and Saltwire (collectively, the "**Borrowers**") have outstanding Credit Facilities with the Applicants. As of March 4, 2024, the outstanding amounts (exclusive of fees and interest, both of which continue to accrue) under the Credit Facilities totaled $32,735,094 (plus $588,772 of accrued and outstanding payment-in-kind ("**PIK**") interest) consisting of: (a) The Herald: $8,236,551 (plus $150,592 of PIK interest); and (b) Saltwire: $24,498,543 (plus $438,180 of PIK interest).[8]

12. Each of the Companies, as well as Mr. Lever and Ms. Dennis' family trusts, are obligors under the Credit Facilities and has granted certain security in respect of its obligations.[9]

[3] Affidavit of Russell French sworn March 7, 2024 ["**French Affidavit**"], paras 23-24 and 28-29.
[4] French Affidavit, para 33.
[5] French Affidavit, para 35.
[6] French Affidavit, para 36.
[7] French Affidavit, para 24.
[8] French Affidavit, para 5.
[9] French Affidavit, paras 40 and 44.

Other Liabilities

13. In addition to the amounts owing under the Credit Facilities, the Companies have a number of liabilities, including to:

(a) Transcontinental in connection with a vendor take-back note (the "**VTB Note**") given by Saltwire when it acquired several assets from Transcontinental in 2017;[10]

(b) Canada Revenue Agency ("**CRA**") in respect of collected and unremitted HST. Based on information provided by CRA, as of January 2, 2024, the outstanding balances owing in respect of HST are: Saltwire: $2,340,392; and The Herald: $4,715,654.[11] This is prior to any refundable tax credits available to the Borrowers. CRA has registered personal property registrations against Saltwire and The Herald and has registered its judgment elsewhere; and

(c) Pension liabilities relating to a recent judgment against The Herald for failure to remit special payments.[12]

14. Saltwire and Transcontinental are currently engaged in litigation regarding the acquisition. Most recently, Saltwire had a decision issued against it requiring it to post $500,000 as security for costs in connection with the Transcontinental litigation.[13]

15. The Herald's most recent valuation report of its defined benefit plan indicated that it has a significant solvency deficiency of approximately $7 million.[14]

[10] French Affidavit, para 56.
[11] French Affidavit, para 60.
[12] French Affidavit, para 64.
[13] French Affidavit, para 11.
[14] French Affidavit, paras 62-63.

D. Defaults, Forbearance Agreements and Events Leading up to the Application

Forbearance Agreements

16. The Borrowers have been in default of their obligations under their respective Credit Agreements for over five years, have made little progress on the repayment of principal under either of the Credit Facilities and have no path or timeline for repayment of the Credit Facilities.[15] In fact, over the last five years, the Borrowers have only made approximately 1/3 of their regular monthly principal payments. Cumulatively, since inception of the loans, principal payments totaling more than $26 million have been deferred.[16]

17. The Applicants have provided significant concessions to the Borrowers over the course of nine Forbearance Agreements including, at various times, waiving strict compliance with certain covenants of the Credit Facilities, permitting PIK interest for certain amounts, deferring significant principal payments since mid-2018 and providing multiple extensions to permit the Borrowers to sell or attempt to sell various real properties and pursue other strategic initiatives.[17]

18. The Companies have failed to comply with several of their obligations under the Forbearance Agreements.[18] The Forbearance Period under the final forbearance agreement, Amended Forbearance #8 has now expired.[19]

Attempted Recapitalization

19. Since October 2023, the Borrowers, through their corporate finance advisor, FTI Capital Advisors-Canada ULC ("**FTI**"), have been conducting a Recapitalization Process. The Applicants agreed to provide the Borrowers until the end of January 2024 to deliver a letter of intent

[15] French Affidavit, paras 68-69.
[16] French Affidavit, para 70(a).
[17] French Affidavit, para 50.
[18] French Affidavit, paras 70-71.
[19] French Affidavit, para 8.

