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

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF A PLAN OF AND IN THE MATTER OF PALADIN LABS CANADIAN HOLDING INC. AND PALADIN LABS INC.**

# FACTUM
# (MOTION FOR A CCAA REPRESENTATION ORDER)

(Returnable December 4, 2023)

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(the "**Quebec Plaintiff**")

**Table of Contents**

## PART I – OVERVIEW

1. This factum is filed in support of the motion brought by counsel for the plaintiff in Quebec Superior Court file number 500-06-001004-197 (the "**Quebec Opioid Class Action**"), Jean-François Bourassa (the "**Quebec Plaintiff**"), requesting the appointment of the law firms of Fishman Flanz Meland Paquin LLP and Trudel Johnston Lespérance as co-counsel to the Canadian Personal Injury Claimants (defined below) in these CCAA proceedings (the proposed "**CCAA Representative Counsel**"), and, as necessary, in the related Chapter 11 proceedings (the "**Motion**").

2. Capitalized terms used in this factum but not otherwise defined have the meanings ascribed to them in the affidavit of Margo Siminovitch sworn October 16, 2023 (the "**Siminovitch Affidavit**") or the supplemental affidavit of Margo Siminovitch sworn November 17, 2023 (the "**Supplemental Siminovitch Affidavit**").

3. It is respectfully submitted that the CCAA Court has jurisdiction to appoint the Quebec Plaintiff as CCAA Representative and the proposed CCAA Representative Counsel to represent the Canadian Personal Injury Claimants in these proceedings, and that it is necessary to do so in order to protect the rights of Canadian victims. Such appointment will ensure that Canadian claimants have effective representation in these CCAA proceedings, and, if necessary, in the Chapter 11 Proceedings, prior to this CCAA Court considering whether it would be unjust to Canadian claimants to recognize any eventual approval of the proposed sale by the United States Bankruptcy Court for the Southern District of New York (the "**US Bankruptcy Court**").

4. Such appointment will also enable representative counsel to engage with various stakeholders with regard to obtaining information about issues specific to Canadian victims, to participate in negotiations to ensure the fair treatment of the Canadian claimants, to participate in any motion brought before this CCAA Court to recognize any approval by the US Bankruptcy Court of the proposed sale of the assets of the Endo Group (defined below), if so approved, and, if deemed appropriate, to ask that this Court revoke the recognition of the Chapter 11 Proceedings and place the Canadian Debtors under CCAA protection.

5. On August 16, 2022, Endo International plc (the "**Endo Parent**") and certain of its affiliates (collectively, the "**Endo Group**") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "**Chapter 11 Proceedings**") before the US Bankruptcy Court.

6. Paladin Labs Inc. ("**Paladin Labs**") and Paladin Labs Canadian Holding Inc. (collectively, the "**Canadian Debtors**" or "**Paladin**") were incorporated under the *Canada Business Corporations Act*, RSC 1985, c. C-44 (the "**CBCA**"). Paladin Labs was an extremely successful and profitable Canadian enterprise, having produced a 4,600% increase in value for its shareholders over the 19 years of its operation prior to its ultimate acquisition by Endo Group in 2014, in a deal estimated to be worth approximately $3.1 billion.[1] As alleged in various class actions instituted in Canada, the opioid products manufactured and sold by Paladin Labs caused devastating harm to individuals across this country who consumed these drugs (the "**Canadian Personal Injury Claimants**").

7. As early as 2014, the Endo Parent and certain of its affiliates were exposed to a number of lawsuits related to their opioid products, the start of a tsunami of opioid-related litigation.[2] However, the filing for bankruptcy protection was deliberately delayed until August 2022 in order to implement a strategic plan whereby inter-company transactions were effected to insulate the Endo Group from opioid-related claims and to intentionally reduce the assets available to opioid claimants.[3] This plan was intended to allow the Endo Group to continue its profitable operations with minimal or no compensation being paid to these claimants[4] and was to be accomplished by the sale of all of the assets of the Endo Group to the Ad Hoc First Lien Group (as defined in the Third Vas Affidavit).

8. An investigation conducted in the United States by the Official Committees uncovered the existence of this plan. However, on March 24, 2023, an agreement was reached with the Debtors (the "**OCC Agreement**"), which paved the way for the hearing for approval of the sale to proceed.[5] As well, the claims process put into place in the Chapter 11 Proceedings is highly prejudicial for

[1] Supplemental Siminovitch Affidavit, para. 42 and Exhibit I.
[2] Supplemental Siminovitch Affidavit, para. 32 and Exhibit H, p. F-43.
[3] Siminovitch Affidavit, paras. 22, 38 and 45.
[4] *Ibid*.
[5] Supplemental Siminovitch Affidavit, paras. 20.

Canadians. Even those whose claims are accepted will receive, at best, a meager amount of financial compensation for the serious harm that they suffered.

9. As explained below, neither Paladin Labs, in its capacity as the foreign representative, nor the Information Officer have advised this Court of the significant issues that have emerged in the Chapter 11 Proceedings that could undoubtedly affect the rights of Canadian victims.

10. The hearing for approval of the proposed sale of the Endo Group's assets is presently scheduled for December 21, 2023 before the US Bankruptcy Court.[6] In the event that the sale is approved, Paladin Labs, in its capacity as foreign representative, will seek recognition of the sale approval order in Canada.

11. Although counsel for the Quebec Plaintiff summarily tracked the evolution of the Chapter 11 Proceedings, the absence of representation of Canadian victims only started to become apparent after late July 2023. At that time, counsel for the Quebec Plaintiff was advised that no proofs of claim will be accepted that were filed on a class basis, the proof of claim filed by the Quebec Plaintiff will not be accepted, and the redacted OCC Proceeding was provided to counsel for the Quebec Plaintiff.[7] All of this information was very disturbing, especially because of the OCC's decision to enter into the OCC Agreement in late March 2023 despite its allegations of egregious fraudulent transactions conceived and implemented by the Debtors to deprive opioid claimants from obtaining a fair recovery.

12. The absence of transparency in the Chapter 11 Proceedings before this Court effectively obscured the fact that the Canadian Personal Injury Claimants' interests have not been represented.

13. The Quebec Plaintiff believes that the proposed sale and claims processes are severely prejudicial to the Canadian Personal Injury Claimants and that the appointment of representative counsel is necessary to protect the interests of Canadian victims.

[6] Supplemental Siminovitch Affidavit, para. 6.
[7] Supplemental Siminovitch Affidavit, para. 8.

## PART II - SUMMARY OF FACTS

### A. The Quebec Opioid Class Action

14. On May 23, 2019, the Quebec Opioid Class Action was instituted in the Quebec Superior Court against more than thirty entities (the "**Quebec Defendants**"), including Paladin Labs. The Quebec Defendants are sellers, manufacturers, marketers and/or distributors of opioid drugs.[8]

15. The authorization (certification) hearing was held in November 2022 and the decision on authorization of the Quebec Opioid Class Action will be issued shortly. The authorization hearing did not proceed against Paladin Labs in view of the stay of proceedings ordered by this Honourable Court on August 17, 2022[9]; however, the issues related to the authorization of the Quebec Opioid Class Action as against the other Quebec Defendants are the same as those in respect of Paladin Labs.

