

Court File No.:

**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 JAMES E. WAGNER CULTIVATION
CORPORATION, JAMES E. WAGNER CULTIVATION LTD., JWC 1
LTD., JWC 2 LTD., JWC SUPPLY LTD. AND GROWTHSTORM INC.**

Applicants

**FACTUM OF THE APPLICANTS
(CCAA Application)**

March 31, 2020

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Sean Zweig (LSO# 57307I)
Email: zweigs@bennettjones.com

Mike Shakra (LSO# 64604K)
Email: shakram@bennettjones.com

Aiden Nelms (LSO# 74170S)
Email: nelmsa@bennettjones.com

Tel: (416) 863-1200
Fax: (416) 863-1716

Lawyers for the Applicants

FACTUM OF THE APPLICANTS

PART I: INTRODUCTION

1. James E. Wagner Cultivation Corporation ("**JWC**"), James E. Wagner Cultivation Ltd. ("**JWC Ltd.**"), JWC 1 Ltd. ("**JWC1**"), JWC 2 Ltd. ("**JWC2**"), JWC Supply Ltd. ("**JWCS**") and GrowthStorm Inc. ("**GrowthStorm**", together with JWC, JWC Ltd., JWC1, JWC2 and JWCS, the "**Applicants**") seek relief pursuant to an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

2. The Applicants' business is a vertically integrated premium cannabis brand, focusing on producing clean and consistent cannabis using their advanced and proprietary aeroponic platform. JWC is a reporting issuer in the provinces of Ontario, Alberta and British Columbia, and the Applicants' head office is in Kitchener, Ontario.

3. JWC has been cash flow negative since its inception and has relied on equity and debt financing for funding. As part of a strategy to achieve profitability, the Applicants are in the process of expanding; however, in connection with this expansion, the Applicants have expended significant resources to date and require additional funding. The Applicants currently have very limited cash on hand and are generally unable to meet their obligations as they become due, the most pressing of which is a \$350,000 payroll obligation due on April 1, 2020.

4. As a result of discussions entered into with their first-lien lender, Trichome Financial Corp. ("**Trichome**"), the Applicants are seeking relief under the CCAA in order to implement a consensual restructuring that would see the Applicants' business emerge as a going concern with a deleveraged balance sheet. Given their current financial circumstances, including the fact that

Trichome has made demand on the Applicants and the pending payroll due on April 1, 2020, the Applicants urgently require a stay of proceedings (the "**Stay of Proceedings**") and related relief under the CCAA in order to continue operating in the ordinary course of business.

5. The Applicants believe that this CCAA proceeding is in the best interests of all of their stakeholders and is intended to ultimately result in their business being conveyed on a going concern basis and with minimal disruption. The relief sought in the Initial Order is reasonably necessary in order for the Applicants to continue operations in the ordinary course, and will maintain the stability of their business and operations, and preserve the value of the Applicants' business, while a sale process is implemented and pursued.

6. Although the Applicants are party to a stalking horse asset purchase agreement with their first-lien lender, the Applicants are not seeking any relief in connection with it, or the intended sale process generally, at this stage. The Applicants will return to Court for that relief at a later date; instead, the relief on this initial application is limited to that which is reasonably necessary to allow the Applicants to continue to operate in the ordinary course of business.

PART II: FACTS

7. The facts underlying this Application are more fully set out in the affidavit of Nathan Woodworth, sworn March 31, 2020 (the "**Initial Affidavit**"). All capitalized terms used but not defined herein have the meanings ascribed to them in the Initial Affidavit.

