

Court No.: 31-2691184
Estate No.: 31-2691184

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

**IN THE MATTER OF THE PROPOSAL OF NABIS HOLDINGS INC., OF THE CITY
OF TORONTO, IN THE PROVINCE OF ONTARIO**

FACTUM OF THE PROPOSAL TRUSTEE
(Motion for Approval of Proposal - Returnable December 21, 2020)

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TO: THE SERVICE LIST

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PART I - OVERVIEW

1. This Factum is submitted by KSV Restructuring Inc., in its capacity as the trustee (the “**Proposal Trustee**”) in the proposal of Nabis Holdings Inc. (“**Nabis**” or the “**Company**”), for its motion for approval of the Amended Proposal filed on December 8, 2020 (the “**Amended Proposal**”) pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the “**BIA**”), and ancillary relief.
2. The Amended Proposal was unanimously accepted by the creditors voting at the meeting held on December 14, 2020 (the “**Creditors’ Meeting**”).
3. The Proposal Trustee recommends that the Court approve the Amended Proposal and grant the ancillary relief set out in the draft order attached as Schedule “**B**” to its Notice of Motion for the reasons set out below.

PART II - THE FACTS¹

Background

4. The Company was formed by amalgamation under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, on October 31, 2002. It was continued into the province of British Columbia under the *Business Corporations Act* (British Columbia) effective May 29, 2019. The Company's shares are listed on the Canadian Stock Exchange under the symbol "CNSX:NAB" and the *OTCQX* under the symbol "OTC:NABIF".

5. The Company's primary focus has been raising capital in the public markets to finance its subsidiaries. The Company, through its subsidiaries, has invested more than \$30 million in the cannabis sector, including licensed cannabis retail and production operations in Canada, the United States and elsewhere.

6. The Company's head office is located in Toronto, Ontario. The Company currently employs three full-time employees.

7. The Company's most significant asset is its indirect interest in Perpetual Healthcare Inc. ("**Perpetual**"). Perpetual is a not-for-profit entity licensed to operate the Emerald Medical Marijuana Dispensary (d/b/a Emerald Phoenix) ("**Emerald**"), a medical cannabis dispensary located in Phoenix, Arizona. A subsidiary of the Company, Nabis AZ, LLC ("**Nabis AZ**"), was appointed the manager of Perpetual and is entitled to a management fee based on the services it

¹ Unless otherwise indicated, the sources of the information in this section are the Report to Creditors of the Proposal Trustee dated December 1, 2020 ("**Trustee's Report to Creditors**").

performs, including the development, administration, operation and management of Emerald, pursuant to a Management Services Agreement.

8. Other than Perpetual, none of the Company's other subsidiaries are operating. The Company's only other investment that may have some nominal value is its wholly-owned subsidiary based in Port Townsend, Washington, Nabis Holdings Washington, LLC ("**Washington**"). Washington's primary assets are its cannabis extraction and production equipment (the "**Washington Assets**"). The Company has advised that it expects to complete a sale of the Washington Assets in the first quarter of 2021. The proceeds are not expected to be material.

9. The Proposal Trustee understands the equity value of the other subsidiaries is expected to be immaterial and possibly nil.

10. The Company has incurred losses and generated negative cash flow from operations since inception. The Company has generated operating losses of \$17.3 million since January 1, 2018 and net losses of \$37.3 million over the same period.

11. The Company's losses have been funded primarily through debt and equity offerings, including the Convertible Debentures² and private placements.

12. In light of its liquidity constraints, the Company filed the Proposal with the Official Receiver under Section 62 of the BIA on November 23, 2020, which contemplated a restructuring of the Company's financial affairs by completing and implementing the recapitalization transactions contemplated therein so the Company can continue to operate on a going-concern

² All capitalized terms not defined in this Factum are used as defined in the Trustee's Report to Creditors, or alternatively, in the Amended Proposal.

basis. The Company filed the Amended Proposal with the Official Receiver on December 8, 2020. Details of the Proposal and Amended Proposal are described below.

Creditors

a. Convertible Debentures

13. Pursuant to an indenture between the Company and Odyssey Trust Company dated March 26, 2019, the Company owes approximately \$36.5 million to the Debentureholders. The Convertible Debentures bear interest at 8% per annum and have a maturity date of March 26, 2022.

14. The Company failed to make the quarterly interest payment due under the Convertible Debentures on June 30, 2020. On July 23, 2020, the Debenture Trustee declared all outstanding principal and accrued interest due and payable and brought an application seeking declaratory relief in respect of the defaults. The Company also failed to make the interest payment due in September 2020.