### B. The Chapter 11 and Foreign Recognition Proceedings

16. The filing of Chapter 11 Proceedings was largely triggered by the potential exposure of the Endo Group from the thousands of lawsuits related to its marketing and sale of prescription opioids, including those actions taken against Paladin Labs in Canada, which includes the Quebec Opioid Class Action.[10]

17. The CCAA Initial Application (returnable on August 17, 2022) was filed by Paladin Labs in its capacity as foreign representative of the Chapter 11 Proceedings, seeking the recognition of the Chapter 11 Proceedings as the Foreign Main Proceeding pursuant to Section 45 of the CCAA in respect of the Canadian Debtors. The Application was granted by this Court on the same day.

18. The CCAA Initial Application and the Vas Affidavit alleged that the Canadian Debtors are guarantors of the US$8.15 billion of funded indebtedness of certain members of the Endo Group

[8] Siminovitch Affidavit, para. 3.
[9] Siminovitch Affidavit, paras. 5-6.
[10] Siminovitch Affidavit, para. 9; Vas Affidavit, paras. 8 and 85(c).

of which approximately US$6.8 billion is secured and that such indebtedness "*will be a primary focus of the Company's [i.e., the Endo Group's] restructuring efforts in the Chapter 11 Cases.*"[11]

## C. The OCC Proceedings and Settlement

19. After their appointment in the Chapter 11 Proceedings, the Official Committees investigated the Debtors' pre-petition conduct, secured obligations and asset base of the Endo Group. This investigation led to the filing of the OCC Proceeding in January 2023, although at that time, the OCC's investigation was still on-going.[12]

20. The redacted OCC Proceeding (Exhibit B to the Siminovitch Affidavit), which was provided to counsel for the Quebec Plaintiff on July 28, 2023, includes the following allegations of fact in respect of the "secured debt" of the Endo Group:

(i) in and around 2014-2015, after opioid litigation against the Endo Parent and certain of its affiliates had commenced, a number of pharmaceutical companies were acquired which guaranteed the Endo Parent's debt and provided liens in support of the guaranteed debt, even though these entities apparently did not receive value for the guarantees and liens provided.[13] Later inter-company re-financings with these pharmaceutical companies are characterized as fraudulent transactions[14];

(ii) as early as April 2018, the minutes of an Endo Parent's board of directors meeting reveal a program code-named "Project Zed", which was intended to mitigate the Endo Group's financial exposure to opioid litigation through "*structural optimization*" of its debts and "***to drive down opioid claimants' potential recoveries in a bankruptcy***"[15] [Emphasis added];

(iii) as part of the Project Zed scheme, in March 2019 and June 2020, the Endo Parent's board of directors authorized the conversion of a total of US$2.96 billion of pre-existing **unsecured debt** (which did not mature for several years) into **secured debt** which was

[11] Siminovitch Affidavit, para. 10; Vas Affidavit, para. 7.
[12] Siminovitch Affidavit, para. 39 and Exhibit B to the Siminovitch Affidavit, para. 26.
[13] The OCC Proceeding, paras. 108-113.
[14] The OCC Proceeding, para. 10.
[15] The OCC Proceeding, paras. 95-96 and Exhibit E to the OCC Proceeding, paras. 2-4 and 41-44.

then both guaranteed and secured by the Endo Parent's subsidiaries, including the Canadian Debtors[16]; and

(iv) these inter-company transactions represented an overpayment of US$550 million in market value to noteholders, and increased the interest obligations in respect of such debt by US$53 million per year[17].

(v) in the initial refinancing effected in April 2017, the Canadian Debtors, as well as other subsidiaries, gave secured guarantees for the debts of the Endo Parent and certain of its affiliates, thereby refinancing **existing** US$3.415 billion of what had been unsecured term loans.[18] Notably, almost none of the allegedly secured debt matures before April 2027.[19]

21. While nothing in the OCC Proceeding indicates that the OCC considered the transactions involving the Canadian Debtors, it appears that the inter-company transactions with the Canadian Debtors were structured and had the same *modus operandi* as the alleged fraudulent transactions described in the OCC Proceeding.

22. The OCC Proceeding also revealed that Daniel Vas and Livio Di Francesco, directors of the Canadian Debtors, awarded themselves **prepaid** executive bonuses in contemplation of the filing for bankruptcy protection. The OCC specifically asserted that the payment of cash bonuses to these two insiders "*was the proximate cause, and a substantial factor, causing Paladin Labs (and the creditors of Paladin Labs) to suffer losses of more than [US]$2.1 million*".[20] This was part of a scheme whereby a number of executives and/or insiders of the Endo Group were paid approximately US$95 million of executive bonuses characterized by the OCC as "*fraudulent transactions and/or transfers*".[21]

[16] The OCC Proceeding, paras. 10, 85-97 and Exhibit E to the OCC Proceeding, paras. 38 and 54.
[17] Exhibit E to the OCC Proceeding, para. 56.
[18] Siminovitch Affidavit, para. 44 and Exhibit E to the OCC Proceeding, paras. 96-102 (Exhibit B to the Siminovitch Affidavit).
[19] Siminovitch Affidavit, para. 10; Vas Affidavit, para. 65.
[20] The OCC Proceeding, para. 309 and Exhibit D to the OCC Proceeding, paras. 9, 70-84, 305-306 and 309 Exhibit B to the Siminovitch Affidavit).
[21] Supplemental Siminovitch Affidavit, para. 18 and Exhibit B to the Siminovitch Affidavit, paras. 70-84.

23. Despite the egregious allegations of wrongdoing described in the OCC Proceeding, in March 2023, an agreement was reached with the Debtors (the "**OCC Agreement**"), which settled, *inter alia*, the OCC's objections to the proposed sale of Endo Group's assets.[22] However, by entering into the OCC Agreement, the OCC's investigation into the Debtors' affairs ended without pursuing the issues affecting the rights of Canadian claimants.[23]

### D. The Bidding Procedure Order and Bar Date Order

24. By way of a motion, on April 25, 2023, Paladin Labs, in its capacity as foreign representative, requested recognition of the therein defined Bidding Procedure Order and Bar Date Order (the "**Fourth Motion**").

25. The Third Vas Affidavit, filed in support of the Fourth Motion, alleged that on March 3, 2023, the US Bankruptcy Court was informed that agreements in principle were reached between the Debtors and various stakeholders, including the OCC Agreement.

26. Having settled with the OCC, the Debtors continued along the planned path of selling the assets of the Endo Group to the Stalking Horse Bidder.