acceptable to the Applicants. The Borrowers did not receive any letters of intent before the end of January 2024.[20] Although a draft letter of intent was submitted on February 22, 2024, it was highly conditional and did not provide a framework for an acceptable transaction.[21]

Demand Letters and NITES

20. The Applicants have sent demand letters and notices pursuant to section 244 of the *Bankruptcy and Insolvency Act*,[22] the 10 day notice period for which has passed. Further:

(a) Pursuant to Amended Forbearances #6 and #7, the Companies consented to the appointment of a receiver or receiver and manager over all of the property, assets and undertaking and agreed to provide full cooperation and assistance to the Lenders in the enforcement of their remedies; and

(b) In connection with Amended Forbearance #8, the Companies signed the Consent, consenting to, among other things, a creditor-led CCAA proceeding, which Consent is now released pursuant to the terms of Amended Forbearance.

The Applicants' CCAA Application

21. As set out in the French Affidavit, since the expiration of the Forbearance Period under Amended Forbearance #8, the Lenders have been attempting to engage with the Borrowers to determine next steps. This has included conceding to the Borrowers' request for additional time to continue the Recapitalization Process outside of a filing provided that tangible process was made to prepare for a filing (which was then rejected by the Borrowers), attempting to discuss

[20] French Affidavit, para 8.
[21] French Affidavit, para 84.
[22] *Bankruptcy and Insolvency* Act, RSC 1985, c B-3 ["***BIA***"], s 244.

concessions to try and proceed with a cooperative filing and requesting information that would assist the Applicants' in assessing the Borrowers' various positions.[23]

22. These efforts have been met with little response and only very late information. The Applicants have lost faith in senior management. The Applicants are proposing a fair and structured process for the commencement of CCAA proceedings which are funded through interim financing and will provide an opportunity for the Recapitalization Process to continue, as that represents the most likely avenue to result in a going concern transaction.

PART III - ISSUE AND ANALYSIS

23. The issue to be determined is whether the Applicants' proposed initial order should be granted including the relief set out therein. This issue is to be assessed in the face of the competing CCAA application being brought by the Companies. The Applicants' believe that the primary issues between the two applications are (a) whether the Applicants' application should be granted or the Companies; and (b) whether the Applicants' proposed monitor (KSV Restructuring Inc.) be appointed or the Companies' (Grant Thornton Inc.). Additional issues may become evident once the parties exchange their applications.

PART IV - LAW & ARGUMENT

A. The CCAA Applies

<u>The Applicants have Standing to Bring the Application</u>

24. Pursuant to section 9(1) of the CCAA, the commencement of proceedings pursuant to the CCAA must be made by the filing of an application to the court.[24] The CCAA does not require that the application be filed by the debtor company. It is well established that creditors may bring

[23] French Affidavit, paras 75, 80 and 86-89.
[24] CCAA, s 9(1).

an application for an initial order under the CCAA in respect of a debtor company.[25] In *Miniso International Hong Kong Limited v. Migu Investments Inc.,* Justice Fitzpatrick notes:

> The commencement of CCAA proceedings is a proper exercise of creditors' rights where, ideally, the CCAA will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario.[26]

25. More recently, in *South Shore Seafoods, et. al.* Justice Stephenson granted an initial order in respect of a group of debtor companies upon the application by their senior secured lender, The Toronto-Dominion Bank.[27]

The Applicants' CCAA Application Should be Selected over the Companies' Application

26. The Applicants are the senior lenders to the Companies with the primary economic interest in the Companies. While it would be open for the Applicants to bring an application for the appointment of a receiver, they have chosen to bring this application for the commencement of CCAA proceedings with the goal of value maximization and preservation of a going-concern business.[28]