15. A special committee formed by the Board and the Debentureholders engaged in discussions to address the defaults under the Convertible Debentures and to restructure the Company. These discussions ultimately led to the Proposal and the Support Agreement, as discussed further below.

b. Other Creditors

16. The Company's non-Debentureholder unsecured claims total approximately \$112,000. These claims primarily represent vendor claims and amounts due to professional advisors.

The Proposal / Amended Proposal

17. As stated above, the Company filed the Proposal with the Official Receiver on November 23, 2020.

18. On December 1, 2020, the Proposal Trustee provided a Notice of Proposal to Creditors and its Report to Creditors by regular mail to the Company, the OSB and to every known creditor affected by the Proposal. The Proposal Trustee also posted these materials on its website.

19. The Report to Creditors included a detailed summary of the Proposal. The main features of the Proposal are described below:

- **Reorganization:** The purpose of the Proposal is to restructure the Company's share capital principally on the basis that: (a) the existing Convertible Debentures, the Indenture, and any and all other Debenture Documents would be cancelled, provided that the Indenture shall remain in effect solely to allow the Debenture Trustee to make the distributions set forth in the Proposal; (b) the Existing Equity would be cancelled for no consideration; and (c) New Senior Unsecured Notes and New Common Shares would be issued to each Affected Creditor (other than a Convenience Creditor), based on such Affected Creditor's Affected Creditor Pro Rata Share.
- **Classes of Creditors:** There will be one class of Affected Creditors for the purposes of considering and voting on the Proposal comprised of all creditors with a Proven Claim, being the amount of a Claim as finally determined in accordance with the provisions of the BIA.
- **Treatment of Affected Creditors:** On the Proposal Implementation Date, in exchange for the release of each Released Claim (other than Unaffected Claims), each Affected Creditor (other than a Convenience Creditor) shall receive its Affected Creditor Pro Rata Share of: (a) new first lien unsecured notes in the aggregate amount of \$23 million on the terms set out in the Proposal; and (b) 3,700,000 new common shares in the capital of the Company.
- **Convenience Creditor:** A Convenience Creditor is deemed to have voted the full amount of its Proven Claim in favour of the approval of the Proposal without a requirement to file a proxy to vote in favour of the Proposal. The Proposal provides for payments of up to \$500 on a pro rata basis of Convenience Creditor Claims up to a maximum aggregate amount of \$25,000. On the Proposal Implementation Date, in exchange for the release of each Released Claim, a Convenience Creditor shall receive its Convenience Creditor Consideration.

- **Proposal Conditions:** The Proposal is conditional upon, among other things: (a) approval of the Proposal by the statutory majority of creditors as required under the BIA; (b) the Approval Order being issued in a form and substance satisfactory to the Company and the Majority Initial Consenting Debentureholders; (c) the Proposal Implementation Date occurring on or before December 31, 2020, or such later date as may be agreed to by the Majority Initial Consenting Debentureholders; (d) payment in full of all reasonable documented fees and expenses of the Debenture Trustee; (e) subject to the maintenance of a minimum cash balance, the Company shall have used its best efforts to pay the fees and expenses of the Consenting Debentureholder Advisor and the Other Debentureholder Advisors in full in cash, on the terms set out in the Proposal; (f) the Company's shares shall continue to be listed on a Canadian securities exchange acceptable to the Majority Initial Consenting Debentureholders; (g) the Support Agreement shall not have been terminated by the Majority Initial Consenting Debentureholders; and (h) the Company shall have delivered a certificate to the Proposal Trustee that the conditions precedent to the Implementation of the Proposal have been satisfied or waived.
- **Release:** Upon Implementation, the Affected Creditors will be deemed to have released and discharged all claims that arose prior to the Proposal Implementation Date against the Released Parties, being the Company, each affiliate and subsidiary, the Consenting Debentureholders, the Proposal Trustee, and each of their former and current officers, directors, principals, members, affiliates, limited partners, general partners, managed accounts or funds, fund advisors, employees, financial and other advisors, legal counsel, including legal counsel to the Special Committee and agents, each in their capacity as such.
- **Equity Claims:** Upon Implementation, all Equity Claims shall, and shall be deemed to be, irrevocably and finally extinguished and all Existing Equityholders shall have no further right, title or interest in and to their respective Equity Claims.

