

**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 PALADIN LABS CANADIAN HOLDING INC. AND PALADIN LABS
INC.**

**APPLICATION OF PALADIN LABS INC. UNDER SECTION 46 OF THE *COMPANIES'*
CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

Applicant

**FACTUM OF THE AD HOC FIRST LIEN GROUP
(Motion for Appointment of Representative Plaintiff Returnable December 4, 2023)**

November 27, 2023

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PART I – INTRODUCTION

1. On August 16, 2022, Endo International plc (“**Endo Parent**”) and certain of its affiliates (collectively, the “**Debtors**”), including Paladin Labs Inc. (“**Paladin**” and together with Paladin Labs Canadian Holding Inc., the “**Canadian Debtors**”), commenced voluntary cases under chapter 11 of the United States Code (the “**Chapter 11 Cases**”) in the United States Bankruptcy Court for the Southern District of New York (the “**Bankruptcy Court**”). Pursuant to an Initial Recognition Order issued on August 19, 2022, the Chapter 11 Cases were found by this Court to constitute a “foreign main proceeding” under the provisions of the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) that govern the recognition of foreign insolvency proceedings.¹

2. Prior to the commencement of the Chapter 11 Cases, the Debtors had engaged in lengthy negotiation and diligence efforts with an ad hoc group consisting primarily of Prepetition First Lien Lenders and Prepetition First Noteholders (the “**Ad Hoc First Lien Group**”) that are owed nearly US\$5.9 billion out of a total of approximately US\$8.15 billion of funded indebtedness of the Debtors, such that, at the time of filing, the Debtors had entered into a restructuring support agreement with the Ad Hoc First Lien Group that contemplated a credit bid acquisition of substantially all of the Debtors’ assets. This bid served as a stalking horse bid (the “**Stalking Horse Bid**”; the purchaser in connection therewith, the “**Stalking Horse Bidder**”) in the sale process which ultimately took place in the Chapter 11 Cases (the “**Sale Process**”).²

3. The Sale Process did not identify any bid superior to the Stalking Horse Bid or allowing a repayment in full the principal amount of the Prepetition First Lien Indebtedness. Following an extensive negotiation and mediation process that was carried out pursuant to an order of the Bankruptcy Court (the “**Mediation**”), the transaction is now supported by several key stakeholders of the Debtors, including the Official Committee of Opioid Claimants (the “**OCC**”), the Official Committee of Unsecured Creditors, the representative for future claimants appointed by the Bankruptcy Court and His Majesty the King in Right of the Province of British Columbia and each of the Canadian provinces and territories.

¹ CCAA, [sections 44](#) and ff.

² Affidavit of Daniel Vas (Sworn August 17, 2022) at para. 11, Application Record returnable August 17, 2022, Tab 2.

4. In consideration for the OCC's support of the transaction, the Ad Hoc First Lien Group agreed, *inter alia*, to establish a trust funded with aggregate cash consideration of US\$119.2 million (the "**PPOC Trust**") for the benefit of present private opioid claimants. In the materials filed in support of his *Motion for a Representative Order* (the "**Motion**"), the plaintiff Jean-François Bourassa (the "**Quebec Plaintiff**") not only acknowledges that the "OCC has been appointed in the Chapter 11 Proceedings to represent the interests of all opioid victims"³, but also that a number of Canadian Personal Injury Claimants which the Quebec Plaintiff purports to represent will receive compensation from the PPOC Trust⁴.

5. The Motion seeking to appoint the Quebec Plaintiff to represent the interests of all Canadian Personal Injury Claimants in the Canadian Recognition Proceedings is opposed by the Ad Hoc First Lien Group on the grounds which have been comprehensively outlined in the Factum of the Foreign Representative dated November 27, 2023 (the "**Factum of the Foreign Representative**"). The Ad Hoc First Lien Group adheres to the summary of facts outlined in the Factum of the Foreign Representative and joins the arguments and submissions outlined therein. The purpose of the present factum is limited to presenting the perspective of the Ad Hoc First Lien Group on certain points without repeating the arguments set out in the Canadian Debtors' Factum.

PART II – SUBMISSIONS

A. The Quebec Plaintiff's Application is Founded on Untested Allegations

6. At its core, the Motion rests on untested and unproven allegations of a deliberate scheme, pursuant to which the Endo Parent would have "*delayed filing for bankruptcy protection for years while it shifted its debt onto subsidiaries, including Paladin, in an effort to erase, or at least diminish, the claims of victims harmed by use of its opioid products.*"⁵ These allegations essentially recycle the allegations set out by the OCC in the pleadings filed in the Bankruptcy Court on January 23, 2023, prior to the resolution of the OCC's objection in the Mediation process.⁶ Should this Court agree to the relief sought in the Motion, the extraordinary agenda set out by the Quebec Plaintiff includes, in addition to re-negotiating the compensation

³ Affidavit of Margo Siminovitch sworn October 16, 2023 ("**Siminovitch Affidavit**") at para. 7, Motion Record of the Quebec Plaintiff ("**MR**"), Tab 2.

