

Estate/Court File No.: 31-2917856

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(IN BANKRUPTCY AND INSOLVENCY)  
COMMERCIAL LIST**

**IN THE MATTER OF THE PROPOSAL OF MAGNA GOLD CORP.**

**FACTUM OF MAGNA GOLD CORP.  
(Returnable March 27, 2023)**

March 23, 2023

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## FACTUM OF MAGNA GOLD CORP.

### PART I: INTRODUCTION

1. Magna Gold Corp. ("**Magna**" or the "**Applicant**") is seeking to continue its proposal proceedings 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 proposed CCAA proceedings and the Initial Order are in the best interest of the Applicant and its stakeholders. A proceeding under the CCAA presents the best means of providing the Applicant with the breathing space required to, among other things: (i) continue to operate its business in the ordinary course; (ii) monitor and update the Court on the progress of its subsidiary's insolvency proceeding in Mexico; and (iii) develop a go-forward business plan for the benefit of Magna's creditors and other stakeholders.
3. The Initial Order sought by the Applicant, *inter alia*:
  - (a) declares that the Applicant is an entity to which the CCAA applies;
  - (b) authorizes the continuation under the CCAA of the proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), commenced by Magna pursuant to a Notice of Intention to Make a Proposal (the "**NOI**") filed on March 3, 2023 (the "**Proposal Proceedings**");
  - (c) appoints KSV Restructuring Inc. ("**KSV**") as an officer of this Court (in such capacity, the "**Proposed Monitor**") to monitor the assets, business and affairs of the Applicant (as appointed, the "**Monitor**");

- (d) stays, for an initial period of not more than ten (10) days (the "**Stay of Proceedings**"), all proceedings and remedies taken or that might be taken in respect of the Applicant, the Monitor or the Directors and Officers or affecting the Applicant's business or the Property (each as defined below), except with the written consent of the Applicant and the Monitor, or with leave of this Court;
- (e) grants the Administration Charge and Directors' Charge (each as defined below) over the Applicant's current and future assets, undertakings and property of every nature and kind whatsoever and wherever situated, including all proceeds thereof (collectively, the "**Property**");
- (f) authorizes the decision by the Applicant to incur no further expenses in relation to any filings and disclosures that may be required by any federal, provincial or other laws respecting securities or capital markets in Canada or the United States;
- (g) relieves Magna of any obligation to call and hold its annual general meeting of shareholders (each an "**AGM**") until further Order of the Court; and
- (h) approves the First Report of KSV in its capacity as proposal trustee in the Proposal Proceedings (in such capacity, the "**Proposal Trustee**") and the Pre-Filing Report of the Proposed Monitor dated March 21, 2023 (the "**Report**"), and the activities of KSV described therein.

## **PART II: FACTS**

4. The facts underlying this motion are more fully set out in the affidavit of Leslie Kapusianyk sworn March 20, 2023 (the "**Kapusianyk Affidavit**") and the Report.<sup>1</sup> All capitalized terms used but not defined herein have the meanings ascribed to them in the Kapusianyk Affidavit.

### **A. Background**

5. Magna was incorporated in 2018 under the provisions of the *Business Corporations Act* (Ontario) (the "**OBCA**") and is a reporting issuer with its common shares currently listed on: (i) the NEX Board of the TSX Venture Exchange (the "**TSXV**") with the trading symbol MGR.H; and (ii) OTC Pink with the trading symbol MGLQF.<sup>2</sup>

6. Magna is a holding company. Accordingly, substantially all of its value is derived through its equity interests in its direct and indirect subsidiaries (collectively, the "**Subsidiaries**", and together with Magna, the "**Magna Group**"). The Magna Group is a Mexico-focused mineral resource company engaged in the acquisition, exploration, development and operation of mineral properties.<sup>3</sup>

7. Magna holds a 99.9% interest in Minera Magna, S.A. de C.V. and a 100.0% interest in 2660170 Ontario Ltd. Through those Subsidiaries, Magna indirectly holds a 99.9% interest in both Molimentales del Noroeste, S.A. de C.V ("**Molimentales**") and LM Mining Corp, S.A. de C.V.<sup>4</sup>

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<sup>1</sup> Affidavit of Leslie Kapusianyk sworn March 20, 2023 [*Kapusianyk Affidavit*]; First Report of KSV in its capacity as proposal trustee in the Proposal Proceedings and the Pre-Filing Report of the Proposed Monitor dated March 21, 2023 [*Report*].