Transfers at Undervalue and Preferential Payments

20. As part of its statutory duties under the BIA, the Proposal Trustee conducted a review of the Company's bank statements and cancelled cheques for the twelve-month period (the "**Review Period**") immediately preceding the commencement of the proposal proceeding to identify transactions that could be considered preferences or transfers at undervalue. The Proposal Trustee focussed on transactions above \$25,000.

21. The Proposal Trustee did not identify any transactions in the Review Period that could be considered a preference or transfer at undervalue.

22. As discussed above in paragraph 19, the Proposal provides for releases against the Released Parties. To the extent that there are potentially reversible or reviewable transactions as defined by bankruptcy legislation, such transactions could not be pursued against the Released Parties to the extent that they were party to such transactions. As no such transactions were identified as a result of the Proposal Trustee's review, there is no prejudice to creditors in providing the release as it relates to these transactions.

23. The Proposal Trustee is not aware of any other causes of action against the Released Parties. As a result, the Proposal Trustee is not aware of any prejudice to creditors resulting from the releases.

Support Agreement

24. Pursuant to the Support Agreement, the Consenting Debentureholders agreed to vote all of their Relevant Debt in favour of the approval, consent, ratification and adoption of the Proposal, on the terms and conditions set out therein.

Amended Proposal

25. On December 8, 2020, with the support of the Supporting Debentureholders, the Company filed the Amended Proposal with the Official Receiver which contained the following amendments to the Proposal:

- (a) the term "New Secured Notes" in the Proposal was replaced with the term "New Senior Unsecured Notes"; and
- (b) the "New Senior Unsecured Notes" will not provide for any security interest in the assets of Nabis or the Guarantors (as that term is defined in the Amended Proposal).

26. With the exception of these amendments, the Amended Proposal is otherwise identical to the original Proposal.

27. On December 8, 2020, the Amended Proposal was filed with the Official Receiver and posted on the Proposal Trustee's website. Notice of the Amended Proposal was also sent on December 8, 2020 by email to certain of the Company's known non-Debentureholder creditors and on December 9, 2020 through a bulletin issued by The Canadian Depository for Securities Ltd. to the Participant Holders on behalf of the Debentureholders. A press release announcing the filing of the Amended Proposal was issued by the Company on December 10, 2020.

The Creditors' Meeting

28. The Creditors' Meeting was held on December 14, 2020.

29. In total, there were 67 voting Affected Creditors present, in person or by proxy. The Affected Creditors in attendance voted unanimously in favour of the Amended Proposal.

Notice of the Proposal Approval Hearing

30. In accordance with the provisions of the BIA, the Proposal Trustee sent the prescribed notice to creditors (section 58(b) of the BIA) on December 1, 2020 with respect to the hearing before the Court on December 21, 2020 for approval of the Amended Proposal, and filed with the Official Receiver the prescribed report (section 58(c) of the BIA). The notice was posted on the Proposal Trustee's website on the same day.

PART III – LAW AND ARGUMENT

A. Procedure on a Proposal

31. Pursuant to section 54(2)(d) of the BIA, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" vote at a duly constituted meeting of creditors:

the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors - other than, unless the court orders otherwise, a class of creditors having equity claims - vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution. (Emphasis added)

B. Test for Court Approval of a Proposal

32. Under section 59(2) of the BIA, the Court will refuse to approve a proposal where its terms are not reasonable or are not calculated to benefit the general body of creditors.

33. The following three-pronged test must be satisfied for court approval of a proposal under the BIA³:

³ [Mayer \(Re\)](#), 1994 CarswellOnt 268 (O.C.G.D. in Bkcy) [*Mayer*]; [Magnus One Energy Corp \(Re\)](#), 2009 ABQB 200 [*Magnus One*].

- (a) the proposal is reasonable;
- (b) the proposal is calculated to benefit the general body of creditors; and
- (c) the proposal is made in good faith.

34. The first two factors are set out in section 59(2) of the BIA, while the last factor has been implied by the Court as an exercise of its equitable jurisdiction.⁴

35. In considering the foregoing factors, it has been held that the Court should take into account not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality.⁵

36. The Court should accord substantial deference to the majority vote of creditors at a meeting of creditors.⁶

37. The Court should also accord substantial deference to the recommendation of the trustee on the proposal.⁷

38. The Proposal Trustee respectfully submits that the test for court approval of the Amended Proposal has been met for the reasons set out below.

i. The Terms of the Amended Proposal are Reasonable

39. Under the first branch of the test for sanctioning a proposal, the Court must be satisfied that the terms of the Proposal are “not unreasonable”.

⁴ [Mayer](#), *supra*.