27. Pursuant to the Stalking Horse Agreement (as defined in the Third Vas Affidavit), a credit bid would be made in the amount of US$5.9 billion for all of the secured assets of the Debtors (including the assets of the Canadian Debtors), and US$5 million for the unencumbered assets of the Debtors, by the holders of the pre-petition first lien indebtedness.[24] If no better offer was tendered, the Debtors would seek approval of the sale to the Stalking Horse Bidder.

28. On April 2, 2023, the US Bankruptcy Court granted the orders sought by the Debtors in the Fourth Motion. The Bidding Procedure Order provided that all of the Debtors' assets would be sold to the successful bidder and the Bar Date Order, *inter alia*, authorized the procedures for filing proofs of claim, the forms and the notice plan.

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[22] Supplemental Siminovitch Affidavit, para. 20.
[23] Supplemental Siminovitch Affidavit, para. 21.
[24] Siminovitch Affidavit, para. 13(d); Third Vas Affidavit, paras. 8 and 50 (a), (e).

29. The orders granted in relation to the Fourth Motion were subsequently recognized in Canada.

30. On June 20, 2023, the Debtors announced that there was no other interest in the purchase of their assets, that they had terminated the sale process, and that they would be seeking an accelerated sale hearing for approval of the sale the Endo Group's assets to the Stalking Horse Bidder.[25]

**E. The Projected Insufficiency of Any Recovery for Canadian Personal Injury Claimants**

31. To preserve the rights of the putative Quebec class members, the Quebec Plaintiff filed a without prejudice proof of claim prior to the Bar Date, even though the process did not provide for the filing of a proof of claim on a class basis.[26]

32. Counsel for the Quebec Plaintiff were advised by the OCC on July 24, 2023 that the proof of claim filed by the Quebec Plaintiff will not be accepted, as the claims process required the provision of details and supporting documents in respect of each class member that consumed Paladin Labs' opioid products individually,[27] which information is not available at this stage in the Quebec Opioid Class Action proceedings.

33. In addition, in order to participate in the trust and achieve any recovery from the sale of the assets of the Canadian Debtors, opioid victims must opt in and provide contractual releases of their claims in favour of, *inter alia*, the Stalking Horse Bidder, the Endo Group and its directors and officers,[28] some of whom were involved in the alleged fraudulent transactions and/or transfers referenced above.

34. Even assuming that their claims are accepted, the projected recovery pursuant to this claims process for Canadian Personal Injury Claimants is negligible. Of the maximum amount of US$119.2 million available to fund the trust being established for personal injury claimants, in

[25] Supplemental Siminovitch Affidavit, para. 5 and Exhibit A.
[26] Siminovitch Affidavit, para. 26.
[27] Supplemental Siminovitch Affidavit, para. 8.
[28] The OCC Resolution Term Sheet filed as Exhibit C to the Third Vas Affidavit.

July 2023 counsel to the OCC advised that only half of the trust funds will be distributed among direct personal injury victims[29] (i.e. a little less than US$60 million).

35. Based on recently provided information, nearly 90,000 Personal Injury Proofs of Claim were filed. The projected recovery per victim is therefore less than US$700 each.[30] To provide some perspective, it is worth noting that the Quebec Opioid Class Action is seeking compensatory damages of CDN$30,000 (plus interest and additional indemnity since 2019) to be paid to each class member as well as the amount of CDN$25 million in punitive damages to be paid by each of the Quebec Defendants, including Paladin Labs.[31]

36. Counsel to the OCC was also recently advised that less than 200 of the Personal Injury Proofs of Claim filed were made by Canadians, although the number of potential Canadian Personal Injury Claimants is estimated to be in the many thousands. Moreover, 200 claims only constitutes 0.22% of the claims filed by the Bar Date whereas, according to the CCAA Initial Application materials, in 2021 the Canadian operations accounted for 3% of the Endo Group's business.[32] No information has been provided as to what 3% represents in monetary terms.

## F. The Asserted and Unresolved Priority Claim of the United States Government

37. On July 18, 2023, the United States attorney for the Southern District of New York, on behalf of the Internal Revenue Service ("**IRS**"), filed an objection to, *inter alia*, the Debtors' motion for an order approving the sale of the Debtors' assets (the "**US Government Objection**"[33]). The US Government Objection alleges, *inter alia*, that:

(i) the proposed sale transaction is an abuse of the bankruptcy system that is plainly unlawful;

(ii) the purported "business purpose" for the sale "*is to avoid paying the priority and potential administrative tax claims that Congress has dictated must be satisfied to*

[29] Siminovitch Affidavit, para. 29.
[30] Siminovitch Affidavit, para. 30.
[31] Siminovitch Affidavit, para. 3 and Exhibit A, para. 2.3.
[32] Siminovitch Affidavit, para. 31; Vas Affidavit, para. 63 (c).
[33] Supplemental Siminovitch Affidavit, para. 22 and Exhibit E, respectively, paras. 2, 3 and 4 of the Preliminary Statement in the US Government Objection and paras. 17 and 26 of the US Government Objection.

*confirm such a plan, and to discharge fraud debts that Congress has deemed nondischargeable*";

(iii) the proposed sale transaction is "*structured so that certain preferred classes of junior creditors will receive substantial payments on account of their prepetition claims, while the Government's priority tax claims and other general unsecured claims will be left completely unsatisfied*";

(iv) the United States government filed a number of proofs of claim between January 19, 2023 and May 30, 2023, and asserted that certain of these claims are entitled to rank in priority under the US Bankruptcy Code; and

(v) if the proposed sale is approved, the first lienholders will simply replace Endo Group's current ownership and it will be "*business as usual for all Endo*".

38. The claims filed by the IRS are for approximately US$4 billion in total (priority unsecured claim of approximately US$3.5 billion and general unsecured claim of US$517 million).[34] The US Government Objection remains unresolved.[35]

39. While the IRS may have priority over the claims of all secured and unsecured creditors in the Chapter 11 Proceedings, including the claims of Paladin's creditors, it is clear that the impact of the US Government Objection cannot have any impact in Canada on the Canadian Debtors.

**PART III – ISSUES**

40. The issues in this Motion are set out as follows:

(i) are the interests of Canadian Personal Injury Claimants represented in the CCAA proceedings and in the Chapter 11 Proceedings?;

(ii) is it appropriate for this Honourable Court to appoint the Quebec Plaintiff as CCAA Representative Plaintiff and to appoint the proposed CCAA Representative Counsel to represent the Canadian Personal Injury Claimants in these CCAA proceedings, and, as necessary in the Chapter 11 Proceedings?; and

[34] Supplemental Siminovitch Affidavit, para. 24 and Exhibit E, para. 17.
[35] Supplemental Siminovitch Affidavit, para. 25 and Exhibit F.

(iii) in the circumstances, should the fees of the CCAA Representative Counsel be paid by the Canadian Debtors?