<sup>2</sup> *Kapusianyk Affidavit*, *ibid* at para 10 and 11; *Report*, *ibid* at section 2.0 at para 1 and 2.

<sup>3</sup> *Kapusianyk Affidavit*, *ibid* at para 6.

<sup>4</sup> *Kapusianyk Affidavit*, *ibid* at para 12; *Report*, *supra* note 1 at section 2.0 at para 3.

8. Magna currently employs five (5) people.<sup>5</sup> While Magna has a relatively small number of employees, the Magna Group has approximately 124 full-time employees. Magna also relies on a variety of consultants and contractors to carry out a number of its activities and, in particular, to carry out project development activities and to supervise work programs on its mineral properties.<sup>6</sup>

9. Magna does not own or lease any real property. Its registered head office is 82 Richmond Street East, Toronto, Ontario, M5C 1P1.<sup>7</sup>

10. While the Magna Group generates some operating cash flow from mining activities, historically the Magna Group was highly dependent on its ability to raise money through the capital markets. The funds raised by Magna were typically loaned to the Subsidiaries to fund operations. Monies were then transferred up from Molimentales to Magna as and when needed as repayment of intercompany loans. On February 24, 2023, in advance of the Proposal Proceedings, Magna entered into a Funding Agreement with Molimentales (the "**Funding Agreement**"). Magna expects to be funded during the proposed CCAA proceedings by Molimentales via the Funding Agreement.<sup>8</sup>

11. Due to, among other things, the production of its operational projects, its cash position forecast revenue, the COVID-19 pandemic and liquidity issues, the Magna Group has been unable to service its debt or meet certain of its other ordinary course obligations. As a result, and after careful consideration, on March 3, 2023 (the "**NOI Filing Date**"), Magna filed the NOI and initiated the Proposal Proceedings.<sup>9</sup> Concurrent with the NOI, Molimentales filed an application (the "**Molimentales Application**") for restructuring and provisional creditor protection before the

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<sup>5</sup> *Kapusianyk Affidavit*, *ibid* at para 14; *Report*, *ibid* at section 2.0 at para 5.

<sup>6</sup> *Kapusianyk Affidavit*, *ibid* at para 16.

<sup>7</sup> *Kapusianyk Affidavit*, *ibid* at para 17 and 18.

<sup>8</sup> *Kapusianyk Affidavit*, *ibid* at para 20 and 21.

<sup>9</sup> *Kapusianyk Affidavit*, *ibid* at para 34; *Report*, *supra* note 1 at section 2.0 at para 6.

Second District Court for Insolvency Matters located in Mexico City, Mexico (the "**Molimentales Proceedings**").<sup>10</sup>

(i) *Magna's Business Interests*

12. Substantially all of the Magna Group's assets are located outside of Canada with its principal projects being:

- (a) *the San Francisco Project* – Molimentales owns a 100% interest in 13 mineral concessions along with the surrounding mineral concessions located in the north central portion of the Mexican state of Sonora, which borders on the American state of Arizona, and is approximately 150 kilometers north of the city of Hermosillo, the capital of Sonora (the "**San Francisco Project**")<sup>11</sup>;
- (b) *the Mercedes Project* – on June 6, 2019, Magna completed its qualifying transaction consisting of an option agreement dated September 25, 2018 (the "**Mercedes Option Agreement**"), pursuant to which Magna acquired an option to acquire a 100% undivided interest in two (2) mining claims located in the municipality of Yécora, Sonora, Mexico (the "**Mercedes Project**"). As at March 16, 2023, Magna had paid US\$440,000 of the US\$1,340,000 owing under the Mercedes Option Agreement<sup>12</sup>; and
- (c) *the Margarita Project* – Molimentales owns a 100% undivided interest in two (2) mineral concessions located within the Municipality of Satevó, in Northern México, in the South-central part of the State of Chihuahua (the "**Margarita**

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<sup>10</sup> *Kapusianyk Affidavit, ibid* at para 35; *Report, ibid* at section 1.0 at para 2.