B. The Applicants

8. The Applicants are all incorporated under the OBCA. JWC is the ultimate parent company of the Applicants and is listed on the TSXV and the OTCQX. The other Applicants are direct, wholly-owned subsidiaries of JWC.¹

9. JWC Ltd. is the operating company and holds the licences issued by Health Canada that are required to grow, process and sell cannabis in Canada for the medical and recreational/adult-use markets.²

10. JWC1, JWC2, JWCS and GrowthStorm do not have any active business operations. However, they are being included in these CCAA proceedings given that they have guaranteed certain obligations of JWC, including the Trichome first lien debt upon which demand has been made.³

C. Business and Operations

11. A corporate structure chart of the Applicants has been included in the Initial Affidavit.⁴

12. The cannabis industry in Canada is highly regulated, with the *Cannabis Act* regulating the possession, cultivation, production, distribution, sale, research, testing, import and export and promotion of cannabis. JWC Ltd. received its licence from Health Canada in 2017 to cultivate, process and sell cannabis for the medical and recreational/adult-use markets, and to sell all of the authorized classes of cannabis to provincially/territorially authorized distributors/retailers and

¹ Affidavit of Nathan Woodworth sworn March 31, 2020, at paras 14-18 [Initial Affidavit].

² *Ibid* at para 16.

³ *Ibid* at para 18.

⁴ *Ibid* at Exhibit "A".

directly to consumers with medical documents. JWC Ltd. obtained a second license in 2019 to cultivate cannabis and sell plant seeds and cannabis plants to provincially/territorially authorized distributors/retailers.⁵

13. JWC Ltd. is currently a party to agreements with various provincial agencies and wholesale partners in Canada for the supply of cannabis product, including (i) an agreement with the Ontario Cannabis Store, and (ii) the Province of Prince Edward Island.⁶

14. JWC Ltd. is subject to a comprehensive and rigorous regulatory regime as set out in the *Cannabis Act* and the regulations thereunder. This regime requires ongoing compliance with a variety of operational requirements, including that directors, officers and certain management personnel must hold security clearances.⁷

15. JWC Ltd. currently employs approximately 160 full-time employees. There are no registered pension plans for the employees and they are non-unionized. JWC Ltd., through its benefits provider Great West Life, offers health and dental benefits and life and accidental death and dismemberment insurance for all of its employees.⁸ No relief sought on this initial application purports to impact these benefits.

D. Assets and Liabilities

16. As of the date of the Initial Affidavit, the Applicants have approximately \$44,000 cash on hand.⁹

⁵ *Ibid* at paras 19, 27-28.

⁶ *Ibid* at para 26.

⁷ *Ibid* at para 28.

⁸ *Ibid* at paras 29-30.

⁹ *Ibid* at para 43.

17. As at March 1, 2020, the Applicants had assets with an unaudited book value of approximately \$40,971,991, almost half of which is comprised of property, plant and equipment.¹⁰

18. As at March 1, 2020, the liabilities of the Applicants had an unaudited book value of approximately \$24,538,355.¹¹ The main liabilities of the Applicants are discussed below.

1. Trichome Financial Inc.

19. JWC is the borrower under a loan agreement with Trichome, first entered into on February 20, 2019 (the "**Initial Trichome Loan Agreement**"), amended and restated on November 6, 2019 (the "**Amended Trichome Loan Agreement**"), and further amended by two amendments in January 2020 and March 2020 (collectively, the "**Trichome Loan Agreement**"). The Amended Trichome Loan Agreement increased Trichome's total commitment to \$7,500,000, all of which is outstanding as at March 31, 2020 (exclusive of costs, charges, fees or expenses).¹²

20. The Initial Trichome Loan Agreement includes an effective interest rate of 14.71%, with no requirement to repay any principal until the maturity date of February 19, 2021. The obligations under the Initial Trichome Loan Agreement are guaranteed by unlimited guarantees of the other Applicants. As general and continued security for the obligations under the Initial Trichome Loan Agreement, various first-lien security was granted to Trichome by JWC and the other Applicants.¹³

21. The Amended Trichome Loan Agreement includes an interest rate of 9.25% payable monthly with no requirement to repay until maturity on November 6, 2021.¹⁴

¹⁰ *Ibid* at para 45.

¹¹ *Ibid* at para 46.

¹² *Ibid* at paras 48, 51-53.

¹³ *Ibid* at paras 48-50.

¹⁴ *Ibid* at para 51.