27. The Companies have, through the Forbearance Agreements and the Consent, consented to the commencement of these proceedings by the Applicants. The Applicants have the contractual right to bring this application without opposition from the Companies. The Consent obtained by the Applicants was for good and real consideration as provided for in Amended Forbearance #8 including, forbearing against enforcement, deferring principal payments, allowing

[25] See e.g. *Re MJardin Group, Inc. (Re)*, 2022 ONSC 3338 (CanLII) at para 21; *Miniso International Hong Kong Limited v Migu Investments Inc.*, 2019 BCSC 1234 (CanLII) ["***Miniso***"] at para 45.
[26] *Miniso*, *supra* at para 47.
[27] Amended and Restated Initial Order, *Re South Shore Seafoods Ltd.,* New Brunswick Court of King's Bench, Court File No. SJM/125/2023, September 29, 2023.
[28] French Affidavit, para 21.

the Borrowers additional time to conduct the Recapitalization Process and allowing Mr. Lever to remain in his position at the Companies during that time.[29]

28. The Applicants provided those concessions on the understanding that a CCAA application brought by them after the expiration of the Forbearance Period would be cooperative, efficient and not costly. By bringing their own application in competition with this application, the Companies are in breach of their contractual obligation under the Consent and have cause the Applicants significant additional cost.

29. Courts have held that when faced with competing CCAA applications from the debtor and from a creditor, as is the case in this proceeding, the key consideration is which application offers the best chance for a fair balancing of the interests of all stakeholders and is reflective of the purpose of the CCAA.[30] However, this caselaw arises from situations where there has not been previous consent by the debtor companies to lender led proceedings. Given the Consent, the Applicants' application should prevail unless it can be demonstrated it is inconsistent with the purposes of the CCAA.

30. Further, the proceedings proposed by the Applicants is clearly reflective of the goals of the CCAA and the balancing of stakeholder interests in that it:

(a) Contemplates a continuation of the Recapitalization Process to be conducted by FTI, which is advancing and can be continued without delay;

(b) Contemplates the appointment of a CRO to oversee operations and assist in the stabilization of the business;

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[29] French Affidavit, paras 75, 80 and 86-89.
[30] *Re Crystallex International Corp.,* 2011 ONSC 7701 (CanLII) at para 26, affirmed 2012 ONCA 404 (CanLII).

(c) Contemplates the appointment of a monitor who is the financial advisor most familiar with the business – the Companies' proposed monitor having been retained for less than a week; and

(d) Provides for interim financing at below market terms (where the Companies have no other source of capital to fund their businesses during the CCAA proceedings).

31. Ultimately, the Applicants **are** the economic stakeholder of interest in this matter – there is no indication that the value of the business and assets as a whole are in excess of the over $32 million owed by the Borrowers. The Companies have provided no evidence that the Applicants are over-secured. In this situation, the Applicants are the parties of interest and their preferred process should be favoured.

32. Conversely, the Companies have been demonstrably mismanaged, and have:

(a) failed to make HST payments, which balances continue to accrue;[31]

(b) withheld monies from their employees which were then used for operational purposes and, in the course of doing so, intentionally mislead their employees, which was noted by the Court in the Pension Decision;[32]

(c) recently made representations to the Court in connection with the Security For Costs Motion that Saltwire was "solvent" and "in compliance with its forbearance agreement" when, in fact, it had received default notices in respect of the forbearance agreement just weeks prior to that time;[33]

[31] French Affidavit, paras 11 and 61.
[32] French Affidavit, para 64.
[33] French Affidavit, para 60.