<sup>11</sup> *Kapusianyk Affidavit, ibid* at para 23 and 24; *Report, ibid* at section 2.0 at para 4(a).

<sup>12</sup> *Kapusianyk Affidavit, ibid* at paras 25-27; *Report, ibid* at section 2.0 at para 4(b).

**Project"** and together with the San Francisco Project and the Mercedes Project, the **"Principal Projects"**).<sup>13</sup>

13. The San Francisco Project is a producing property, while the Mercedes Project and the Margarita Project are in the exploration and development stage. In addition to the Principal Projects, Magna has certain additional mineral projects that are, for the most part, in the exploration phase and subject to option agreements.<sup>14</sup>

(ii) *Magna's Financial Position*

14. As at February 28, 2023, Magna had total assets with a book value of \$37.4 million and total liabilities with a book value of \$11.8 million.<sup>15</sup> While the book value of Magna's assets exceeds the book value of its liabilities, the realizable value of the assets will only be known following the culmination of the Molimentales Proceedings.<sup>16</sup>

15. There are currently no registrations against Magna under the *Personal Property Security Act*, R.S.O. 1990, c. P. 10, as amended, or the *Personal Property Security Act* [RSBC 1996] Chapter 359.<sup>17</sup>

16. On August 19, 2021, Magna closed an offering of convertible debentures (the **"Convertible Debentures"**) for gross proceeds of \$10,000,000 (the **"Offering"**) pursuant to two (2) Convertible Debenture Certificates (together, the **"Convertible Debenture Certificates"**). Pursuant to the Offering, Magna sold \$10,000,000 aggregate principal amount of the Convertible

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<sup>13</sup> *Kapusianyk Affidavit, ibid* at para 28 and 29; *Report, ibid* at section 2.0 at para 4(c).

<sup>14</sup> *Kapusianyk Affidavit, ibid* at para 22; *Report, ibid* at section 2.0 at para 4.

<sup>15</sup> *Kapusianyk Affidavit, ibid* at para 39 and 40.

<sup>16</sup> *Kapusianyk Affidavit, ibid* at para 41.

<sup>17</sup> *Kapusianyk Affidavit, ibid* at para 42; *Report, supra* note 1 at section 2.1.2 at para 1.

Debentures to funds managed by Delbrook Capital Advisors Inc. ("**Delbrook**"), a shareholder of Magna.<sup>18</sup>

17. The Convertible Debentures are unsecured obligations that mature on August 19, 2023 and bear an interest rate of 8.5%. The Convertible Debenture Certificates contemplated an interest rate adjustment in the event that the security contemplated thereunder was delivered, however, that security was never delivered to Delbrook. Until the commencement of the Proposal Proceedings, Magna was making timely interest payments under the Convertible Debenture Certificates.<sup>19</sup>

18. Magna owes approximately \$855,000 to third party vendors and service providers, including professional advisors. Magna owes payroll arrears of approximately \$51,000 and, as of March 16, 2023, has an accrued vacation pay liability of approximately \$109,900.<sup>20</sup>

*(iii) The NOI and the Proposal Proceedings*

19. As previously noted, due to, among other things, the production of its operational projects, its cash position, its forecast revenue, the COVID-19 pandemic and liquidity issues, the Magna Group was unable service its debt or meet certain of its other ordinary course obligations. As a result, on the NOI Filing Date, Magna filed the NOI and initiated the Proposal Proceedings.<sup>21</sup> Concurrent with the NOI, Molimentales commenced the Molimentales Proceedings.<sup>22</sup>

20. Magna's decision to file the NOI and initiate the Proposal Proceedings, as opposed to seeking relief under the CCAA from the outset, was driven in large part by timing requirements and interplay between Canadian and Mexican creditor relief laws and the need for immediate relief

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<sup>18</sup> *Kapusianyk Affidavit, ibid* at para 43; *Report, ibid* at section 2.1.2 at para 3(A).