## PART IV – LAW AND ARGUMENTS

### A. The Canadian Personal Injury Claimants are Not Represented

41. While the OCC has described its role as a fiduciary for all holders of claims arising from harm caused by the Debtors' opioid products and practices in recognition of (…) "*the importance of providing thousands of* ***Opioid Claimants with the ability to participate in the Chapter 11 Cases*** *by and through an official committee"*[36] [Emphasis added], in fact it has not, and does not, represent the interests of Canadian Personal Injury Claimants.

42. Firstly, the American-centric focus of the OCC is apparent in reviewing the OCC's filings in the Chapter 11 Proceedings. For example, the OCC Proceeding provides statistical data about the impact of opioids on Americans,[37] but it contains no mention of the deaths, overdoses and the suffering experienced by Canadian victims as a result of opioid addiction and dependence. In fact, Canadians are the second largest consumers of opioids in the world (after the United States) and the Canadian government has declared opioid addiction to be a major health crisis in this country.[38]

43. Secondly, it is apparent from our review of the work of the OCC that it has not addressed any specific issues that impact Canadian victims. For example:[39]

(i) although the OCC Proceeding describes in detail the Project Zed scheme with respect to inter-company transactions with American subsidiaries, it makes no specific reference to the transactions of the same character entered into with the Canadian Debtors;

(ii) although requested by counsel for the Quebec Plaintiff, no information has been provided with regard to the validity and enforceability of the security given by the Canadian Debtors for the benefit of the Endo Parent pursuant to Canadian law, and this,

[36] Supplemental Siminovitch Affidavit, para. 26 and Exhibit G, para 1.
[37] Paras. 25 and 30 of Exhibit E to the OCC Proceeding (filed as Exhibit B to the Siminovitch Affidavit).
[38] Supplemental Siminovitch Affidavit, para. 29; Exhibit A to the Siminovitch Affidavit, para. 2.133 (referring to Exhibit P-4).
[39] Supplemental Siminovitch Affidavit, para. 33.

even though this issue has a potentially enormous impact on the rights of the Canadian claimants of Paladin Labs; and

(iii) the OCC has not distinguished Canadian claimants from American claimants, even though the alleged priority claims of the IRS only apply in the context of American law. In the context of the CCAA, this type of tax claim does not enjoy any priority over secured and unsecured creditors.[40]

44. Thirdly, none of the individual members of the OCC are Canadian,[41] and no Canadian counsel has been appointed to advise the OCC although the Canadian Debtors are well aware of various Canadian counsel who could have been called upon to serve on this supposedly representative committee.

45. Significantly, the CCAA Court has not been advised of the issues described above either by Paladin Labs, in its capacity as foreign representative, or by the Information Officer.

46. The Supplemental Order (Foreign Main Proceeding) dated August 19, 2022 in these proceedings includes the appointment of the Information Officer as an officer of this Court with the duty, *inter alia*, to report to the CCAA Court information about the status of the Foreign Proceeding, "*which reports may include information relating to the Property, the Business,* ***or such other matters as may be relevant to the proceedings herein***".[42] [Emphasis added] Although the Information Officer reported that it reviewed the OCC Proceeding, it has not advised this Court about the issues raised therein that affect, or could affect, Canadian creditors or how the subsequent resolution of the OCC's objection is prejudicial for Canadian victims.

47. The facts are this case are clearly distinguishable from the case of *Voyager Digital*, wherein Justice Kimmel disagreed with the suggestion that, without the appointment of representative

[40] As the SCC explained in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 45 [***Century Services***], unless there is an express provision in the tax legislation, the tax claim does not enjoy a preferred treatment under the CCAA. For example, the GST legislation does not include such a clear and express provision.
[41] Supplemental Siminovitch Affidavit, para. 14 and Exhibit C, para 4.
[42] Para. 12(b) of the Supplemental Order. Note that, in *Digital Domain Media Group, Inc. (Re)*, 2012 BCSC 1565 at para. 32, the Court noted that "*The proposed role of …* [Information Officer] *is to provide information to not only this court, but to other creditors and stakeholders as may be appropriate.* ***To some extent, this role is similar to the role of a monitor in CCAA proceedings***." [Emphasis added]

counsel, there was no opportunity for uniquely situated Canadians in the Foreign Proceeding to be represented in the subject proceedings. She explained that the Information Officer had been appointed: *"to keep the court apprised of any concerns that are specific to Canadian stakeholders that may arise in the context of future recognition orders sought from this court*" and that *"[T]he concerns raised by opposing counsel, at some level, seem to presume that the Information Officer will fail to recognize and bring concerns to the court's attention in the future …*".[43] In *Voyager Digital*, Justice Kimmel considered that the concerns being expressed were premature and speculative.

48. In contrast, the present Motion is neither premature nor speculative, given that this Court has not been apprised of the significant issues relevant to Canadian stakeholders as described above. As well, no information was found in the CCAA materials that is publicly available in this Court record that explains:

(i) the circumstances surrounding the provision of the guarantees and security given by the Canadian Debtors in light of the timing of such transactions and their effect on the solvency of the Canadian Debtors;

(ii) the consideration, if any, received by the Canadian Debtors, in connection with the guarantees and security;

(iii) the findings of any investigation performed (if done) of the validity and enforceability of the guarantees given by the Canadian Debtors under Canadian law and any assessment as to whether the assets of the Canadian Debtors are properly included in the proposed sale or whether they should be available to satisfy the claims solely of Canadian creditors.

49. This information is critical so that this Court may be advised of the consequences for Canadians of any sale order it is asked to recognize.[44] For example, if these guarantees and security are not valid, or otherwise unopposable to the Canadian Personal Injury Claimants, then the assets

[43] In *The Matter of Voyager Digital Ltd.*, 2022 ONSC 4553 at paras. 47 to 48.
[44] In *Digital Domain Media Group, Inc. (Re)*, 2012 BCSC 1567, the information officer had advised the CCAA Court of how the sale was advantageous for Canadian creditors. That information assisted Justice Fitzpatrick that they would not suffer any prejudice by reason of the sale process and that recognition of the sale order was appropriate.

of the Canadian Debtors cannot be included in the proposed sale and a substantially greater recovery may be available to Canadian victims through the assets of the Canadian Debtors.