(d) failed to provide information requested on a timely or non-existent basis;[34] and

(e) continued to commit further defaults under the Credit Agreements.[35]

33. The Applicants have lost faith in the Companies' management team and management has displayed a repeated failure to properly manage the Companies' business.[36]

34. While the Applicant's CCAA application maximizes value for stakeholders by reflecting the interests of the main economic stakeholders, the Companies' CCAA application cannot be trusted to do the same. Senior management of the Companies has shown a disregard for the interests of stakeholders including funding operations pension funds and HST and, in connection with the Transcontinental security for costs motion, represented to the court under Affidavit Evidence that Saltwire was solvent and in compliance with its forbearance agreement, when, in fact, the Companies had received a default notice only a few weeks prior to that time.[37]

<u>The Companies are Debtor Companies to which the CCAA Applies</u>

35. Relief under the CCAA is available to a "debtor company" or affiliated "debtor companies" where the total claims against such company or affiliated companies exceed $5 million.[38] The CCAA defines a "company" to include any incorporated company having assets in Canada.[39] A "debtor company" includes any company that is "bankrupt or insolvent".[40] A financially troubled company is insolvent for the purposes of the CCAA if it is "reasonably expected to run out of

[34] French Affidavit, paras 82-89.
[35] French Affidavit, para 70 and 77.
[36] French Affidavit, paras 10 and 80-81.
[37] French Affidavit, paras 60, 63-65.
[38] CCAA, s 3(1).
[39] CCAA, s 2(1).
[40] CCAA, ss 2 and 3.

liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring."[41]

36. The Companies are insolvent. They have outstanding obligations well in excess of $5 million – its obligations to the Applicants total over $32 million. The Companies have received multiple demand letters from the Applicants. The Forbearance Agreements with the Applicants have expired; all obligations and liabilities owing to the Applicants are due and payable immediately.

37. Each of the Companies requires protection pursuant to the CCAA as well as the oversight of the CRO and the proposed Monitor.

The Court has Jurisdiction to hear the Application

38. Applications under the CCAA must 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."[42]

39. This Court has jurisdiction to hear the application. Among other things the Companies are all incorporated pursuant to the laws of Nova Scotia, their registered head offices are in Halifax, Nova Scotia and all members of senior management are located in Halifax, Nova Scotia.

40. Section 10(2) of the CCAA provides that any initial application must be accompanied by (a) statement indicating, on a weekly basis, the projected cash flow of the debtor company; (b) report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and (c) copies of all financial statements, audited or

[41] *Re Stelco Inc.,* 2004 CanLII 24933 (ON SC) at para 26.
[42] CCAA, s 9(1).

unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

41. The Applicants have included in their materials:

(a) Copies of all of the most recent financial statements that have been provided by the Companies to the Applicants; and

(b) the Company Proposed Cash Flow.

42. As set out in the French Affidavit and the Pre-Filing Report, the Company Proposed Cash Flow was only provided to the Applicants in the evening of March 7, 2024 and contains materially different information from prior cash flow information provided by the Companies. The Lenders and KSV have not been able to fully assess the Company Proposed Cash Flow. It is anticipated that further inquiry into the Company Proposed Cash Flow will have to be made by KSV if appointed as Monitor.[43]

B. The Discretion of the Court '

43. Relief under the CCAA should be granted if it accords with the remedial purposes of the CCAA, which include rehabilitation, the avoidance of social and economic loss resulting from liquidation, and the building of consensus among interested stakeholders.[44] An initial order may include any relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course during the restructuring period.[45]

44. The Court should exercise its discretion and grant the Applicants' proposed initial order. The Companies are insolvent and on the verge of a liquidity crisis. The relief being sought is what

[43] French Affidavit, para 106.
[44] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 (CanLII) at paras 15, 59 and 70.
[45] CCAA, s 11.02(1).

is reasonably necessary for the ongoing operation of the business for the first 10 days after this hearing including interim funding which is being provided by the Applicants.

C. The Stay of Proceedings Should be Granted

45. The Court may grant a stay of proceedings for up to 10 days in respect of the initial application provided that it is satisfied that it is appropriate in the circumstances.[46] The stay of proceedings ensures that creditor enforcement does not interfere with the company's ability to maintain operations while restructuring its affairs.[47] The stay of proceedings maintains the status quo while the company develops a plan for the benefit of its creditors.[48]

D. KSV Should be Appointed as Monitor

46. The issue of an appropriate monitor requires the balancing of interests.[49] When deciding between competing Monitor proposals, the court will compare the proposed monitors' ability to fulfill their role, including by looking at independence, as well as the experience and familiarity with the case that are required in the circumstances.[50] All of these factors favour the appointment of KSV.