<sup>19</sup> *Kapusianyk Affidavit, ibid* at para 44 and 46; *Report, ibid* at section 2.1.2 at para 3(A).

<sup>20</sup> *Kapusianyk Affidavit, ibid* at para 47; *Report, ibid* at section 2.1.2 at para 3(B) and 3(C).

<sup>21</sup> *Kapusianyk Affidavit, ibid* at para 34; *Report, ibid* at section 2.0 at para 6.

<sup>22</sup> *Kapusianyk Affidavit, ibid* at para 35; *Report, ibid* at section 1.0 at para 2.



for Magna following the successful admission of the Molimentales Application. The Molimentales Proceedings are expected to last longer than six (6) months.<sup>23</sup>

21. Since commencing the Proposal Proceedings, Magna has worked diligently to maintain the stability of its operating business, manage its relationships with key stakeholders, liaise with the securities exchanges, work with the Proposal Trustee and comply with its obligations under the BIA.<sup>24</sup>

*(iv) Continuation of the Proposal Proceedings under the CCAA*

22. As previously noted, given Magna's urgent need for creditor protection to coordinate between Canadian and Mexican creditor relief laws, filing the NOI was determined to be the best alternative in the circumstances. To permit the Applicant's business to continue operating as a going-concern and to protect whatever equity Magna may have, which will only be known once the Molimentales Proceedings are advanced, the Applicant is now seeking the breathing space, flexibility and stability afforded by the CCAA.<sup>25</sup>

23. Pursuant to the BIA, under the Proposal Proceedings, Magna is required to make a proposal that is acceptable to its creditors within six (6) months of the NOI Filing Date. Given, among other things, the need to continue ordinary course operations, the expected duration of the Molimentales Proceedings (i.e. more than six (6) months) and the uncertainty as to the value of Magna until those proceedings are advanced, it is expected that Magna will require more than six (6) months to develop its restructuring.<sup>26</sup>

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<sup>23</sup> *Kapusianyk Affidavit, ibid* at para 36; *Report, ibid* at section 3.0 at para 1 and 2.

<sup>24</sup> *Kapusianyk Affidavit, ibid* at para 37.

<sup>25</sup> *Kapusianyk Affidavit, ibid* at para 48.

<sup>26</sup> *Kapusianyk Affidavit, ibid* at para 49.

24. Absent a continuation of the Proposal Proceedings under the CCAA, a deemed bankruptcy would likely result which would be detrimental to Magna's creditors and other stakeholders.<sup>27</sup>

**PART III: ISSUES**

25. The issues to be considered on this motion are whether this Court should:

- (a) continue the Proposal Proceedings under the CCAA;
- (b) grant the Stay of Proceedings;
- (c) grant the Administrative Charge;
- (d) grant the Directors' Charge; and
- (e) grant the Securities Relief.

**PART IV: LAW AND ARGUMENT**

**A. The Proposal Proceedings should be continued under the CCAA**

26. Section 11.6 of the CCAA authorizes this Court to take up and continue proposal proceedings commenced under Part III of the BIA where no proposal has been filed thereunder.

27. In *(Re) Clothing for Modern Times Ltd.*, this Court held that when approving the continuance of BIA proposal proceedings under the CCAA, courts should consider whether:

- (a) the moving parties have satisfied the sole statutory condition in section 11.6 of the CCAA, being that they have not filed a proposal under the BIA;

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<sup>27</sup> *Kapusianyuk Affidavit*, *ibid* at para 50.

- (b) the proposed continuation is consistent with the purposes of the CCAA; and
- (c) the moving parties have provided the court with the information that would otherwise form part of an initial CCAA application pursuant to subsection 10(2) of the CCAA.<sup>28</sup>

28. The Applicant must also demonstrate that it is a "debtor company" to which the CCAA applies whose liabilities exceed \$5 million. Each of these criteria are satisfied here.