50. In the present case there is a need for representative counsel to ensure that this Court is made aware of the issues that have arisen in the Chapter 11 Proceedings so the Court can determine whether the Canadian stakeholders are being treated with substantive fairness. In the Third Report of the Information Officer, it is simply asserted (at p. 13) that "*Canadian stakeholders are treated in the same manner as US stakeholders …*". Even if this statement was correct (which is denied), being treated the same does not, in the circumstances, equate to being treated fairly and equitably. As stated by the former Supreme Court of Canada Chief Justice Beverley McLachlin: "*Substantive equality recognizes the fallacy of formal equality*".[45]

## B. This Court has Jurisdiction to Appoint Representative Counsel

51. The jurisdiction of Canadian courts to appoint representative counsel in insolvency proceedings pursuant to section 11 of the CCAA and Rule 10.01 of the *Rules of Civil Procedure*[46] "*is undoubted*".[47] Section 11 of the CCAA gives this Court broad discretion "*to make any order that it considers appropriate in the circumstances*" and Rule 10.01(f) of the *Rules of Civil Procedure* permits courts to appoint one or more persons to represent any person or class who are otherwise "*unascertained or have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served*"[48], where it is "*necessary or desirable*" to do so.

52. By way of example, Justice Morawetz (as he then was) in *Nortel* affirmed that "*the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.*"[49]

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[45] "*Equality: The Most Difficult Right*", The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 14. (2001), 2001 CanLIIDocs 388.
[46] R.R.O. 1990, Reg. 194.
[47] *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 22 at para. 13 [***Roman Catholic***]
[48] *JTI-Macdonald Corp., Re*, 2020 ONSC 61 at paras. 19 [***JTI-Macdonald***].
[49] *Nortel Networks Corporation (Re)*, 2009 CanLII 26603 (ON SC) at para. 12 [***Nortel***]. See also *Fraser Papers Inc., Re*, 2009 CanLII 55115 (ON SC) at para. 7 [***Fraser Papers***].

53. This Court has previously appointed representative counsel for Canadian claimants in Canadian proceedings that relate to foreign main proceedings instituted under Chapter 11 of the U.S. Bankruptcy Code.[50] Undoubtedly, this Court has jurisdiction to appoint representative counsel to represent the Canadian Personal Injury Claimants in these CCAA proceedings and, as necessary, in the Chapter 11 Proceedings.

### C. It is Appropriate to Appoint the Proposed CCAA Representative Counsel

54. In considering whether it is appropriate to appoint representative counsel, the following non-exhaustive, but somewhat overlapping, list of factors (often referred to as the "Canwest factors") are considered by the courts:[51]

(i) the vulnerability and resources of the group sought to be represented;

(ii) any benefit to the companies under CCAA protection;

(iii) the facilitation of the proceedings and efficiency;

(iv) any social benefit to be derived from representation of the group;

(v) the avoidance of a multiplicity of legal retainers

(vi) whether representative counsel has already been appointed to those who have similar interests to the group seeking representation and is prepared to act for the group seeking the order;

(vii) the balance of convenience and fairness; and

(viii) the position of other stakeholders.

55. The applicability of a number of these factors in the circumstances of the particular proceedings justifies appointing representative counsel.[52] By way of illustration, in *Target,* Justice Morawetz (as he then was) approved the appointment of representative counsel and the payment of the fees for such counsel by the applicants, taking into account four of the Canwest factors,

[50] For example: *Grace Canada, Inc. (Re)*, 2008 CanLII 54779 (ON SC); *Fraser Papers*, *supra* note 49.
[51] *Canwest Publishing Inc. (Re)*, 2010 ONSC 1328 at para. 21 [***Canwest***]; *Roman Catholic* , *supra* note 47 at para. 24.
[52] *Karasik v Yahoo! Inc*., 2020 ONSC 1440 at para. 19.

being: (i) vulnerability and resources; (ii) the social benefit; (iii) the avoidance of legal retainers; and (iv) the balance of convenience and whether it is fair and just to creditors of the estate.[53]

### *(i) The vulnerability and resources of the group*

56. The vulnerability and resources of the proposed represented group is an important factor that militates in favour of the appointment of representative counsel.[54]

57. Addiction and dependence have destroyed the lives of millions of opioid victims and it is evident that the Canadian Personal Injury Claimants are an especially vulnerable group. These individuals are located across the country, most of whom, without the appointment of representative counsel, would not have the resources or ability to effectively participate or advance their claims within these complex proceedings.

58. Without effective representation, Canadian claimants will see their claims against Paladin Labs extinguished for no value or *de minimus* value and therefore these victims will benefit from the appointment of representative counsel.

### *(ii) Social benefit derived from representation of the group, including access to justice*

59. The opioid epidemic has affected every region in Canada, driven in part by pharmaceutical companies like Paladin Labs. The appointment of the proposed CCAA Representative Counsel (and the proposed CCAA Representative) will provide a social benefit by ensuring that the interests of the Canadian Personal Injury Claimants are effectively and fairly represented and their concerns are brought to this Court's attention before the Court is asked to recognize a sales approval order issued by the US Bankruptcy Court.

60. While insolvency law seeks to assist financially struggling companies to emerge successfully from protection orders, it is important that mechanisms exist to ensure that this objective is not achieved by corporate strategies designed specifically to avoid providing compensation to the victims of these companies' wrongdoing. As stated by the Supreme Court of Canada: *"... the requirements of appropriateness, good faith, and due diligence are baseline*

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[53] *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 61 [***Target***].
[54] *Canwest*, *supra* note 51 at para. 21.

*considerations that a court should always bear in mind when exercising CCAA authority. (...)* ***I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs****. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and* ***all stakeholders are treated as advantageously and fairly as the circumstances permit***."[55] [Emphasis added]

61. The fact that none of the Canadian opioid-related class actions are certified is not an obstacle to the appointment of representative counsel. For example, in the context of the on-going Canadian tobacco-related CCAA proceedings, the proposed representative counsel was appointed because not all of the individuals with an interest in the CCAA proceedings were represented by counsel.[56] Justice McEwen granted the motion to appoint representative counsel presented by the monitors to represent all individuals who assert or may be entitled to assert a claim or cause of action as against one or more of the applicants.[57] The context was analogous to the present proceedings in that the applicants had sought protection in the face of a multitude of lawsuits instituted by governments, individual and class actions (certified and uncertified). On the issue of access to justice, Justice McEwen stated that: "*The social benefits of access to justice, in the facilitating of a complex restructuring, are met. At this time many of the TRW Claims* ***are unascertained and unasserted. As such, many of the TRW Claimants are likely unaware of these CCAA proceedings****. The Representation Order sought would further promote access to justice by giving the TRW Claimants a* ***powerful, single voice in the process***."[58] [Emphasis added]

62. One of the main purposes of representative proceedings is: "*to provide effective communication with stakeholders and ensure their interests are brought to the attention of the Court and other CCAA participants.*"[59] Without "*a powerful, single voice in the process*", the Canadian Personal Injury Claimants will be denied access to justice in these CCAA proceedings and it is likely that their interests will be entirely subsumed by the Chapter 11 Proceedings.

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[55] *Century Services, supra* note 40 at para. 70.
[56] *JTI-Macdonald, supra* note 48 at para. 4. See also *Cash Store Financial Services*, 2014 ONSC 4567 at para. 18, 26-27 [***Cash Store***].
[57] *JTI-Macdonald, supra* note 48 at paras. 25 and 34.
[58] *JTI-Macdonald, supra* note 48 at para 30.
[59] *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65 at paras. 9.

