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 3306133 NOVA SCOTIA LIMITED, 1003940 NOVA SCOTIA LIMITED, HEADLINE PROMOTIONAL PRODUCTS LIMITED, BRACE CAPITAL LIMITED, BRACE HOLDINGS LIMITED AND 4648767 NOVA SCOTIA 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-

3306133 Nova Scotia Limited, 1003940 Nova Scotia Limited, Headline Promotional Products Limited, Brace Capital Limited, Brace Holdings Limited and 4648767 Nova Scotia Limited

Respondents

BOOK OF AUTHORITIES OF THE MONITOR

June 16, 2025

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

George Benchetrit
Tel: 416.218.1141
Email: george@chaitons.com

David Im
Tel: 416.218.1124
Email: dim@chaitons.com

Lawyers for the Monitor

BURCHELL WICKWIRE BRYSON LLP
1801 Hollis Street, Suite 1800
Halifax, NS B3J 3N4

Dillon Trider
Tel: (902) 482-7002
Email: dtrider@bwbllp.ca

Lawyers for the Monitor (Local Counsel)

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TAB 1

Court File No.: CV-18-608313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FORME DEVELOPMENT GROUP INC. AND THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO

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

Sean Zweig / Aiden Nelms for Moving Party (KSV as Monitor)
D.J. Miller / Alex Soutter for Moving Party (Ferina)
Adam Slavens for Tarion Warranty Corporation
Dom Michaud for –various mortgagees in claims process
Chris Besant for Non-Applicant companies
Bobby Sachdeva / Stephanie DiCarie for Grant Thornton, Trustee in Bankruptcy
Jeffrey Larry for First Source Mortgage
George Benchetrit for Home Trust Company
John N. Birch for Cassels Brock
Mario Forte for CCAA entities

ENDORSEMENT OF MR. JUSTICE HAINEY
DATED FEBRUARY 20, 2020

1. The Monitor brings a motion for relief to be reviewed below. The motion is supported by all stakeholders represented by counsel recorded on the Counsel Slip except the Non Applicant companies represented by Mr. Besant who opposes the motion.

2. At the outset of the motion the Monitor's counsel, at my direction, suggested to Mr. Besant that the order could be granted without prejudice to his client's position. Mr. Besant declined to proceed in this fashion and insisted that the motion proceed.

3. Despite Mr. Besant's submissions, I granted the order for the following reasons:

   (i) The Kennedy approval and vesting order and the distribution order were not opposed and I am satisfied the sale and proposed distribution are in the best interest of the stakeholders;

(ii) The ancillary order is appropriate and the time for service of the motion record is abridged. No one is prejudiced by this order as the motion record was served 8 days before the motion was heard.

(iii) I am satisfied that the stay period should be extended to May 31, 2020. The *Applicants have acted in good faith and circumstances exist that make the order appropriate because it will permit the Monitor to maximize stakeholder recovery for the reasons set out at paragraph 53 of the Monitor's Factum.

(iv) The confidential appendices of the Monitor's Twelfth Report contain sensitive commercial information that should be sealed in accordance with the test in *Sierra Club*. That aspect of the Order is not opposed.

(v) The undertaking dated March 11, 2019 should be amended by order of the Court to substitute Bennett Jones LLP, the Monitor's legal counsel, to hold the surplus funds currently held in Cassels Brock & Blackwell LLP's ("**CBB**") trust account and any further realizations from the Non-Applicants unsold real property. CBB is therefore ordered to transfer these funds to Bennett Jones LLP forthwith on the terms set out in the order.

(vi) I am satisfied that I should make an order pursuant to section 181(1) of the BIA annulling the assignments into bankruptcy made on January 28, 2020 by the Non-Applicant companies without any notice to the Monitor for the following two reasons;

(a) the Non-Applicant companies were not demonstrably insolvent persons. Each company has sold its real property generating sufficient proceeds to repay its mortgage debt in full and to fund the surplus funds currently held in CBB's trust account in the amount of approximately $11 million. The only evidence before the Court is that the value of the Non-Applicant's assets exceeds their liabilities. This is not a "clear cut situation" of insolvency that is "clearly established by sound and convincing evidence"; and

(b) in my view the assignments into bankruptcy are all entirely duplicative and serve no valid purpose. The Non-Applicant's creditor relationships are already being managed in these CCAA proceedings and the Court supervised claims process, all of which was consented to by Mr. Wang, the controlling mind of the Non-Applicants. If these assignments are not annulled, they will stay the Court approved claims process at the expense of creditors and the Court and will not accomplish anything already achieved by these unique and heavily negotiated CCAA proceedings. The claims process is one of several integral "building blocks" in the CCAA proceedings and, in my view, must be respected. The assignments must not be permitted to undermine this important building block [see Chief Justice Morawetz's Reasons at paragraph 81 in *Target Canada Co.*, 2015 ONSC 303].