1. ***The Threshold Criteria for Continuing the Proposal Proceedings under the CCAA are Satisfied***

29. The Applicant submits that the proposed continuance of the Proposal Proceedings under the CCAA satisfies the criteria in subsection 11.6(a) of the CCAA. Namely:

- (a) ***No Proposal Has Been Filed*** – no proposal has been filed in the Proposal Proceedings and, therefore, the sole statutory condition under subsection 11.6(a) of the CCAA has been met.
- (b) ***The Proposed Continuance is Consistent with the Purposes of the CCAA*** – the CCAA is intended to permit companies to carry on business, and where possible, avoid the social and economic costs of liquidation.<sup>29</sup> Further, the CCAA is intended to preserve the *status quo* and provide a structured environment in which an insolvent company can continue to carry on business while it develops a plan for its restructuring that will enable it to remain in operation for its benefit and the

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<sup>28</sup> *(Re) Clothing for Modern Times Ltd.*, 2011 ONSC 7522 at para 9; *Comstock Canada Ltd. (Re)*, 2013 ONSC 4756 at paras 36-42.

<sup>29</sup> *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para 15 [*Century Services*].

benefit of its creditors.<sup>30</sup> The continuation of the Proposal Proceedings under the CCAA is consistent with these purposes. The benefit of the protection and flexibility afforded by the CCAA will allow Magna to: (i) continue to operate its business in the ordinary course; (ii) monitor and update the Court on the progress of the Molimentales Proceedings; (iii) develop a go-forward business plan for the benefit of Magna's creditors and other stakeholders; and (iv) evaluate the viability of presenting a plan of compromise or arrangement to the Applicant's creditors within the proposed CCAA proceedings.<sup>31</sup>

- (c) ***The Information Required under Subsection 10(2) of the CCAA has been Filed*** – subsection 10(2) of the CCAA requires that an initial application be accompanied by: (i) a statement indicating, on a weekly basis, the projected cash flow of the debtor company (the "**Cash Flow Forecast**"); (ii) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement (the "**Prescribed Representations**"); and (iii) copies of all financial statements, audited or unaudited, prepared during the year before the application (the "**Financial Statements**").<sup>32</sup> Magna's Cash Flow Forecast and the Prescribed Representations are appended to the Report at Appendix "B".<sup>33</sup> Magna's available Financial Statements are attached to the Kapusianyk Affidavit at Exhibit "D".<sup>34</sup>

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<sup>30</sup> [Canadian Airlines Corp. \(Re\) \(2000\), 19 CBR \(4th\) 1](#) at para 12.

<sup>31</sup> [Kapusianyk Affidavit](#), *supra* note 1 at para 51.

<sup>32</sup> [Companies' Creditors Arrangement Act, RSC 1985, c C-36](#), s 10(2) [CCAA].

<sup>33</sup> [Report](#), *supra* note 1 at section 3.2 at para 2.

<sup>34</sup> [Kapusianyk Affidavit](#), *supra* note 1 at para 38.

**2. *The Applicant is a Company to which the CCAA Applies***

30. The CCAA applies to a "debtor company" or "affiliated debtor companies" whose liabilities exceed \$5 million.<sup>35</sup> A "debtor company" is defined under subsection 2(1) of the CCAA as any "company" that is "insolvent" or has committed an act of bankruptcy within the meaning of the BIA.

31. Subsection 2(1) of the CCAA defines "company", in relevant part, as "any company [...] incorporated by or under an Act of Parliament or of the legislature of a province". As Magna was incorporated under the OBCA, it is clearly a "company" for the purposes of the CCAA.

32. Since the CCAA does not define "insolvent", courts have taken guidance from the definition of "insolvent person" in section 2 of the BIA. The BIA defines an "insolvent person" disjunctively as a person:

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

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<sup>35</sup> *CCAA*, *supra* note 32, s 3(1).