63. In the *Rising Phoenix* case, the Court granted the application to appoint representative counsel. As set out in the application, without such representation,: "*the Students' interests can be easily overwhelmed by that of other deep-pocketed parties with competing interests. It is in the interest of justice to insure that the Students, who have a real interest in the current CCAA proceedings and their outcome, are able to actively participate in the CCAA Proceedings …".*[60]

***(iii) Whether representative counsel has already been appointed to those who have similar interests to the group seeking representation and is prepared to act for the group seeking the order / multiplicity***

64. No other Canadian counsel has sought to be appointed representative counsel for the Canadian Personal Injury Claimants. This is not a situation like *Nortel* where counsel from five different law offices requested that they be appointed as representative counsel of, in that case, groups of employees (including former and current non-unionized employees, terminated employee and retirees).[61] In *Nortel*, Justice Morawetz (as he then was) concluded that effective representation could be accomplished by the appointment of a single representative counsel.[62]

65. The proposed CCAA Representative Counsel are knowledgeable and experienced in these types of claims. The law firms of Fishman Flanz Meland Paquin LLP and Trudel Johnston Lespérance are leading firms in the areas of insolvency and class actions, respectively, and would represent the interests of Canadian victims effectively and efficiently. For example, these firms currently act as co-counsel for the Quebec Class Action Plaintiffs in the extremely complex tobacco-related CCAA proceedings and are deeply involved in the efforts to devise a fair and equitable global resolution of the litigation. Counsel for the Quebec Plaintiff have the necessary language capability[63] and are well placed to advocate on behalf of all Canadian victims, and not just the Quebec victims. The appointment of the proposed CCAA Representative Counsel will ensure that all Canadian victims are represented with consistency.

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[60] *Application for the Issuance of a Student Representation Order* dated February 9, 2022 in *Re Rising Phoenix International Inc*. (Montreal 500-11-060613-227 (Commercial Division)), para. 30 (For reference purposes only).
[61] *Nortel*, *supra* note 49 at para. 3.
[62] As author J. Carhart notes, as the *Nortel* case evolved, conflicts of interest among the groups of employees became more apparent and other representative counsel were appointed: "*The Role of Representative Counsel in Canadian Insolvency Proceedings*" (February 2013) 30:1, National Insolvency Review at p. 6.
[63] *Fraser Papers*, *supra* note 49 at para. 15.

66. The proposed CCAA Plaintiff has been active as the putative class representative in the Quebec Opioid Class Action[64] and has agreed to assume the role of CCAA Representative Plaintiff in these proceedings on behalf of all Canadians who have been harmed by their use of Paladin Labs' opioid drugs.

67. There is no issue of conflict that would arise with the appointment of the proposed CCAA Representative Counsel. None of the Canadian opioid-related class actions naming Paladin Labs as a defendant have been certified and it is well settled that, until certification, proposed class members are not in a solicitor-client relationship with plaintiffs' counsel.[65] The Quebec Opioid Class Action is the most advanced of the Canadian class actions (the two-week hearing on authorization (certification) was held a year ago) and many other interlocutory matters have been pleaded and ruled upon by the Quebec Court.

***(iv) The balance of convenience and fairness***

68. As stated by the Supreme Court of Canada in *Sun Indalex*: "*... it is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to provide a constructive solution for all stakeholders when a company has become insolvent.*"[66]

69. In the context of cross-border insolvency proceedings, the CCAA Court should "*consider the interests of stakeholders in this country and the impact, if any, that may result from the relief requested.*"[67] The principles of comity and cooperation between jurisdictions do not prevent a Canadian judge from exercising his/her discretion when the recognition of a foreign order by a Canadian court could result in the confiscation of the rights of Canadians, for example, where the court concludes that there is an "*absence of good faith and respect for the Canadian public interest, represented by the Court and the regulatory authorities*".[68] Indeed, the Courts have confirmed that a recognizing court should not defer to the foreign court where doing so would result in an injustice

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[64] Siminovitch Affidavit, paras. 4 and 55 and Exhibit A, para. 2.239.
[65] *Pearson v. Inco Ltd.*, 2001 CanLII 28084 (ON SC) at para. 18.
[66] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 205.
[67] *Lear Canada (Re)*, 2009 CanLII 37931 (ON SC) at para. 18 [***Lear***].
[68] *Stanford International Bank Ltd. (Syndic de)* 2009 QCCS 4106 at para. 61, leave to appeal the Court of Appeal dismissed (2009 QCCA 2475), and leave to appeal the SCC dismissed (2011 CanLII 82381 (SCC)).

to the creditors in the recognizing state.[69] Moreover, section 61(2) of the CCAA provides that: "*Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy*".

70. In this case, the OCC uncovered, *inter alia*, a scheme involving the inter-company transfers of debt purposely designed to avoid providing compensation to opioid claimants and to set up the eventual sale of the Endo Group's assets as is presently contemplated in the Chapter 11 Proceedings. The facts that are alleged in the OCC Proceeding support this Court drawing an inference that the inter-company transactions with the Canadian Debtors were part of the "Project Zed" scheme. In addition, the OCC Proceeding directly alleged that the pre-payments of cash bonuses to the Canadian Debtors' directors constituted fraudulent transfers.[70] As recently stated by the Ontario Court of Appeal: "*The types of facts to support an inference of such an intention to convey property away from creditors – present or future – are often described as "badges of fraud*"".[71]

71. At the very least, the net effect of the inter-company activity described in the Vas Affidavit was to significantly devalue Paladin Labs, a historically profitable Canadian company, and the actions and conduct of the Endo Group with regard to the Canadian Debtors warrants assessment in order to ascertain whether there was any sufficient legitimate corporate reason for the guarantees and liens provided by the Canadian Debtors, other than to defeat the rights of Canadian victims. The assumption of a parent company's debt is concerning where there is no legitimate corporate purpose for foisting the debt of the parent company onto what had been a solvent and profitable Canadian company with its own creditors, and rendering it insolvent.[72] Indeed, directors and officers must "*exercise the care, diligence and skill that a reasonably prudent person would*

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[69] *Canadian Imperial Bank of Commerce v. ECE Group Ltd.*, 2001 CanLII 28442 (ON SC) at paras. 10-11; *Lear, supra* note 67 at para. 18; *Payless Holdings LLC (Re)*, 2017 ONSC 2321 at para. 43, the Court, in recognizing a foreign DIP Order, considered whether doing so would alter the *status quo* and make any creditor group worse off.
[70] Exhibits D and F to the OCC Proceeding.
[71] *Ontario Securities Commission v. Camerlengo Holdings Inc.*, 2023 ONCA 93 at para. 11.
[72] *Palmer v Carling O'Keefe Breweries of Canada Ltd.*, 1989 CanLII 4355 (ON SC). The Court found that the imposition of acquisition debt on a corporation after a leveraged buyout serves no valid business purpose of the corporation and was oppressive to the preferred shareholders.