⁴ Siminovitch Affidavit at paras. 28 and ff, MR Tab 2.

⁵ Siminovitch Affidavit at para. 25, MR Tab 2.

⁶ Siminovitch Affidavit at para. 38 and ff, MR Tab 2.

to be paid to Canadian Personal Injury Claimants, “[...] *petitioning this Court to revoke the recognition of the Chapter 11 Proceedings as the foreign main proceeding and to place Paladin under CCAA protection in Canada* [...]”.⁷

7. The Motion was filed on the basis of an unsupported hypothesis and constitutes a collateral attack on a series of orders rendered in the Chapter 11 Cases. It is also a blatant attempt at circumventing extensive negotiations that have concluded with the OCC and that culminated to a deal in which the Ad Hoc First Lien Group agreed to cause the Stalking Horse Bidder to pay substantial additional sums for the benefit of all private opioid claimants, including the Canadian Personal Injury Claimants.

8. More fundamentally however, the potential existence of a scheme of the sort alleged in the Motion, even assuming such a scheme existed (which is strictly denied), cannot be imputed to the Ad Hoc First Lien Group, seeing as there is no factual foundation to argue that the lenders who form part of that group are anything other than bona fide third-party creditors, or that they participated in the elaboration of this alleged scheme. In addition, even if such a scheme existed and could be proved, the security granted to the Ad Hoc First Lien Group would remain opposable and enforceable, such that in circumstances where these secured loans are in default and the Sale Process has confirmed that the value of the Debtors’ assets is insufficient to reimburse the Prepetition First Lien Indebtedness in full, this Court should deny the relief sought in the Motion.

B. The Prepetition First Liens are Valid and Enforceable

9. The Quebec Plaintiff complains about the lack of information in the CCAA Court record regarding the validity and enforceability of the guarantees and security granted by the Canadian Debtors to the Ad Hoc First Lien Group.⁸ It bears noting, however, as set out in the Factum of the Foreign Representative, that counsel for the Quebec Plaintiff has been in possession of the applicable credit agreements, guarantees and security documents in respect of the Prepetition First Lien Indebtedness since July 2023, yet no specific deficiencies with the guarantees or liens are alleged by the Quebec Plaintiff in its pleadings.⁹

⁷ Siminovitch Affidavit at para. 54(b), MR Tab 2.

⁸ Siminovitch Affidavit at paras. 35-36, MR Tab 2.

⁹ Factum of the Foreign Representative, at para. 15.

10. In fact, not only does the Quebec Plaintiff fail to allege any specific defects with respect to the guarantees and liens granted in favour of the holders of Prepetition First Lien Indebtedness, such security has in fact been found to be valid and enforceable during the course of the process that was carried out in the Chapter 11 Cases.

11. On October 27, 2022, the Bankruptcy Court entered the Cash Collateral Order, which contains certain “Debtors’ Stipulations” confirming, in no uncertain terms, that the Prepetition First Liens, which are the liens over the assets of the Debtors, including the Canadian Debtors securing the Prepetition First Lien Indebtedness, are (i) “valid, binding, properly perfected, enforceable, non-avoidable liens on and security interests in the Prepetition Collateral”, (ii) were granted for fair consideration, and (iii) are not subject to any challenge or attack. Any party that wished to challenge these stipulations was permitted to do so by January 10, 2023, being 75 calendar days after entry of the Cash Collateral Order (the “**Challenge Period**”).

12. The Quebec Plaintiff failed to file any objection by January 10, 2023. Instead, the Challenge Period passed without any contestation to the liens securing the Prepetition First Lien Indebtedness (except by the OCC and UCC, which have settled such disputes many months ago in March 2023), such that the Chapter 11 Cases have proceeded - and several orders have been granted - on the basis that the Prepetition First Liens¹⁰ are valid and enforceable.

13. Now, in an effort to circumvent the orders and deadlines imposed by the Chapter 11 Cases, the Quebec Plaintiff turns to this Court, after choosing not to file an objection or make representations in the Bankruptcy Court, to dismantle the building blocks of this global restructuring by requesting that Plaintiff’s Counsel be permitted to engage in an investigation to see if it can lodge an untimely contest to the validity of the Prepetition First Liens vis-à-vis Paladin, such that it can then petition this Court for unprecedented relief, whereby this Court will be asked to revoke its own order that recognized a foreign insolvency proceeding as a foreign main proceeding (well after the appeal period has lapsed) and subvert the long-standing order and jurisdiction of the Bankruptcy Court with respect to such matters.

¹⁰ These security interests are described in detail at paragraphs 70 and following of the Affidavit of Daniel Vas sworn on August 17, 2022, and include guarantees granted by the Canadian Debtors and securing the Prepetition First Lien Indebtedness.

14. As stated by this Court in the *Target* matter “[t]he CCAA process is one of building blocks. [...] During these proceedings, this court has made a number of orders. It is essential that court orders made during CCAA proceedings be respected [...] Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.”¹¹ The foregoing reasoning, although expressed in the context of a main CCAA proceeding, equally holds true – and in fact should be afforded even greater weight - in the recognition of foreign insolvency proceedings, in circumstances where the notions of comity and cooperation with foreign courts mandate deference towards the building blocks that are foreign orders and judgments.