<sup>36</sup> *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3, s 2.

33. In *Re Stelco Inc.* ("*Stelco*"), Farley J. held that a company would also be insolvent under 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".<sup>37</sup>

34. The Applicant is insolvent under both the BIA's disjunctive test and the broader test set out in *Stelco*. Magna: (i) is generally unable to meet its obligations as they become due; (ii) committed an act of bankruptcy when it filed the NOI; (iii) has been unable to service its debt or meet certain of its other ordinary course obligations; (iv) is experiencing severe liquidity issues; and (v) has total liabilities in the amount of approximately \$12 million, well exceeding the statutory threshold of \$5 million.<sup>38</sup>

35. In light of the foregoing, the Applicant is insolvent within the meaning of the CCAA and is a "debtor company" to which the CCAA applies.

## **B. The Stay of Proceedings Should be Approved**

36. Section 11.02 of the CCAA provides this Court with the jurisdiction to impose a stay of proceedings for a period of not more than 10 days if it is satisfied that circumstances exist that make the order appropriate.<sup>39</sup> A stay of proceedings is appropriate where it maintains the *status quo* and provides an applicant(s) with breathing room while they seek to restore solvency and emerge from the CCAA on a going-concern basis.<sup>40</sup>

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<sup>37</sup> *Stelco Inc., Re.* [2004] OJ No 1257 at paras 26 and 40.

<sup>38</sup> *Kapusianyk Affidavit*, *supra* note 1 at para 34 and 40; *Report*, *supra* note 1 at section 3.3 at para 1(b).

<sup>39</sup> CCAA, *supra* note 32, s 11.02.

<sup>40</sup> *Century Services*, *supra* note 29 at para 14; *Canwest Global Communications Corp.* 2011 ONSC 2215 at paras 24-25; *Target Canada Co. (Re)*, 2015 ONSC 303 at para 8.

37. The Applicant requires the Stay of Proceedings to prevent enforcement action by its creditors. It would be detrimental to the Applicant's business if proceedings were commenced or continued or rights and remedies were executed against it.<sup>41</sup> The Stay of Proceedings will stabilize and preserve the value of the Applicant's business and provide the breathing space necessary to continue to operate as a going-concern with minimal disruption to its ordinary course business operations. Additionally, the Applicant will be able to monitor the Molimentales Proceedings and explore various strategic alternatives with a view to maximizing stakeholder value.<sup>42</sup>

38. The Applicant submits that the proposed Stay of Proceedings is in the best interests of the Applicant and its stakeholders, meets the statutory requirements and is appropriate in the circumstances.<sup>43</sup>

39. The Cash Flow Forecast demonstrates that the Applicant will have sufficient liquidity to fund its obligations and the costs of these CCAA proceedings through the end of the proposed Stay of Proceedings.<sup>44</sup>

### **C. The Administration Charge Should be Granted**

40. The Applicant is seeking a charge in the amount of \$300,000 to secure the professional fees and disbursements of the Proposed Monitor, along with its counsel and the Applicant's counsel, at their standard rates and charges, incurred prior and subsequent to the date of the Initial Order (the "**Administration Charge**").

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<sup>41</sup> *Kapusianyk Affidavit, supra* note 1 at para 53.

<sup>42</sup> *Kapusianyk Affidavit, ibid* at para 54.

<sup>43</sup> *Kapusianyk Affidavit, ibid* at para 55.

<sup>44</sup> *Kapusianyk Affidavit, ibid* at para 71; *Report, supra* note 1 at section 3.3 at para 1(d).

41. Section 11.52 of the CCAA expressly provides this Court with the statutory jurisdiction to grant an administration charge in favour of a court-appointed monitor and the legal experts engaged by such monitor and the debtor company, provided notice is given to the secured creditors likely to be affected by the charge.<sup>45</sup>

42. In *Canwest Publishing Inc.*, the Court considered section 11.52 of the CCAA and identified the following list of non-exhaustive factors to be considered when granting such charges:

- (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.<sup>46</sup>

43. The Applicant submits that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge, given that:

- (a) the proposed restructuring will require the extensive involvement of the professional advisers who are proposed have the benefit of the Administration Charge;

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<sup>45</sup> CCAA, *supra* note 32, s 11.52.