*exercise in comparable circumstances*."[73] These issues were not addressed by the OCC, and will never be addressed by them in view of the OCC Agreement.

72. In 2015, Justice Schrager of the Quebec Court of Appeal considered the nature of inter-corporate transactions involving the transfer of monies from the Canadian tobacco companies to their respective foreign parent companies in the context of a request that security for an appeal be furnished. He noted that the trial judge had characterized ""t*he tangled web of interconnecting contracts" as a creditor proofing exercise*". Justice Schrager stated that the companies had "*structured their affairs in a manner that drastically, if not completely, reduces their exposure to satisfy any substantial condemnation that might be made against them (…) The structure and* modus operandi *was put in place years ago because no doubt Appellants could observe the seriousness of the case (…)*".[74]

73. It is evident that the strategies employed by the Debtors in the present case, such as the Project Zed scheme, were a direct consequence of their recognition of the seriousness of the mounting opioid-related litigation. If the Canadian Debtors' assets were strategically deployed for the purpose of liberating the Endo Group's substantial debt while driving down the recoveries available to Canadian victims, as appears and/or can be inferred from the OCC Proceeding, then the proposed sale would result in an injustice to the Canadian Personal Injury Claimants, and should not be approved in Canada.

74. Accordingly, the appointment of a representative counsel is essential in order to ensure that this is a "live issue" before the CCAA Court when it is called upon to approve the sale of the Canadian Debtors' assets as part of the proposed sale of the Endo Group's assets.

75. In addition to the issue of substantive unfairness vis-à-vis Canadian victims that may not be addressed without the appointment of representative counsel, there is also a serious issue with procedural unfairness that affects this group of claimants.

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[73] *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68 at para. 57; Legislative Summary – LS-389E published by the Parliamentary Research Branch of the Parliament of Canada, issued February 23rd, 2001 and revised June 11, 2001. In that document, the authors' state at p. 4: "*Despite this repeal* [s. 44 CBCA]*, directors dealing with such transactions are subject to statutory fiduciary duties to act in the best interest of the corporation and can be sued for failing to do so*".

[74] *Imperial Tobacco Canada Ltd. c. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1737 at paras. 30 and 44.

76. As mentioned above, the claims process developed in the Chapter 11 Proceedings is prejudicial for Canadian claimants, as it did not allow for claims to be filed on a class-wide basis. This is inconsistent with Canadian law where claims in a CCAA context are routinely permitted to be filed on a class-wide basis. For example, in the *Sino-Forest* case, the claim procedure provided for only one proof of claim to be filed in respect of the substance of the matters set out in the Quebec class action and another one with respect to the Ontario class action.[75] Justice Morawetz (as he then was) confirmed that: *"... claims arising out of the class proceedings are claims in the CCAA process."*[76]

77. Given the early stages of the opioid-related litigation in Canada,[77] it is likely that most of these potential claimants are unaware of the process[78] that is unfolding with respect to the Chapter 11 Proceedings. Indeed, the small number of proofs of claim filed by Canadians suggests that the majority of Canadian victims remain unaware of the Chapter 11 Proceedings and the process that was developed for filing claims in the United States.

78. With the appointment of representative counsel, this Court will be able to consider whether the rights of the Canadian Personal Injury Claimants are being unduly prejudiced in the Chapter 11 Proceedings.

## D. Payment of the Fees and Disbursements of Proposed Representative Counsel

79. Pursuant to section 11 of the CCAA, the Court has the authority to order that the fees of representative counsel be paid by the debtor applicant and may, in an appropriate circumstance, order that the fees and expenses of such counsel rank in priority over the

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[75] *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078 at para. 35 [***Sino-Forest***], leave to appeal to the Court of Appeal dismissed (2013 ONCA 456), leave to appeal to the SCC dismissed (2014 CanLII 11054 (SCC)).

[76] *Sino-Forest*, *ibid* at para. 41; See also the Initial Order dated March 12, 2019 in *Imperial Tobacco Canada Limited, et al, Re*, (March 12, 2019), Toronto, Ont Ct J [Commercial List] CV-19-616077CL (Initial Order of McEwen J), para. 4 (g), (h) and (j) in which Justice McEwen, included the Quebec Class Action within the definition of a "Tobacco Claim".

[77] Vas Affidavit, para. 112: A table summarizes the eight Canadian Opioid Lawsuits involving Paladin and/or related entities. The first opioid-related class action in Canada against the pharmaceutical companies, including the Canadian Debtors, was instituted on May 15, 2019.

[78] *JTI-MacDonald*, *supra* note 48 at para 30.

claim of any secured creditor of the company when such charge is necessary for their effective participation in the proceedings.[79]

80. In *Nortel*, Justice Morawetz (as he then was) confirmed that the discretion pursuant to s. 11 of the CCAA empowers the Court to order legal and other professional expenses of representative counsel to be paid from the estate of the debtor applicant.[80]

81. In *Fraser Papers*, as was the situation in *Nortel*, the request to appoint representative counsel was made in the context of employees. Justice Pepall concluded that it was in the interests of justice that one firm be appointed as representative counsel and that the firm's fees be paid by the applicants.[81]

82. When it is fair and appropriate to do so, the Courts have ordered that the fees of representative counsel be paid by the debtor applicant in contexts other than employee groups, including groups of investors[82], students[83] and otherwise unrepresented claimants[84].

83. By way of illustration, and as summarized above, representative counsel was appointed in the tobacco-related insolvency proceedings for individuals who were not represented in the certified class actions. These individuals lacked the financial means and/or ability to engage in the complex proceedings without the assistance of representative counsel. Justice McEwen ordered that the appointed representative counsel would be among the parties "*who shall be paid their reasonable professional fees and disbursements in each case on an hourly basis (...) and among those who benefit from the Administration Charge (...) and shall be paid by the Applicants in accordance with an agreement among the Applicants.*"[85]

84. As another example, in the *Rising Phoenix* case, decided in 2022, Justice Collier ordered that the applicants pay the reasonable fees and disbursements of representative counsel to protect the interests of enrolled students whether such fees and expenses were incurred before or after the

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[79] Section 11.52 of the CCAA.
[80] *Nortel*, *supra* note 49 at para. 12.
[81] *Fraser Papers*, *supra* note 49 at paras. 7 and 18.
[82] *League Assets Corp. (Re),* 2013 BCSC 2043.
[83] *Re Rising Phoenix International Inc*., (February 15, 2022), Montreal 500-11-060613-227 (QC SC) (Collier J).
[84] *Imperial Tobacco Canada Limited, et al, Re,* (December 9, 2019), Toronto, Ont Sup Ct J [Commercial List] CV-19-616077CL (McEwen J).
[85] *Ibid* at para 7.

date of the order. In that case, the debtors provided student recruitment and other services to mostly international students. The application for a representative order asserted that the debtors' initial application failed to highlight relevant information, that the CCAA proceedings had a highly prejudicial impact on the students, and that: "*the Students have not had an opportunity, and do not have the means, to be adequately represented in the CCAA Proceedings, the result of which has and will have a major impact on their lives …*".[86]

85. Similarly, the Chapter 11 Proceedings could have a highly prejudicial impact on thousands of Canadians who were harmed by Paladin Labs' opioid products. The Canadian Personal Injury Claimants, as individuals, do not have the means nor knowledge to participate meaningfully in these complex multi-jurisdictional proceedings, and require representative counsel to do so on their behalf, especially as it is clear that Paladin Labs', in its capacity as foreign representative, Initial Application failed to highlight information relevant to this group and to this Court.