22. JWC and Trichome are also parties to a Factoring Agreement. Total availability under the Factoring Agreement was initially capped at \$5 million and the financing of any receivables was subject to Trichome's sole discretion. As at the date of the Initial Affidavit, no receivables are outstanding. As security for the Factoring Agreement, JWC and each of the Applicants granted various security interests to Trichome.¹⁵

23. On or about March 31, 2020, Trichome issued notices under section 244 of the *Bankruptcy and Insolvency Act* and made demand in respect of the Trichome Loan Agreement.¹⁶

2. Lind Global Macro Fund LP

24. On December 29, 2019, JWC entered into a convertible security funding agreement for up to \$10,000,000 with Lind Global Macro Fund LP ("**Lind**"), and on March 10, 2020, JWC entered into a second convertible security funding agreement for \$1.2 million with Lind (collectively, the "**Lind Financing**"). The obligations of JWC are guaranteed by JWC Ltd. and GrowthStorm. Trichome and Lind have entered into a subordination and postponement agreement, which provides that JWC's obligations to Lind are subordinate to its obligations to Trichome.¹⁷

25. There is approximately \$3,900,000 outstanding under the Lind Financing.¹⁸

3. Unsecured Indebtedness

26. The Applicants have a number of unsecured creditors, more fully discussed in the Initial Affidavit.¹⁹ Among those include Ball Construction Ltd., with whom JWC and JWC Ltd. entered

¹⁵ *Ibid* at paras 55-56.

¹⁶ *Ibid* at para 57.

¹⁷ *Ibid* at paras 58-64.

¹⁸ *Ibid* at para 65.

¹⁹ *Ibid* at paras 66-72.

into an agreement on February 20, 2019 (with subsequent amendments), which has approximately \$3,700,000 outstanding.²⁰

27. Employee liabilities include gross payroll of approximately \$350,000 biweekly, inclusive of government remittances, and an additional \$58,000 (approximately) for benefits. The Applicants are current with respect to the payment of payroll and the remittance of employee source deductions, however, given the current liquidity issues, the payroll due on April 1, 2020, will not be made unless the Initial Order is granted.²¹

28. Given the nature of their business, the Applicants are indebted to a variety of third party suppliers that provide services and products in connection with operating a business in the cannabis industry. The aggregate amount owed to such third party suppliers is approximately CAD\$1.4 million and US\$26,281.86.²²

29. As at March 31, 2020, rent owing to landlords was collectively in arrears in the aggregate amount of approximately \$420,000.²³

30. JWC Ltd., along with a number of the Applicants' officers, are currently subject to ongoing litigation commenced in September 2018.²⁴

E. Issues Leading to the CCAA Filing

31. JWC has been cash flow negative since its inception and has relied on equity and debt financing for funding. As part of a strategy to achieve profitability, the Applicants are in the

²⁰ *Ibid* at paras 66-67.

²¹ *Ibid* at para 71.

²² *Ibid* at para 72.

²³ *Ibid*.

²⁴ *Ibid*.

process of expanding, with the aim of increasing their cannabis production and processing capacity and lowering their cost of goods sold. However, in connection with this expansion, the Applicants have expended significant resources to date and now require additional funding.²⁵

32. The urgency of this application mainly stems from the fact that the Applicants have very limited cash on hand and have payroll and remittance obligations due on April 1, 2020 in the amount of approximately \$350,000.²⁶ Without the relief sought on this application, the Applicants will be unable to meet that obligation and continue to operate in the ordinary course.

33. In addition, on March 31, 2020, Trichome, the Applicants' first-lien lender, issued demands under the *Bankruptcy and Insolvency Act*.

34. As part of an effort to explore opportunities to enhance the capital of the Applicants in light of the above liquidity issues, JWC's board of directors passed a resolution on March 19, 2020, establishing a committee of independent members of the board.²⁷

F. Proposed DIP Financing

35. Trichome has agreed to provide a super-priority, debtor-in-possession interim, non-revolving credit facility up to a maximum amount of \$4,000,000 (the "**Proposed DIP Financing**"), under which JWC is the borrower and the remainder of the Applicants are guarantors. The interest rate applicable to advances under the DIP Loan is 10% per annum payable monthly, and includes

²⁵ *Ibid* at para 8.