<sup>46</sup> *Canwest Publishing Inc.*, 2010 ONSC 222, at para 54.



- (b) the professionals who are proposed to have the benefit of the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Applicant;
- (c) each proposed beneficiary of the Administration Charge is performing distinct functions and there is no duplication of roles;
- (d) to the best of the Applicant's knowledge, there are no secured creditors; and
- (e) the Proposed Monitor is supportive of the Administration Charge and its quantum.<sup>47</sup>

**D. The Directors' Charge Should be Granted**

44. The Applicant is seeking a charge in the amount of \$300,000 to secure the indemnity of its directors and officers (the "**Directors and Officers**") for liabilities they may incur during these proposed CCAA proceedings (the "**Directors' Charge**").

45. Section 11.51 of the CCAA authorizes this Court to grant the Directors' Charge in an amount it considers appropriate where the secured creditors likely to be affected by the charge are given notice thereof. Such a charge may not be granted if adequate indemnification insurance for the benefit of a debtor company's directors and officers could be obtained at a reasonable cost.<sup>48</sup>

46. The purpose of granting a charge under the CCAA to secure the indemnity of a debtor company's directors and officers is to "keep the directors and officers in place during the

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<sup>47</sup> *Kapusianyk Affidavit*, *supra* note 1 at paras 42, 59 and 60; *Report*, *supra* note 1 at section 4.2.1 at paras 2-4.

<sup>48</sup> *CCAA*, *supra* note 32 at s 11.51(3)-(4).

restructuring by providing them with protections against liabilities they could incur during the restructuring".<sup>49</sup>

47. The Applicant submits that it is appropriate in the 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 Directors and Officers are beneficiaries under a liability insurance policy maintained by Magna, however, these types of policies have various exceptions, exclusions and carve-outs and may not provide sufficient coverage against the potential liability that the Directors and Officers could incur in connection with the proposed CCAA proceedings;
- (c) the Directors' Charge would only cover obligations and liabilities that the Directors and Officers may incur after the commencement of these CCAA proceedings, that are outside the scope of the existing insurance policy and will not cover willful misconduct or gross negligence;
- (d) the Applicant requires the active and committed involvement of the Directors and Officers in order to continue its business operations in the ordinary course;

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<sup>49</sup> [Canwest Global Communications Corp. \(Re\)](#), [2009] OJ No. 4286 at paras 46-48 [*Canwest Global*].

- (e) the amount of the Directors' Charge is reasonable in the circumstances and is limited to the potential exposure of the Directors and Officers in these proposed CCAA proceedings;
- (f) to the best of the Applicant's knowledge, there are no secured creditors; and
- (g) the Proposed Monitor is supportive of the Directors' Charge and its quantum.<sup>50</sup>

#### **E. The Securities Relief Should be Granted**

48. The Applicant relies on the Court's inherent jurisdiction pursuant to section 11 of the CCAA in connection with the Securities Relief. Courts have frequently exercised their broad jurisdiction under the CCAA to, among other things, permit reporting issuers to: (i) not incur further expenses in relation to any filings and disclosures that may be required by any federal, provincial or other laws respecting securities or capital markets in Canada<sup>51</sup>; and (ii) postpone their annual general meeting pending further order of the Court.<sup>52</sup>

49. In the case at hand, it would not be practical or appropriate, and would be an unnecessary distraction and unwarranted expense, for the Applicant to incur costs associated with its filing and disclosure obligations or the need to call an AGM.<sup>53</sup> The Monitor is supportive of the Securities Relief.<sup>54</sup>

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<sup>50</sup> *Kapusianyk Affidavit*, *supra* note 1 at paras 61 - 64.; *Report*, *supra* note 1 at section 4.2.2 at paras 2-4.