⁵ [Magnus One](#), *supra*.

⁶ [Abou-Rached, Re, 2002 CarswellBC 1642 \(B.C. S.C.\)](#) [[Abou-Rached](#)]; [Magnus One](#), *supra*.

⁷ [Abou-Rached, Re](#), *supra*; [Magnus One](#), *supra*.

40. Courts have interpreted “reasonable” to mean the proposal can be carried out in accordance with its terms:

The court is authorized to approve only proposals which are reasonable and calculated to benefit the general body of creditors. “Reasonable” means that on a dispassionate view, the court is satisfied that the things proposed can, in fact, be carried out. The court, in other words, reviews the terms of the proposal in order to ensure that creditors have not, in their enthusiasm or lack of attention approved a proposal which is bound to fail.⁸

41. In its Report to Creditors, the Proposal Trustee provided its analysis as to the estimated distributions in the event of a bankruptcy. The estimated gross realizable value of the assets in a bankruptcy is approximately \$11.9 million, before costs of realization (selling and other professional costs). This represents an estimated recovery of up to 33¢ on the dollar, before attributing any residual value, if any, in the Company’s equity interest in Nabis AZ and costs of realization, including professional fees.

42. The Proposal Trustee recommended that the creditors vote in favour of the Amended Proposal as it is of the view that there is greater value to the Company’s creditors in the Amended Proposal than in a bankruptcy scenario for the following reasons:

- (a) Nabis AZ is the Company's only operating subsidiary. As a result of the recent regulatory changes in Arizona which legalized the recreational use of cannabis, Nabis AZ may have considerable value that is best realized through a continuation of the business and operations of Nabis AZ;
- (b) In the event of a bankruptcy, the equity interest in Nabis AZ is likely to be monetized by the bankruptcy trustee (“**Trustee**”). A sale by a Trustee is likely to

⁸ [*Booth \(Re\)*, 1998 CarswellOnt 2053 \(O.C.G.D., in Bkcy\)](#) [*Booth*]; [*Abou-Rached, Re*](#), *supra*.

be on an expedited basis as directed by the inspectors appointed in the bankruptcy estate. A bankruptcy would remove control of the business from the Company's management, whereas under the Amended Proposal the Company can undertake value maximization initiatives on an orderly basis;

- (c) In addition to the likely forced sale of the equity interest in Nabis AZ in a bankruptcy, a bankruptcy would eliminate the value of the Tax Losses, which could otherwise be used to shelter any future income or capital gains earned by the Company (to the extent permissible), and may also be an asset which is attractive to a purchaser of the Company. Additionally, the Company would lose the ability to use the Company's public listing to raise any further capital that the Company may require to grow or fund its business, as well as the public listing itself, which may have considerable value;
- (d) Implementation of the Amended Proposal will result in new management and a new Board of Directors being appointed. These individuals will have the opportunity to consider the best options to maximize the value of the Company's business, including the Nabis AZ business. The opportunity to consider multiple realization avenues for the benefit of the Company's creditors only exists if the Company avoids a bankruptcy. In a bankruptcy, those opportunities are lost and liquidation of the Nabis AZ interest is likely; and
- (e) A liquidation of the Company in a bankruptcy is the floor for recoveries in this proceeding, and the identical value could be realized if the Company is restructured through the proposal process. Approval of the Amended Proposal provides creditors with significant upside, including the benefit to grow and/or realize on the

assets of the Company on an orderly basis over time, plus the opportunity to take advantage of the Tax Losses and the public listing.

43. As such, it is respectfully submitted that the terms of the Amended Proposal meet the reasonableness standard under the test for court approval.

ii. The Amended Proposal is Calculated to Benefit the General Body of Creditors

44. Under the second branch of the test for sanctioning a proposal, the Court must be satisfied that the proposal is calculated to benefit the general body of creditors.

45. Courts have refused to approve proposals on this basis where, for example, the proposal serves the interests of persons other than the creditors; where there has not been full disclosure of the assets of the debtor and the encumbrance against those assets; or where the proposal, by its terms, is bound to fail.⁹ None of those circumstances are present in this case.

46. The acceptance of the Amended Proposal by a requisite majority of the Company's creditors is strong evidence of the benefit perceived by the general body of creditors.

47. As such, the terms of the Amended Proposal meet this branch of the test for court approval.

iii. The Amended Proposal is Made in Good Faith

48. As explained above, the principal purpose of this proceeding has been to create a stabilized environment to enable the Company to pursue a restructuring of its financial position, business and operations by completing a proposal.