47. KSV has consented to acting as Monitor.[51]

48. KSV is a licenced trustee within the meaning of section 2(1) of the *Bankruptcy and Insolvency Act*[52] and has consented to act as Court-appointed Monitor of the Companies. KSV is qualified to act in such capacity under section 11.7 of the CCAA. KSV is not subject to any of the restrictions set out in section 11.7(2) of the CCAA on who may be appointed as Monitor.

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[46] CCAA, s 11.02(1).
[47] CCAA, s 11.02.
[48] *Re Lehndorff*, [1993] OJ No 14, 17 CBR (3d) 24 (Ont Ct J (Gen Div [Comm List]) at paras 5-6.
[49] *Re Nelson Education Limited*, 2015 ONSC 3580 (CanLII) at para 38.
[50] *Arrangement relatif à Groupe Sélection inc.,* 2022 QCCS 4281 (CanLII) ["***Groupe Sélection***"] at paras 161-163 and 169, affirmed 2022 QCCA 1596 (CanLII).
[51] French Affidavit, para 97.
[52] *BIA,* s 2(1).

49. KSV has experience in many provinces across Canada in a wide range of industries, including in Nova Scotia.

50. KSV has obtained a detailed understanding of the Companies and their businesses as it has been engaged as financial advisor to the Applicants since October 2023 and has spent time with the Companies' management in advance of these proceedings.[53] This gives KSV the necessary familiarity required to promptly handle the imminent liquidity crisis that the Companies have expressed that they are in.[54]

51. Grant Thornton Inc., the Companies' proposed Monitor, was retained in the last few days, after the Companies' previous financial advisor withdrew its consent to act as monitor. As was the case for the debtor's proposed monitor that was rejected by the court in *Groupe Sélection*, despite being "competent and experienced insolvency professionals", as they are "new to the case," Grant Thornton Inc.'s "learning curve [will impede] the urgency to act imposed by the circumstances".[55]

52. The balancing of stakeholder interests necessitates the appointment the Applicant's proposed Monitor. In *Groupe Sélection*, a key factor in the Court's rejection of the debtor's monitor proposal was the fact that the debtor's principal lenders and key business partners had lost confidence in the debtor's management team and executives.[56] The Applicants, who represent the majority of economically interested stakeholders in the Companies, have lost confidence in management.[57]

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[53] French Affidavit, paras 15 and 95.
[54] French Affidavit, para 14.
[55] French Affidavit, para 18; *Groupe Sélection*, *supra* at paras 168-169. [Unofficial translation]
[56] *Groupe Sélection*, *supra* at paras 1, 10-12 and 123.
[57] French Affidavit, para 15.

53. Apart from the existing caselaw, the Applicants' proposed monitor should be preferred over that of the Companies given:

(a) the Companies have consented to both a receiver being appointed as well as the Applicants' bringing a lender-led proceeding;

(b) The Applicants are the only or primary financial stakeholder in these proceedings and is ultimately funding all costs of the proceedings given the risks of recovery on its loan obligations;

(c) The Applicants are unwilling to provide interim financing to fund CCAA proceedings unless KSV is appointed as Monitor (and the Companies have not indicated they have alternative financing arranged);

(d) The Applicants would object to any other interim financing that was being proposed on a priority basis; and

(e) It is not uncommon for a lenders' financial advisor to become a court officer and there is no indication that KSV will not act in any manner other than as set out in the Initial Order and mandated by the CCAA.

54. The powers proposed to be granted to the Monitor in the Initial Order are largely consistent with those set out in the Model Order.