(vii) I am satisfied that this CCAA claims process should continue and that proven Wang claims will be admitted as proven claims in the proceedings related to the Wang NOI.

(viii) Finally, without further order of the Court the surplus funds to be transferred from CBB to the Monitor's counsel shall not be used to pay any parties' legal fees.

(ix) In my view, this is an appropriate case to make an order as to costs. I have requested counsel provide me with short written cost submissions.

(x) I thank all counsel for their helpful submissions.

- References to "Applicants" acting in good faith in this context refers to the Monitor, as it is a super-Monitor in these CCAA proceedings.

Hainey, J.
February 20, 2020

TAB 2

SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00713245-00CL **DATE: July 31, 2024**

NO. ON LIST: 4

TITLE OF PROCEEDING: IN THE MATTER OF A COMPROMISE OR ARRANGEMENT OF BALBOA INC. et al.

BEFORE: JUSTICE STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Shayne Kukulowicz	Counsel for the Monitor – KSV Restructuring Inc.	skukulowicz@cassels.com sfernandes@cassels.com
Noah Goldstein David Sieradkzi Nathalie El-Zakhem	Monitor – KSV Restructuring Inc.	ngoldstein@ksvadvisory.com dseiradkzi@ksvadvisory.com nelzakhem@ksvadvisory.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Richard Marques	Lender to The Lion's Share Group Inc.	gowithrich@gmail.com
Lori Bassett	Secured Lender	Jamie.bassett489@gmail.com
Cameron Topp	Lender	camerontopp@gmail.com
Karen Beckman	Lender	Karenbeckman7@gmail.com
Jeffrey Simpson	Counsel for the DIP Lender	jsimpson@torkinmanes.com

George Benchetrit	The Secured Lender Representative Counsel	george@chaitons.com
Jennifer Stam	Counsel for The Fuller Landau Group – Receiver of The Lion's Share Group Inc.	Jennifer.stam@nortonrosefulbright.com
Mario Forte	The Unsecured Lender Representative Counsel	forte@gsnh.com
Jennifer O'Connell	Lender	Jennifer.montreal@gmail.com
Miriam Perks	Secured Lender	miriamperks@icloud.com

ENDORSEMENT OF JUSTICE STEELE:

[1] The Monitor, KSV Restructuring Inc., seeks an order, among other things, extending the stay period for a month and approving the Property Management Agreement with Richmond Advisory Services Inc.

[2] No party opposes the relief sought on this motion.

[3] The Monitor is a so-called "super Monitor" and has expanded powers.

[4] The Monitor seeks to extend the stay period to August 31, 2024. Section 11.02(2) of the CCAA empowers the court to grant a stay extension where the court is satisfied that circumstances exist that make such an order appropriate, and the applicants have acted and continue to act in good faith. In the context of a "super-Monitor" in CCAA proceedings, the monitor is held to the good faith standard: *Forme Development Group Inc. (Re)*, Court File No.: CV-18-608313-00CL.

[5] The Monitor has acted in good faith and due diligence in discharging its duties and obligations under the CCAA and the Expanded Powers Order; there is no evidence to the contrary. In addition, I am satisfied that circumstances exist such that it is appropriate to extend the stay. As noted by the Monitor, additional time is needed to advance and present the Alternative Solution (as defined in section 3.3(2) of the Monitor's Sixth Report). There is sufficient funding available to fund operations during the extension period based on the Cash Flow Forecast.

[6] The replacement of the property manager, SID Management, was contemplated in the Expanded Powers Order. Further, the Monitor states that it makes commercial sense and will address issues in the business practices of SID identified by the Monitor. The Monitor wishes to retain Richmond Advisory Services. Before selecting Richmond, the Monitor solicited and received proposals from three parties to act as property managers. The Monitor sought proposals from additional property managers that declined the opportunity. The Monitor notes that Richmond is qualified to perform the mandate, has experience dealing with distressed properties and provided a superior proposal to the other prospective property managers.