²⁶ *Ibid* at para 9, 71.

²⁷ *Ibid* at para 74.

an upfront fee of 3% (\$120,000), however the fee will not become payable until after the Comeback Hearing.²⁸

36. The proceeds of the Proposed DIP Financing will be used for the following purposes: (i) to fund professional fees; (ii) to fund the payment of interest and other amounts payable under the Proposed DIP Financing; and (iii) to finance operating expenses and restructuring costs in these CCAA proceedings, and for general corporate purposes. The Proposed DIP Financing is subject to customary conditions precedent, covenants and representations and warranties.²⁹

37. The amount of the Proposed DIP Financing that is proposed to be funded at this time (\$800,000) is only the portion necessary to keep the Applicants operating in the ordinary course until the Comeback Hearing, with no fees being earned thereon prior to the Comeback Hearing.³⁰

G. Proposed Monitor

38. It is proposed that KSV Kofman Inc. (the "**Proposed Monitor**") will act as Monitor in these CCAA proceedings. The Proposed Monitor was previously the informal financial advisor to Trichome.³¹

PART III: ISSUES

39. The issues to be considered on this application are whether:

- (a) each of the Applicants is a "debtor company" to which the CCAA applies;

²⁸ *Ibid* at para 75.

²⁹ *Ibid* at paras 76-77.

³⁰ *Ibid* at para 78.

³¹ *Ibid* at para 81.

- (b) the Stay of Proceedings should be granted;
- (c) the Court should approve the Proposed DIP Financing and grant the DIP Charge;
- (d) the Administration Charge should be granted; and
- (e) the Directors' Charge should be granted.

B. The Applicants are "debtor companies"

40. The CCAA applies in respect of a "debtor company or affiliated debtor companies" whose liabilities exceed \$5 million.³² The term "debtor company" is defined as "any company that: (a) is bankrupt or insolvent...". The term "company" is defined as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province...".³³ Each of the Applicants is a "company" within the meaning of the CCAA as they are each incorporated under the OBCA.³⁴

41. Each of the Applicants is a "debtor company" as defined in the CCAA because it is a company that is insolvent. The insolvency of a debtor company is assessed as of the time of filing the CCAA application.³⁵ Courts have taken guidance from the definition of "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act*, which, in relevant part, provides that an "insolvent person" is a person:

- (a) who is for any reason unable to meet his obligations as they generally become due;

³² *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, s 3(1) [CCAA].

³³ *Ibid* s 2(1).

³⁴ Initial Affidavit, *supra* note 1 at paras 14-17.

³⁵ [Re Stelco Inc \(2004\), 48 C.B.R. \(4th\) 299](#) (Ont. Sup. Ct. J. [Commercial List]) at para 4 [*Stelco*].

- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.³⁶

42. A company is also insolvent for purposes of the CCAA "if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring."³⁷

43. The Applicants are insolvent based upon the above definitions. As set out above, JWC, as borrower, and the rest of the Applicants, as guarantors, are liable under the Trichome Loan Agreement upon which demand has been made. With limited cash on hand, the Applicants are unable to meet their obligations as they become due, including the approximately \$350,000 for payroll and related remittances (and approximately \$58,000 for benefits) due on April 1, 2020.

44. Each of the Applicants is insolvent based on the above definitions and the Applicants, as a whole and individually, have debts in excess of \$5 million.

C. The Stay of Proceedings Should be Granted

1. The Recent Amendments to the CCAA

45. The Applicants are seeking a stay of proceedings under section 11.02 of the CCAA. On November 1, 2019, the CCAA was amended to include section 11.001:

³⁶ *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s 2.

³⁷ *Stelco*, *supra* note 35 at paras 26, 40.