E. The Appointment of the CRO is Appropriate

55. David Boyd, a representative of Resolve Advisory Services Ltd. ("**Resolve**"), is the proposed CRO in these proceedings. Courts have held that the appointment of a CRO is

appropriate as such expertise will assist the Companies in achieving the objectives of the CCAA.[58] The jurisdiction of the Court to appoint a CRO falls within the Court's jurisdiction to make any order it deems appropriate in the circumstances.

56. Mr. Boyd has the necessary background and qualifications to act as CRO of the Companies. Prior to founding Resolve, Mr. Boyd spent approximately 28 years with a national restructuring firm and has previous experience in restructuring mandates under the CCAA. Mr. Boyd is a Fellow Chartered Professional Accountant, a Fellow Chartered Accountant, a Chartered Insolvency and Restructuring Professional, a Licensed Insolvency Trustee and a member of the Insolvency Institute of Canada.

F. The Proposed Court-Ordered Charges are Necessary and Appropriate

57. The Applicants are seeking approval of three priority charges as part of the Initial Orders, as discussed below (the "**Charges"**). The Charges are necessary and appropriate in the circumstances to allow the restructuring proceedings to proceed.

The Administration Charge

58. The Applicants are seeking the Administration Charge in favour of the proposed Monitor, the proposed Monitor's counsel, the Applicants' counsel and the CRO to secure payments of their reasonable fees and disbursements incurred both prior to filing and after in the initial maximum amount of $300,000.

59. Section 11.52 of the CCAA expressly provides that the Court has jurisdiction to grant an administration charge where it concludes that (a) the notice has been given to the secured

[58] *Re Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107 (CanLII) at paras 26-31.

creditors likely to be affected by the charge; (b) the amount is appropriate; and (c) the charges should extend to all of the proposed beneficiaries.[59]

60. In *Re Canwest Global Communications Corp.*[60] and *Re Canwest Publishing Inc.*,[61] administration charges were granted pursuant to section 11.52(1). In *Canwest Publishing*, Justice Pepall provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.[62]

61. The Administration Charge is appropriate in the circumstances:

(a) The beneficiaries of the charge will provide the required legal and financial advice during the course of these proceedings;

(b) There is no anticipated duplication of roles;

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[59] CCAA, s 11.52.
[60] *Re Canwest Global Communications Corp.*, 2009 CanLII 55114 (ON SC) at para 40.
[61] *Re Canwest Publishing Inc.*, 2010 ONSC 222 (CanLII) ["***Canwest Publishing***"] at para 54.
[62] *Canwest Publishing*, *supra* at para 54.

(c) None of the professionals covered by the Administration Charge has received a retainer; and

(d) The proposed Monitor has indicated it believes the amount of the Administration Charge is appropriate in the circumstances.

The Directors' Charge

62. The Applicants are agreeable to seeking the Directors' Charge in favour of the officers and directors of the Companies in the amount of $1.075 million.

63. Pursuant to section 11.51 of the CCAA, the Court has specific authority to grant a charge to the directors and officers of a company as security for an indemnity provided by the company in respect of certain statutory obligations. In order to grant such a charge, the Court must be satisfied that (a) notice has been given to the secured creditors likely to be affected by the charge; (b) the amount is appropriate; (c) the Companies could not obtain adequate indemnification insurance at reasonable cost; and (d) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

64. The Applicants understand that the Companies do maintain certain D&O insurance policies. However, in the event that the policies do not respond to a claim or are insufficient to cover the amount of a claim, the Companies are unlikely to have sufficient funds available to satisfy any contractual indemnities to the directors or officers should the directors or officers need to call upon those indemnities.

65. The proposed Monitor believes the quantum of the charge is reasonable in view of the potential liabilities faced by these directors and officers in the post-filing period. The Company

Proposed Cash Flow contemplates that the amounts covered by the Directors' Charge will be paid in the ordinary course of business.