15. Allowing the Quebec Plaintiff, at this stage, to institute a collateral attack on the Chapter 11 Cases and the orders rendered by this Court and the Bankruptcy Court runs contrary to the fundamental principle of finality essential to any restructuring process, in a manner that would suggest that binding decisions (including by courts presiding over main proceedings outside of Canada), processes and timelines need not be followed or can later be attacked. In particular, in this case, granting the relief sought by the Quebec Plaintiff would directly frustrate several developments that have taken place in the Chapter 11 Cases, including the Cash Collateral Order, the Bidding Procedures Order, the OCC Resolution Term Sheet and more fundamentally, the Initial Recognition Order. As noted by the Honourable David R. Collier, J.S.C. in the matter of *Re NMX Residual Assets Inc.*,¹² allegations or motions that “*directly attack the integrity of the CCAA procedure [...] constitute a collateral attack*” that cannot be permitted. Similarly, in the case at hand, the Quebec Plaintiff should not be permitted to dismantle the Chapter 11 Cases and the corresponding Canadian Recognition Proceedings, having chosen, up to this date, not to engage or contest any order or stage of said proceedings.

C. No Additional Representation for the Canadian Personal Injury Claimants is Warranted

16. The Quebec Plaintiff, being clearly dissatisfied with the projected recovery for Canadian Personal Injury Claimants pursuant to the PPOC Trust, yet having failed to timely identify any deficiencies in the Prepetition First Liens, requests that this Court appoint the Plaintiff’s Counsel to carry out an untimely investigation into a hypothesis pursuant to which the Debtors

¹¹ [Target Canada Co. \(Re\)](#), 2016 ONSC 316, at [para. 81](#).

¹² *Re NMX Residual Assets Inc. et al.*, 500-11-057716-199 (02-14-2022), Judgment of the Honourable David R. Collier, J.S.C. at para. 29, Book of Authorities, Tab 1.

implemented a series of inter-company transactions with Paladin which, they allege, “[...] appear to be part of the strategy to “uptier” Endo Parent’s debts and reduce opioid claimants’ potential recoveries.”¹³

17. The goal of the foregoing investigation includes unearthing facts which may justify a potential request to terminate the recognition in Canada of the Chapter 11 Proceedings as the foreign main proceeding and to place Paladin in its own distinct CCAA process, all of which, the Quebec Plaintiff argues, should be funded by the Canadian Debtors, or more accurately, from the collateral over which the holders of Prepetition First Lien Indebtedness hold their security. However, the Ad Hoc First Lien Group does not consent to its collateral being used to fund the payment of the fees of the two law firms which have been proposed to represent the Quebec Plaintiff.

18. In *Canwest Publishing*, Pepall J. (as she then was), highlighted that, among other factors, in assessing whether to appoint representative counsel, the Court should consider if there is no other counsel available to represent the interests, while avoiding a multiplicity of legal retainers.¹⁴

19. In the case at hand, the OCC already represents the interests of personal injury claimants, including the Canadian Personal Injury Claimants. The OCC has spent significant estate time and resources analyzing the Prepetition First Liens, while engaging in the Mediation and the process that ultimately culminated in the creation of the PPOC Trust. The OCC is already represented by competent legal counsel, the costs of which have already been borne by the Debtors’ estates from cash collateral over which holders of First Lien Indebtedness hold valid security. Had the Ad Hoc First Lien Group known at the time of the Mediation that an entirely distinct set of attorneys would be appointed to represent the Canadian Personal Injury Claimants in Canada in addition to the OCC, it would have certainly negotiated differently.

20. The approval of the retention of two additional law firms is not warranted at this late stage in the Chapter 11 Cases and would be unfair towards the creditors who are funding this restructuring through their consent to the Debtors’ use of their cash collateral. The debts owing to holders of Prepetition First Lien Indebtedness will not be repaid in full. In this context, as a

¹³ Notice of Motion of the Quebec Plaintiff at para. 22, MR Tab 1.

¹⁴ *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 6437, Book of Authorities, Tab 2.

matter of principle and without regard to the amount of funding requested, given that the OCC is already represented, there is no justification for funding the additional representation of the Quebec Plaintiff.

PART III – RELIEF REQUESTED

21. For all of the reasons sets forth above, as well as for the reasons outlined in the Factum of the Foreign Representative, the Ad Hoc First Lien Group requests that the Court dismiss the motion of the Quebec Plaintiff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of November, 2023.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. [Target Canada Co. \(Re\)](#), 2016 ONSC 316
2. *Re NMX Residual Assets Inc. et al.*, 500-11-057716-199 (02-14-2022),
Judgment of the Honourable David R. Collier, J.S.C
3. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 6437

**SCHEDULE “B”
RELEVANT LEGISLATION**

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

Cross-border Insolvencies

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company’s property;
and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

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Court File No. CV-22-00685631-00CL

Applicant

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SUPERIOR COURT OF JUSTICE
(Commercial List)**

Proceedings commenced at Toronto

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