<sup>51</sup> *Cantrust Holdings Inc. et al. Initial Order*, Court File No. CV-20-00638930-00CL, March 31, 2020 at para 46 and 47; *Urthecast Corp. et al. Revised Amended and Restated Initial Order*, Court File No. S-208894, September 23, 2020 at para 53 and 54, *Freshlocal Solutions Inc. et al. Initial Order*, Court File No. S-223941, May 16, 2022 at para 48 and 49.

<sup>52</sup> *Sears Canada Inc. et al. Initial Order*, Court File No. CV-17-11846-00CL, June 22, 2017 at para 54; *Canwest Global*, *supra* note 49; *Cline Mining Corporation (Re)*, 2014 ONSC 6998 at paras 53-55; *MPX International Corporation. et al. Initial Order*, Court File No. CV-22-00684542-00CL, July 25, 2022 at para 42.

<sup>53</sup> *Kapusianyk Affidavit*, *supra* note 1 at para 66 and 67; *Report*, *supra* note 1 at section 4.1 at paras 2.

<sup>54</sup> *Report*, *ibid* at para 3.

50. Should the Securities Relief be granted, shareholders and other stakeholder will continue to have uninterrupted access to, among other things, the Applicant's operational and financial information via the website established by the Proposed Monitor.<sup>55</sup>

51. In light of the foregoing, the granting of the Securities Relief is just and appropriate in the circumstances.

**PART V: RELIEF REQUESTED**

52. The Applicant respectfully requests that this Court grant the proposed form of Initial Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

*Bennett Jones LLP*

March 23, 2023

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<sup>55</sup> *Kapusianyk Affidavit, supra* note 1 at para 68.

## SCHEDULE A – LIST OF AUTHORITIES

### *Cases Cited*

1. [Canadian Airlines Corp, \(Re\) \(2000\), 19 CBR \(4th\) 1](#)
2. [Canwest Global Communications Corp. \(Re\), \[2009\] OJ No. 4286](#)
3. [Canwest Global Communications Corp, 2011 ONSC 2215](#)
4. [Canwest Publishing Inc., 2010 ONSC 222](#)
5. [Century Services Inc. v. Canada \(Attorney General\), 2010 SCC 60](#)
6. [Cline Mining Corporation \(Re\), 2014 ONSC 6998](#)
7. [Comstock Canada Ltd. \(Re\), 2013 ONSC 4756](#)
8. [\(Re\) Clothing for Modern Times Ltd, 2011 ONSC 7522](#)
9. [Stelco Inc., Re, \[2004\] OJ No 1257](#)
10. [Target Canada Co \(Re\), 2015 ONSC 303](#)

### *Other Sources*

1. [Cantrust Holdings Inc. et al, Initial Order, Court File No. CV-20-00638930-00CL](#), March 31, 2020 at para 46 and 47
2. [Freshlocal Solutions Inc. et al, Initial Order, Court File No. S-223941](#), May 16, 2022 at para 48 and 49
3. [MPX International Corporation. et al, Initial Order, Court File No. CV-22-00684542-00CL](#), July 25, 2022 at para 42
4. [Sears Canada Inc. et al, Initial Order, Court File No. CV-17-11846-00CL](#), July 22, 2017 at para 54
5. [Urthecast Corp. et al, Revised Amended and Restated Initial Order, Court File No. S-208894](#), September 23, 2020 at para 53 and 54

## SCHEDULE B – STATUTES RELIED ON

### **Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3**

#### **Section 2**

##### **Definitions**

***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; (personne insolvable)

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

#### **Section 2(1)**

##### **Definitions**

***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(1)**

##### **Applications**

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.

#### **Section 10(2)**

##### **Documents that must accompany initial application**

(2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a 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 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.

## **Section 11**

### **General Power of Court**

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

### **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 11.51**

### **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.

### **Section 11.6**

#### **Bankruptcy and Insolvency Act matters**

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

**IN THE MATTER OF THE PROPOSAL OF MAGNA GOLD CORP.**

Estate/Court File No.: 31-2917856

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(BANKRUPTCY AND INSOLVENCY)  
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