The DIP Financing and DIP Charge

66. The Applicants are seeking authorization for the Companies to borrow funds pursuant to the proposed interim financing term sheet (the "**Proposed Interim Financing Term Sheet**") during the pendency of the CCAA proceedings on the terms and conditions summarized in the French Affidavit.

67. The Applicants are seeking a priority charge to secure obligations of the Companies' under the Proposed Interim Financing Term Sheet (the "**DIP Lender's Charge**").

68. The proposed DIP Lender's Charge will rank subsequent to the Administration Charge but rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise including the Directors' Charge and CRA, but excluding any equipment lessors or financiers who have valid purchase money security interests or true lease arrangements and who have not received notice of the application.

69. In determining whether to grant a charge to secure the interim financing sought, it is submitted that the Court should review the following factors described in section 11.2 of the CCAA:

(a) whether notice has been given to secured creditors who are likely to be affected by the subject charge;

(b) whether the amount of the interim financing to be secured by the charge is appropriate and necessary having regard to the Applicant's cash flow statement;

(c) whether the charge secures an obligation that would exist before the order is made; and

(d) the enumerated factors in subsection 11.2(4) of the CCAA.[63]

70. The only party that the Applicants are aware may be affected by the Charges (other than the Applicants themselves), is CRA in respect of outstanding HST. The Applicants intend to provide CRA with notice of this application.

71. The Company Proposed Cash Flow indicates that the Companies are likely to have a need for DIP financing within the first 10 days of the filing, such amounts not expected to exceed $500,000. Interim funding will only be advanced upon determination by the CRO and the Monitor that such funds are required, prior to the Comeback Hearing.

72. As set out above, the proposed DIP Lender's Charge does not secure any pre-filing obligations, under the Proposed Interim Financing Term Sheet.

73. The Court should consider the following when considering subsection 11.2(4) of the CCAA: (a) the period during which the Companies are expected to be subject to proceedings under the CCAA; (b) how the Companies' business and financial affairs are to be managed during the proceedings; (c) whether the Companies' management has the confidence of its major creditors; (d) whether the proposed interim financing would enhance the prospects of a viable compromise or arrangement; (e) the nature and value of the Applicant's property; (f) whether any creditor would be materially prejudiced as a result of the security or charge; and (g) the proposed Monitor's report.[64]

[63] CCAA, s 11.2.
[64] CCAA, s 11.2(4).

74. The Honourable Justice Mark Schrager, now at the Quebec Court of Appeal, has noted that existing lenders have an "informal right of first refusal" on the interim loan.[65] As such, it is not appropriate to force the Applicants, who are secured creditors" to pay "the cost to permit [the debtor] to buy some time" while imposing upon them an onerous third party interim facility.[66]

75. In the present circumstances:

(a) The initial amount of $500,000 is being proposed pending the comeback given the lack of cooperation in information sharing provided by the Companies in connection with the cash flow forecast – it is anticipated that further funding may be made available as it is determined by the Monitor it is required;

(b) During the CCAA proceedings, the Companies will be monitored and assisted by the CRO and the Monitor, both of whom may be provided further powers on subsequent motions;

(c) Without funding under the Proposed Interim Financing Term Sheet, the Companies are unlikely to be able to continue operations. The Companies have not other source of funding any cash shortfalls during the forecast period;

(d) The economic terms of the Proposed Interim Financing Term Sheet are below market including a favourable interest rate of 8% and minimal commitment fee (1%);

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[65] Mark Schrager, "Financing the Insolvent Company – An Overview" (2006) at pp. 14-15, online (pdf): Davies Ward Phillips & Vineberg LLP <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjkkI2GzOCEAxVZGFkFHVzuDfcQFnoECBUQAQ&url=https%3A%2F%2Fwww.dwpv.com%2F~%2Fmedia%2FFiles%2FPDF_EN%2F2014-2007%2FFinancing_the_Insolvent_Company_-_An_Overview.ashx&usg=AOvVaw1_hkq1xPZXaM3w93s8DVkV&opi=89978449>.