⁹ [Abou-Rached](#), *Re, supra*.

49. The Amended Proposal will result in the Company having a recapitalized balance sheet, which should assist it to raise capital for the business of its subsidiaries.

50. In the opinion of the Proposal Trustee, the Amended Proposal has been made in good faith.

C. Other Relief

i. U.S. Securities Act Exemption

51. The Proposal Trustee seeks an order declaring that the terms and conditions of the exchange of securities under the Amended Proposal are fair to those to whom securities will be issued. The relief relates to the exemption provided under Section 3(a)(10) of the U.S. *Securities Act of 1933* (the “**Securities Act**”).

52. Section 3(a)(10) provides an exemption from registration under the Securities Act for offers and sales of securities in specified exchange transactions. Before the issuer can rely on the exemption, the following conditions must be met¹⁰:

- The securities must be issued in exchange for securities, claims, or property interests; they cannot be offered for cash;
- A court or authorized governmental entity must approve the fairness of the terms and conditions of the exchange;
- The reviewing court or authorized governmental entity must:

¹⁰ [U.S. Securities and Exchange Commission, Division of Corporation Finance, Staff Legal Bulletin No. 3A \(CF\) dated June 18, 2008.](#)

- find, before approving the transaction, that the terms and conditions of the exchange are fair to those to whom securities will be issued; and
- be advised before the hearing that the issuer will rely on the Section 3(a)(10) exemption based on the court's or authorized governmental entity's approval of the transaction;
- The court or authorized governmental entity must hold a hearing before approving the fairness of the terms and conditions of the transaction;
- A governmental entity must be expressly authorized by law to hold the hearing, although it is not necessary that the law require the hearing;
- The fairness hearing must be open to everyone to whom securities would be issued in the proposed exchange;
- Adequate notice must be given to all those persons; and
- There cannot be any improper impediments to the appearance by those persons at the hearing.

53. The Proposal Trustee respectfully submits that all of the foregoing conditions (other than the declaration of this Court) have been met in respect of the Amended Proposal and the motion before this Court to approve the Amended Proposal, and recommends that an order be issued declaring that the terms and conditions of the exchange of securities under the Amended Proposal are fair to those to whom securities will be issued.

54. In the opinion of the Proposal Trustee, the terms and conditions of the securities exchange are fair to those to whom securities will be issued under the Amended Proposal on the basis that:

- a. Affected Creditors will be receiving shares in a recapitalized company in exchange for their debt owed by the insolvent company;
- b. the process was transparent. On November 23, 2020, the Company issued a press release advising of the filing of the Proposal and calling of the meeting of creditors. On December 14, 2020, the date the Amended Proposal was accepted by the requisite majority of the Affected Creditors, the Company issued a press release disclosing that the Amended Proposal had been accepted by the Affected Creditors and that the court hearing for approval of the Amended Proposal would take place on December 21, 2020. This press release was posted to the Proposal Trustee's website; and
- c. the requisite majority of the Company's creditors have voted in favour of the Amended Proposal.

PART IV – RELIEF SOUGHT

55. For the reasons submitted above, the Proposal Trustee respectfully recommends an order substantially in the form attached as Schedule “B” to the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 15th day of December, 2020.



CHAITONS LLP

*Lawyers for KSV Restructuring Inc., solely
in its capacity as the Proposal Trustee*

SCHEDULE “A” – LIST OF AUTHORITIES

Mayer (Re), 1994 CarswellOnt 268 (O.C.G.D., in Bkcy)

Magnus One Energy Corp (Re), 2009 ABQB 200

Abou-Rached, Re, 2002 CarswellBC 1642 (B.C. S.C.)

Booth (Re), 1998 CarswellOnt 2053 (O.C.G.D., in Bkcy)

U.S. Securities and Exchange Commission, Division of Corporation Finance, Staff Legal Bulletin No. 3A (CF) dated June 18, 2008.

SCHEDULE "B" - STATUTORY PROVISIONS

Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3, as amended

Vote on proposal by creditors

54. (1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

Voting system

(2) For the purpose of subsection (1),

(a) the following creditors with proven claims are entitled to vote:

(i) all unsecured creditors, and

(ii) those secured creditors in respect of whose secured claims the proposal was made;

(b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose

(i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and

(ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);

(c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and

(d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Application for court approval

58. On acceptance of a proposal by the creditors, the trustee shall

(a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;

(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

(c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and

(d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

Court to hear report of trustee, etc.

59. (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Reasonable security

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Court may order amendment

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

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Court File No. 31-2691184

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