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

46. The stated purpose of the recent amendments to the CCAA is "enhancing retirement security by making the insolvency process fairer, more transparent and more accessible" by, among other things, limiting "the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players".³⁸

47. This amendment is consistent with existing jurisprudence which states that terms in initial orders should be kept to terms "as are reasonably necessary for the continued operation of the debtor company during a brief but realistic period of time".³⁹

48. In cases considering this new amendment, the Court has adopted the above and stated the purpose of section 11.001 "is to make the insolvency process fairer, more transparent and more accessible by limiting the decisions made at the outset of the proceedings to measures that are reasonably necessary to avoid the immediate liquidation of an insolvent company and to allow for broader participation in the restructuring process."⁴⁰ Its intent is to ensure that, absent exceptional circumstances, the relief shall be limited to relief reasonably necessary for the ordinary course continued operations and, whenever possible, the *status quo* should be maintained during the initial

³⁸ Canada, Innovation, Science and Economic Development Canada, [Insolvency reforms to come into force](#), News Release, (Ottawa: Media Relations) 2019 at 2; Canada, Marketplace Framework Policy Branch, [Order Fixing November 1, 2019 as the Day on Which Certain Provisions of the two Acts Come into Force: SI/2019-90](#), Canada Gazette, Part II, Volume 153, Number 18 [*Order Fixing*]. See also [Re Lydian International Limited](#), 2019 ONSC 7473 at para 31 [*Lydian*].

³⁹ [Royal Oak Mines Inc.](#), [1999] OJ No. 709 at paras 21-24; [Miniso International Hong Kong Limited v Migu Investments Inc.](#), 2019 BCSC 1234 at paras 77-80 [*Miniso*].

⁴⁰ [Re Clover Leaf Holdings Company](#), 2019 ONSC 6966 at para 13 [*Clover Leaf*].

10-day period.⁴¹ This 10-day period "allows for a stabilization of operations and a negotiating window."⁴²

49. Consistent with the above, the Applicants have limited all relief sought on this application to that which is reasonably necessary in the circumstances for the continued operations of their business during the initial 10-day period, including the payroll due on April 1, 2020. Relief outside of that scope, including approval of the stalking horse asset purchase agreement, the proposed sale process and the approval of a chief restructuring officer, will not be sought until a later date.

2. The Requirements for the Stay of Proceedings are Satisfied

50. Section 11.02 of the CCAA provides the Court with the power to impose a stay of proceedings if it is satisfied that circumstances exist that make the order appropriate.⁴³ A stay of proceedings is appropriate to provide the debtor with breathing room while it seeks to restore solvency and emerge from the CCAA on a going concern basis.⁴⁴ Pursuant to the recent amendments to the CCAA, such relief can be granted for a period of not more than 10 days. The Initial Order is in accordance with this amendment.

51. The Applicants require the Stay of Proceedings to prevent enforcement action from Trichome, that has issued a demand, as well as other creditors. It would be detrimental to the Applicants' business if proceedings were commenced or continued or rights and remedies were executed against them and, without the Stay of Proceedings, the Applicants are unable to continue operations in the ordinary course of business, including meeting payroll obligations. The Stay of

⁴¹ [Lydian](#), *supra* note 38 at para 26.

⁴² [Ibid](#) at para 30.

⁴³ CCAA, *supra* note 32 s 11.02.

⁴⁴ [Century Services Inc v Attorney General \(Canada\)](#), 2010 SCC 60 at para 14; [Target Canada Co.](#) 2015 ONSC 303 at para 8.

Proceedings will stabilize and preserve the value of the Applicants' business and ultimately provide the Applicants with breathing space to develop and oversee an orderly sale process, while maintaining business operations in the ordinary course.⁴⁵

52. The Applicants believe the granting of the Stay of Proceedings is in the best interests of the Applicants and their stakeholders, meets the statutory requirements, and is appropriate in the circumstances.

D. The Proposed DIP Financing Should be Approved

1. The Proposed DIP Financing Satisfies Subsection 11.2(5) of the CCAA

53. On November 1, 2019, a new subsection 11.2(5) was added to the CCAA regarding DIP financing sought at an initial application:

11.2(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.⁴⁶

54. Consistent with section 11.001 discussed above, and the stated purposes of the amendments, this limits the approval of DIP financing today to what "is reasonably necessary for the continued operations of the debtor company in the ordinary course of business" to ensure that decisions taken at the outset of a CCAA proceeding are limited "to measures necessary to avoid the immediate liquidation of an insolvent company".⁴⁷

⁴⁵ Initial Affidavit, *supra* note 1 at paras 79-80.