[7] The Monitor asks the Court to approve the Sixth Report and the activities set out therein. This is common practice and there are good policy and practical reasons for the court to do so: *Target Canada Co. (Re)*, 2015 ONSC 7574 at para. 23.

[8] The Monitor also seeks court approval of the fees and disbursements of the Monitor and its counsel incurred between April 1, 2024 to May 31, 2024. The Court will consider whether fees and disbursements are "fair and reasonable in all circumstances:" *Re Nortel Networks Corporation et al*, 2017 ONSC 673, at para. 13.

[9] In assessing the reasonableness of the Monitor's fees, the court may consider the following factors set out in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at para 33:

a. The nature, extent and value of the assets being handled;

b. The complications and difficulties encountered;

c. The degree of assistance provided by the company, its officers or its employees;

d. The time spent;

e. The Monitor's knowledge, experience and skill;

f. The diligence and thoroughness displayed;

g. The responsibilities assumed;

h. The results achieved; and

i. The cost of comparable services when performed in a prudent and economical manner.

[10] In paragraph 7.0(3) of the Monitor's Sixth Report, the Monitor states that an "extensive amount of work" has been undertaken in this CCAA proceeding to date. The Monitor further indicates in paragraph 7.0(4) that because the Investigation has concluded, the Monitor expects the pace of the incurrence of fees going-forward to be reduced. While the fees are significant, I agree with the Monitor that the hourly rates charged by their counsel are consistent with the rates charged by large corporate law firms practicing in this market in Toronto. The Monitor confirmed that their counsel's "billings reflect work performed consistent with the Monitor's instructions." I also understand that because the expanded powers, significantly more work was required of the Monitor and its counsel than under a typical CCAA. The fees sought are supported by fee affidavits. The Monitor states that the overall fees charged by its counsel and the Monitor are reasonable and appropriate in the circumstances.

[11] Order attached.

TAB 3

Target Canada Co. (Re), 2015 ONSC 7574 (CanLII)

Date:	2015-12-11
File number:	CV-15-10832-00CL
Other citation:	31 CBR (6th) 311
Citation:	**Target Canada Co. (Re), 2015 ONSC 7574 (CanLII), <https://canlii.ca/t/gmp4d>, retrieved on 2025-02-25**

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11
SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. AND TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *J. Swartz* and *Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

Richard Swan and *S. Richard Orzy*, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and *Alan Mark*, for Alvarez & Marsal, Monitor

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

[4] The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

[5] The essence of the opposition is that the request of the Monitor to obtain approval of its activities – particularly in these liquidation proceedings – is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

[6] Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

[7] Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

"provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

[8] The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

[9] The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable – if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

[10] Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

[11] In addition, paragraph 51 of the Amended and Restated Order provides that:

> ... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

[12] The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

(a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;

(b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;

(c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

(d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;

(e) provides protection for the monitor, not otherwise provided by the CCAA; and

(f) protects creditors from the delay in distribution that would be caused by:

a. re-litigation of steps taken to date; and

b. potential indemnity claims by the monitor.

[13] Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest* v. *Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque* v. *Montreal Trust Co. of Canada* (1997), 1997 NSCA 153 (CanLII), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

...

30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:

> 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
>
> ....
>
> 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.

...

> 37. Although many of these authorities cite with approval the broad language of *Henderson* v. *Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[15] In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

[16] Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

[17] Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

[18] For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, 2006 CanLII 15145 (ON SC), [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.,* 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

[20] The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

> [23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:
>
> (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
>
> (b) brings the Monitor's activities before the Court;
>
> (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
>
> (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
>
> (e) provides protection for the Monitor not otherwise provided by the CCAA; and
>
> (f) protects the creditors from the delay and distribution that would be caused by:
>
> (i) re-litigation of steps taken to date, and
>
> (ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

_____

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015

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

-and-

3306133 Nova Scotia Limited, 1003940 Nova Scotia Limited, Headline Promotional Products Limited, Brace Capital Limited, Brace Holdings Limited and 4648767 Nova Scotia Limited

Applicants

Respondents

2024 Hfx No. 531463

SUPREME COURT OF NOVA SCOTIA

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BOOK OF AUTHORITIES

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

George Benchetrit
Tel: 416-218-1141
Email: george@chaitons.com

David Im
Tel: 416-218-1124
Email: dim@chaitons.com

Lawyers for the Monitor