[66] *Re Octagon Properties Group Ltd*, 2009 ABQB 500 (CanLII) at para 17.

(e) The Applicants would object to any other interim financing being provided on a priming basis;

(f) The proposed Monitor supports the granting of the DIP Lender's Charge;

(g) The proposed Monitor has indicated that the proposed DIP Lender's Charge does not materially prejudice other lenders; and

(h) The Applicants would not provide such funding absent the granting of the DIP Lender's Charge.

76. The factors in 11.2(4) can be conceptually divided in two groups: whether the interim loan (a) will result in a successful restructuring, and (b) is the interest of the creditors. As such, it is clear that considering the impact and concerns of creditors are important in this determination.

77. In a situation when the existing lenders are ready to offer interim financing which can be adjusted depending on the evolution of the restructuring in order to facilitate the success of the process, the interim financing of the existing lenders ought to be selected in order to avoid the prejudice that they would otherwise suffer.

PART V - RELIEF SOUGHT

78. For the reasons set out above, the Applicants request the Initial Order substantially in the form attached to the Applicants' notice of application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of March, 2024.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re MJardin Group Inc.*, 2022 ONSC 3338 (CanLII)

2. *Miniso International Hong Kong Limited v Migu Investments Inc.*, 2019 BCSC 1234 (CanLII)

3. Amended and Restated Initial Order, *Re South Shore Seafoods Ltd.,* New Brunswick Court of King's Bench, Court File No. SJM/125/2023, September 29, 2023

4. *Re Crystallex International Corp.*, 2011 ONSC 7701 (CanLII), affirmed 2012 ONCA 404 (CanLII)

5. *Re Stelco Inc.*, 2004 CanLII 24933 (ON SC)

6. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 (CanLII)

7. *Re Lehndorff*, [1993] OJ No 14, 17 CBR (3d) 24 (Ont Ct J (Gen Div [Comm List])

8. *Re Nelson Education Limited*, 2015 ONSC 3580 (CanLII)

9. *Arrangement relatif à Groupe Sélection inc.,* 2022 QCCS 4281 (CanLII), affirmed 2022 QCCA 1596 (CanLII)

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

11. *Re Canwest Global Communications Corp.*, 2009 CanLII 55114 (ON SC)

12. *Re Canwest Publishing Inc.*, 2010 ONSC 222 (CanLII)

13. Mark Schrager, "Financing the Insolvent Company – An Overview" (2006) at pp. 14-15, online (pdf): Davies Ward Phillips & Vineberg LLP <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjkkI2GzOCEAxVZGFkFHVzuDfcQFnoECBUQAQ&url=https%3A%2F%2Fwww.dwpv.com%2F~%2Fmedia%2FFiles%2FPDF_EN%2F2014-2007%2FFinancing_the_Insolvent_Company_-_An_Overview.ashx&usg=AOvVaw1_hkq1xPZXaM3w93s8DVkV&opi=89978449>

14. *Re Octagon Properties Group Ltd.*, 2009 ABQB 500 (CanLII)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies' Creditors Arrangement Act, RSC 1985, c C-36

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; (*compagnie*)

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; (*compagnie débitrice*)

Affiliated companies

(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)** two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

- **(a)** securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and
- **(b)** the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

- **(a)** it is controlled by
    - **(i)** that other company,

- **(ii)** that other company and one or more companies each of which is controlled by that other company, or
- **(iii)** two or more companies each of which is controlled by that other company; or

- **(b)** it is a subsidiary of a company that is a subsidiary of that other company.

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.

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.

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.

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.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(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.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

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

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

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

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- **(a)** the inventory,
- **(b)** the accounts receivable, or
- **(c)** the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

- **(a)** whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
- **(b)** in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.