⁴⁶ CCAA, *supra* note 32 s 11.2(5).

⁴⁷ *Ibid* s 11.2(5); [Order Fixing](#), *supra* note 38.

55. In a recent case applying subsection 11.2(5), the Court held that the provision is consistent with the existing jurisprudence on interim financing that "DIP financing should be granted keep the lights on and should be limited to terms that are reasonably necessary for the continued operation of the company."⁴⁸ When considering this new amendment, a British Columbia Court endorsed the view that the amendment "is not inconsistent with the current approach of Canadian courts when exercising its discretion under s. 11.2 of the *CCAA*".⁴⁹

56. Subsection 11.2(5) requires that this Court be satisfied, after considering all of the facts and circumstances in the case before it, that the interim financing sought to be approved is "reasonably necessary" for continued operations in such circumstances. What is "reasonably necessary" in each case is inevitably a question of fact based on the circumstances before the Court.⁵⁰

57. In line with the prior case law holding that DIP financing should be restricted to what is "reasonably necessary" to meet the debtor's needs, courts have approved DIP financing where it would provide stability to the debtor's business, ensure liquidity, prevent customers from going elsewhere, and ensure the day-to-day operations of the debtor's business.⁵¹ In a recent decision from British Columbia considering the requirements of subsection 11.2(5) when approving DIP financing, the Court found the new provision was satisfied as the interim financing was "necessary to permit the [applicant] to maintain the value of the enterprise while they pursue a restructuring".⁵²

⁴⁸ *Clover Leaf*, *supra* note 40 at para 20.

⁴⁹ *Miniso*, *supra* note 39 at para 80.

⁵⁰ [8440522 Canada Inc. Re. 2013 ONSC 6167](#) at para 30.

⁵¹ *Ibid* at paras 30-31.

⁵² *Miniso*, *supra* note 39 at paras 86, 88.

58. In this case, without the Proposed DIP Financing, the Applicants would be unable to maintain continued business operations in the ordinary course and in particular would be unable to finance payroll on April 1, 2020. The loss of employees would be devastating to the Applicants' business, many of which are required to be employed under the cannabis licenses. In addition to providing liquidity and preserving the Applicants' enterprise value, the Proposed DIP Financing is critical to maintaining the *status quo*. No liquidation is being contemplated and the Proposed DIP Financing will be almost immediately used to honour commitments to employees. The requirement in subsection 11.2(5) is satisfied.

2. The Proposed DIP Financing Satisfies the Criteria in Subsections 11.2(1), (4)

59. Subsection 11.2(1) expressly provides the Court with the statutory jurisdiction to grant a DIP financing charge “on notice to the secured creditors who are likely to be affected by the security or charge – in an amount that the court considers appropriate...having regard to [the debtors’] cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.” In the Initial Order, the Applicants are seeking a DIP Charge up to a maximum of \$800,000, that will rank subordinate to the Administration Charge and the Directors' Charge.⁵³

60. In accordance with subsection 11.2(1), notice has been provided to the secured creditors, the charge will not secure obligations incurred prior to the CCAA proceedings, and the amount proposed to be funded is limited to the amount necessary to continue ordinary course operations

⁵³ Initial Order, dated April 1, 2020 at para 39 [Initial Order].

prior to the Comeback Hearing. The DIP Charge sought at this application is only for the amount to be accrued in the 10-day period preceding the Comeback Hearing.⁵⁴

61. Subsection 11.2(4) sets out the following non-exhaustive factors to be considered by the Court in deciding whether to grant a DIP financing charge:

11.2(4) *Factors to be considered.* – In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.⁵⁵

62. The following factors support approval of the Proposed DIP Financing and the granting of the DIP Charge:

- (a) The Applicants are facing a liquidity crisis, with payroll obligations of \$350,000 due on April 1, 2020. The only way in which these obligations can be met is through the Proposed DIP Financing. Any loss of employees would be devastating

⁵⁴ Initial Affidavit, *supra* note 1 at paras 91-93; Affidavit of Aiden Nelms sworn March 31, 2020.