86. The cost of such representation should be borne by the Canadian Debtors.

87. As has been stated by the CCAA Courts, motions to appoint representative counsel "*are very fact-specific*".[87] In the present case, the Endo Group is already paying the fees for many groups of counsel ostensibly to protect the interests of various groups of claimants affected by the Chapter 11 Proceedings. As appears from Orders filed in the Chapter 11 Proceedings on May 8 and October 4, 2023, the Debtors are paying: (i) the fees and expenses of their own counsel and other professionals; (ii) the fees and expenses of counsel and other professionals retained by the OCC; and (iii) the fees and expenses of counsel for the other committees of creditors and their professional advisors. In the aggregate, the fees to be paid by the Debtors to professionals for the periods from August 16 to December 31, 2022 and from January 1 to April 30, 2023, exceed US$140 million.[88] As well, as appears from the CCAA Initial Order, the fees of the Information Officer and its legal counsel are being paid by the Canadian Debtors. There is no reason for the representative counsel's fees to be treated any differently.

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[86] *Application for the Issuance of a Student Representation Order* dated February 9, 2022 in *Re Rising Phoenix International Inc*. (Montreal 500-11-060613-227 (Commercial Division)), para. 4 (For reference purposes only).
[87] *Cash Store*, *supra* note 56 at para. 25.
[88] Supplemental Siminovitch Affidavit, para. 43 and Exhibit J.

## PART IV – ORDER REQUESTED

88. For the reasons set out above, counsel for the Quebec Plaintiff request that this Court grant the CCAA Representation Order. The requested relief is necessary and appropriate in the circumstances.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 17th day of November, 2023.

Fishman Flanz Meland Paquin

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Members

**SCHEDULE "A"**

**LIST OF AUTHORITIES**

| ***Tab*** | ***Description*** |
|---|---|
| 1. | *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 |
| 2. | *Digital Domain Media Group, Inc. (Re)*, 2012 BCSC 1565 |
| 3. | *In The Matter of Voyager Digital Ltd.*, 2022 ONSC 4553 |
| 4. | *Digital Domain Media Group, Inc. (Re)*, 2012 BCSC 1567 |
| 5. | Former Supreme Court of Canada Chief Justice Beverley McLachlin: "*Equality: The Most Difficult Right*", The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 14. (2001), 2001 CanLIIDocs 388 |
| 6. | *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 22 |
| 7. | *JTI-Macdonald Corp., Re*, 2020 ONSC 61 |
| 8. | *Nortel Networks Corporation (Re)*, 2009 CanLII 26603 (ON SC) |
| 9. | *Fraser Papers Inc., Re*, 2009 CanLII 55115 (ON SC) |
| 10. | *Grace Canada, Inc. (Re)*, 2008 CanLII 54779 (ON SC) |
| 11. | *Canwest Publishing Inc. (Re)*, 2010 ONSC 1328 |
| 12. | *Karasik v Yahoo! Inc.*, 2020 ONSC 1440 |
| 13. | *Target Canada Co. (Re)*, 2015 ONSC 303 |
| 14. | *Cash Store Financial Services*, 2014 ONSC 4567 |
| 15. | *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65 |
| 16. | J. Carhart, "*The Role of Representative Counsel in Canadian Insolvency Proceedings*" (February 2013) 30:1, National Insolvency Review |
| 17. | *Pearson v. Inco Ltd.*, 2001 CanLII 28084 (ON SC) |
| 18. | *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 |
| 19. | *Lear Canada (Re)*, 2009 CanLII 37931 (ON SC) |
| 20. | *Stanford International Bank Ltd. (Syndic de),* 2009 QCCS 4106, leave to appeal to the Court of Appeal dismissed (2009 QCCA 2475), and leave to appeal to the SCC dismissed (2011 CanLII 82381 (SCC)) |
| 21. | *Canadian Imperial Bank of Commerce v. ECE Group Ltd.*, 2001 CanLII 28442 (ON SC) |
| 22. | *Payless Holdings LLC (Re)*, 2017 ONSC 2321 |
| 23. | *Ontario Securities Commission v. Camerlengo Holdings Inc.*, 2023 ONCA 93 |

| ***Tab*** | ***Description*** |
|---|---|
| 24. | *Palmer v Carling O'Keefe Breweries of Canada Ltd.*, 1989 CanLII 4355 (ON SC) |
| 25. | *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68 |
| 26. | Legislative Summary – LS-389E published by the Parliamentary Research Branch of the Parliament of Canada, issued February 23rd, 2001 and revised June 11, 2001. |
| 27. | *Imperial Tobacco Canada Ltd. c. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1737 |
| 28. | *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078, leave to appeal to the Court of Appeal dismissed (2013 ONCA 456), leave to appeal to the SCC dismissed (2014 CanLII 11054 (SCC)) |
| 29. | *Imperial Tobacco Canada Limited, et al, Re*, (March 12, 2019), Toronto, Ont Ct J [Commercial List] CV-19-616077CL (Initial Order of McEwen J) |
| 30. | *League Assets Corp. (Re),* 2013 BCSC 2043 |
| 31. | *Re Rising Phoenix International Inc*., (February 15, 2022), Montreal 500-11-060613-227 (QC SC) |
| 32. | *Imperial Tobacco Canada Limited, et al, Re,* (December 9, 2019), Toronto, Ont Sup Ct J [Commercial List] CV-19-616077CL (McEwen J) |

## SCHEDULE "B"

## RELEVANT STATUTES

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

**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 11.52 (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.

**Section 11.52 (2)**

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

**Section 61 (2)**

Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

### 2. Ontario *Rules of Civil Procedure,* R.R.O. 1990, REGULATION 194

**Representation of an interested person who cannot be ascertained**

***Proceedings in which Order may be Made***

**10.01** (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the *Variation of Trusts Act*;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

**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**

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

***ONTARIO***
**SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

**Proceeding commenced at Toronto**

# FACTUM
**(MOTION FOR A CCAA REPRESENTATION ORDER)**
**(Returnable December 4, 2023)**


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