⁵⁵ *CCA*, *supra* note 32 s 11.2(4); [Canwest Publishing Inc. Re, 2010 ONSC 222](#) at para 42 [*Canwest Publishing*].

to the Applicants' business, including because many of the employees are required to be employed under the cannabis licenses.

- (b) The Proposed DIP Financing is necessary to maintain the ongoing business and operations of the Applicants.
- (c) The Proposed DIP Financing will preserve the value and going concern operations of the Applicants' business, which is in the best interests of the Applicants and their stakeholders.
- (d) Trichome requires the DIP Charge as a condition of providing the Proposed DIP Financing.
- (e) The proposed DIP lender is the existing first-lien lender so is already familiar with the Applicants' business and operations.
- (f) As the Applicants were already obligors with respect to the first-lien security, there is no change from the pre-filing *status quo* in terms of the ranking of the security.
- (g) The amount of the Proposed DIP Financing is appropriate having regard to the Applicants' cash-flow statement as well as DIP financing approved in similar facilities, and the amount that is proposed to be funded prior to the Comeback Hearing is only the portion necessary to keep the Applicants operating in the ordinary course of business.

- (h) The cash flow projections demonstrate that debtor-in-possession financing is urgently required to provide the Applicants with the required liquidity for continued business operations in the ordinary course.
- (i) The Proposed Monitor is supportive of the Proposed DIP Financing and does not believe that creditors will be prejudiced as a result of its approval.⁵⁶

63. The Applicants submit that approval of the Proposed DIP Financing and the DIP Charge is appropriate in the circumstances, consistent with the terms of the CCAA, reasonably necessary in order to enable the continued operation of the Applicants' business in the ordinary course, and in the best interests of the Applicants and their stakeholders - including the employees of the Applicants who are intended to be paid in the ordinary course from the Proposed DIP Financing.

E. The Administration Charge Should be Granted

64. The Applicants are seeking an Administration Charge in the amount of \$500,000 to secure the professional fees and disbursements of the Proposed Monitor, along with its counsel and the Applicants' counsel, incurred prior to (in relation to the CCAA proceedings), on, or subsequent to the date of the Initial Order, incurred at their standard rates and charges.⁵⁷

65. Section 11.52 of the CCAA expressly provides the Court with the jurisdiction to grant an administration charge. The following list of non-exhaustive factors are to be considered when granting an administration charge:

⁵⁶ Initial Affidavit, *supra* note 1 at paras 9, 12, 43, 71, 75-78, 91-93, 96; Pre-Filing Report of the Proposed Monitor KSV Kofman Inc. dated March 31, 2020 at paras 4, 5.1, 6.3, 9 [Proposed Monitor's Report].

⁵⁷ Initial Affidavit, *ibid* at para 82; Initial Order, *supra* note 53 at para 32.

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is 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.⁵⁸

66. The Applicants submit that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge, given that:

- (a) the Applicants' business is highly regulated and subject to numerous statutory and regulatory restrictions and requirements;
- (b) the beneficiaries of the Administration Charge have, and will continue to, contribute to these CCAA proceedings and assist the Applicants with their business, including continuing operations in the ordinary course;
- (c) each proposed beneficiary of the Administration Charge is performing distinct functions and there is no duplication of roles;
- (d) the quantum of the proposed charge is fair and reasonable;

⁵⁸ [*Canwest Publishing*](#), *supra* note 55 at para 54.

- (e) Trichome, the first-lien lender and the proposed DIP lender, supports the Administration Charge; and
- (f) the Proposed Monitor is supportive of the Administration Charge.⁵⁹

F. The Directors' Charge Should be Granted

67. The Applicants are seeking a Directors' Charge in the amount of \$450,000 to secure the indemnity of their directors and officers for liabilities they may incur during the CCAA Proceedings, which may include unpaid accrued wages and unpaid accrued vacation pay, together with unremitted excise, sales, goods and services, and harmonized sales taxes.⁶⁰

68. Section 11.51 of the CCAA affords the Court the jurisdiction to grant the Directors' Charge; the court may not make the order if "the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost" and the "court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct".⁶¹

69. "The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring".⁶²

⁵⁹ Initial Affidavit, *supra* note 1 at paras 22, 28, 82-84; Proposed Monitor's Report, *supra* note 56 at paras 6.1, 9.

⁶⁰ Initial Affidavit, *ibid* at paras 88, 90; Initial Order, *supra* note 53 at para 20.

⁶¹ CCAA, *supra* note 32 s 11.51(3)-(4).

⁶² [Canwest Global Communications Corp \(2009\), OJ No. 4286](#) at paras 46-48.

70. The Applicants submit it is appropriate in these circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge, given that:

- (a) the directors and officers have indicated their continued service and involvement in these CCAA proceedings is conditional upon the granting of the Directors' Charge;
- (b) the Applicants' liability insurance policies may provide insufficient coverage;
- (c) the Directors' Charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;
- (d) the Directors' Charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of the CCAA Proceedings and does not cover wilful misconduct or gross negligence;
- (e) the Applicants will require the active and committed involvement of the directors and officers in order to continue business operations in the ordinary course, particularly due to the strict regulatory environment in which the Applicants operate and the security clearances required to be obtained by certain personnel;
- (f) the amount of the Directors' Charge is reasonable in the circumstances and is limited to the potential exposure during the initial 10-day period; and
- (g) the Proposed Monitor is supportive of the Directors' Charge.⁶³

⁶³ Initial Affidavit, *supra* note 1 at paras 28, 85-90; Proposed Monitor's Report, *supra* note 56 at paras 6.2, 9.

PART IV: RELIEF REQUESTED

71. The Applicants submit that they meet all of the qualifications required to obtain the requested relief and request that this Court grant the proposed form of Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Bennett Jones LLP

March 31, 2020

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [Canwest Global Communications Corp, Re \(2009\), OJ No. 4286](#)
2. [Canwest Publishing Inc, Re, 2010 ONSC 222](#)
3. [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60](#)
4. [Miniso International Hong Kong Limited v Migu Investments Inc, 2019 BCSC 1234](#)
5. [Re Clover Leaf, 2019 ONSC 6966](#)
6. [Re Lydian International Limited, 2019 ONSC 7473](#)
7. [Re Stelco Inc, \(2004\) 48 CBR \(4th\) 299](#)
8. [Royal Oak Mines Inc, \[1999\] OJ No. 709](#)
9. [Target Canada Co, 2015 ONSC 303](#)
10. [8440522 Canada Inc, Re, 2013 ONSC 6167](#)

Secondary Sources

- Canada, Innovation, Science and Economic Development Canada, [Insolvency reforms to come into force](#), News Release, (Ottawa: Media Relations) 2019.
- Canada, Marketplace Framework Policy Branch, [Order Fixing November 1, 2019 as the Day on Which Certain Provisions of the two Acts Come into Force: SI/2019-90](#), Canada Gazette, Part II, Volume 153, Number 18.

SCHEDULE B – STATUTES RELIED ON

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

Section 2(1), "Company"

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

Section 3

Application

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

Affiliated companies

(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.

Section 11.001

Relief reasonably necessary

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Section 11.02

Stays, etc. – initial application

(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.

Section 11.2

Interim financing

(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.

Section 11.51

Security or charge relating to director's indemnification

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 11.52

Court may order security or charge to cover certain costs

(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

Section 2, "Insolvent Person"

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

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JAMES E. WAGNER CORPORATION,
JAMES E. WAGNER CULTIVATION LTD., JWC 1 LTD., JWC 2 LTD., JWC SUPPLY LTD AND GROWTHSTORM INC.**

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

FACTUM OF THE APPLICANTS
(CCAA Application)

BENNETT JONES LLP

One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Sean Zweig (LSO# 57307I)

Mike Shakra (LSO# 64604K)

Aiden Nelms (LSO# 74170S)

Tel: 416-863-1200

Fax: 416-863-1716

Lawyers for the Applicants