

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SKYLINK EXPRESS INC. (the "**Applicant**")

FACTUM OF THE APPLICANT

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TO: **THE SERVICE LIST**

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FACTUM OF THE APPLICANT

PART I - INTRODUCTION

1. The Applicant, Skylink Express Inc. (the "**Applicant**") brings this application seeking, among other things, the proposed Initial Order to commence proceedings under the *Companies' Creditors Arrangement Act* (Canada), RSC 1985, c C-36 (the "**CCAA**").
2. This factum is also in response to an application brought by The Toronto-Dominion Bank ("**TD**") dated March 8, 2024 (Court File No. CV-24-00716192-00CL, the "**Receivership Application**") seeking, among other things (a) the appointment of msi Spergel Inc. ("**Spergel**") as receiver and manager over the assets of Skylink; (b) in the alternative an order appointing Spergel as interim receiver of Skylink; (c) judgment in favour of TD against Momentum in the amount of \$15 million; and (d) costs.
3. The primary purpose of the CCAA application is to provide a stabilized environment while it commences its restructuring and obtain debtor-in-possession funding which is urgently required, both of which are discussed in further detail below.
4. Capitalized terms used herein and not otherwise defined have the meaning given to them in the affidavit of Kyle Dennhardt sworn March 8, 2024 (the "**Dennhardt Affidavit**") and

the supplemental affidavit of Kyle Dennhardt sworn March 9, 2024 (the “**Supplemental Affidavit**”).

PART II - SUMMARY OF FACTS

5. Skylink has operated for over 25 years providing regional air cargo services throughout North America and, today, is one of Canada’s largest operators, specializing in regional courier feeder operations and time-sensitive, cost effective, air cargo charters throughout North America (the “**Business**”). Skylink’s focus is to provide “last mile” services for major delivery servicers to secondary locations, primarily in Canada. Skylink currently has bases in Vancouver, Winnipeg, Hamilton, Montreal-Mirabel and Québec City.¹ Skylink’s sole shareholder is Momentum Decisive Solutions Canada Inc. (“**Momentum**”) who acquired Skylink in 2020.²

6. Skylink operates a fleet of 16 aircraft, comprised of 208B (4), 1900C (10) and 1900D (2) all-cargo aircraft, of which 14 are owned by Skylink.³

7. Skylink: (a) employs 79 full time employees, 7 part time employees, as well as 11 independent contractors; (b) provides certain group benefits to its employees through Manulife; and (c) does not maintain any registered pension plans.⁴

8. The Applicant is party to a collective agreement with UNIFOR entered into in March 2023 in respect of approximately 37 members of its pilot group.⁵

9. The Applicant is current with respect to payment of wages, vacation pay and remittance of source deductions.⁶

¹ Affidavit of Kyle Dennhardt, sworn March 8, 2024 (“**Dennhardt Affidavit**”) at para 12, Application Record, Tab 2, p 16.

² Dennhardt Affidavit at para 10, Application Record, Tab 2, p 16.

³ Dennhardt Affidavit at para 13, Application Record, Tab 2, p 16.

⁴ Dennhardt Affidavit at para 15, Application Record, Tab 2, p 17.

⁵ Dennhardt Affidavit at para 15, Application Record, Tab 2, p 17.

⁶ Dennhardt Affidavit at para 15, Application Record, Tab 2, p 17.

10. The primary customer of the Business is the United Parcel Service Canada Ltd. (“**UPS**”). The Applicant and UPS are party to a long-term feeder aircraft charter agreement (the “**UPS Contract**”) pursuant to which the Applicant provides critical charter services for UPS throughout Canada. Skylink is UPS’s sole provider of these services and there are no other service providers in Canada that could re-service UPS’s requirements and, without Skylink’s service, UPS would be unable to deliver to the remote locations exclusively serviced by Skylink.⁷

11. Over the past year, the Applicant has experienced negative operating cash flow, such that it is now facing an imminent liquidity crisis. Factors that have contributed to the decline of the Business include:

- (a) economic factors resulting in less demand for cargo delivery services, which has resulted in the loss of certain routes and customers;
- (b) increase in operating costs and turnover in the labour market, particularly for aircraft maintenance engineers (“**AME**”) and pilots due to change in regulatory requirements, labour shortages and the recent unionization of the Applicant’s pilot group;
- (c) significant increases in the cost for aircraft parts due to and a decline in the availability of the same parts; and
- (d) significant increase in the anticipated future capex requirements of the business due to, among other things, the cost of the capex (outlined above) and regulatory changes, including new software/hardware requirements for aircraft.⁸

⁷ Dennhardt Affidavit at para 14, Application Record, Tab 2, p 16. Supplemental Affidavit of Kyle Dennhardt sworn March 9, 2024 (the “**Supplemental Dennhardt Affidavit**”) at para 15(c) and 19.

⁸ Dennhardt Affidavit at para 5, Application Record, Tab 2, p 14.

Assets and Liabilities

12. Skylink's assets consist primarily of its capital assets (its aircraft), accounts receivable, inventory (aircraft parts) and goodwill. As set out in the December 31, 2023 Financial Statements:

- (a) the book value of Skylink's current assets was \$8,322,358 and total assets including capital assets and goodwill was \$36,409,821; and
- (b) the booked value of Skylink's liabilities was \$24,040,408.⁹

Debt Structure

13. The Toronto-Dominion Bank ("TD") is the Applicant's senior secured lender (and only known secured creditor).¹⁰ TD provided acquisition financing for the acquisition of Skylink by Momentum in 2020 as well as provides a secured line of credit.¹¹ The TD Loan Facility is secured pursuant to various security granted by the Applicant on all of its assets including on the aircraft as well as pursuant to a secured guarantee provided by Momentum (in the maximum amount of \$15 million).¹² The current balance of the TD Loan Facility is approximately \$13.8 million and the balance on the secured line of credit is approximately \$300,000.¹³

14. The Applicant maintains various American Express and VISA cards for use by its employees for Business related expenses. As of March 8, 2024, the estimated amount was \$250,000. The Applicant intends to continue to make payments in the ordinary course during the CCAA filing to keep the balances on the cards current.¹⁴

⁹ Dennhardt Affidavit at paras 18 and 19, Application Record, Tab 2, pp 18-19.

¹⁰ Dennhardt Affidavit at para 59, Application Record, Tab 2, p 28.

¹¹ Dennhardt Affidavit at paras 6 and 22, Application Record, Tab 2, pp 15 and 19.

¹² Dennhardt Affidavit at para 22, Application Record, Tab 2, p 19.

¹³ Dennhardt Affidavit at paras 6 and 20, Application Record, Tab 2, pp 15 and 18.

¹⁴ Dennhardt Affidavit at para 24, Application Record, Tab 2, p 19.

15. The Applicant also has approximately \$1.7 million of aged trade payables and incurs trade liabilities in the ordinary course of its Business.¹⁵

16. Other than TD, there are no other parties with personal property security registrations against the Applicant or registrations against the Applicant's aircraft.¹⁶

Restructuring Efforts and the Need for CCAA Protection

17. As set out above, over the past 15 months the Applicant's cash position has eroded significantly. To address the financial situation and other concerns regarding management, the Applicant and its Board of Directors have taken several restructuring steps to attempt to turn around the Business. Among other things:

- (a) in mid-2023, the Applicant appointed a new President;
- (b) in 2024, it hired additional management, including a new vice president of financing and other team members;
- (c) it took steps to reduce overhead and operating costs, including streamlining its approach and costs in connection with crew travel, crew turnover rates and insurance (without reduction in coverage);
- (d) it reviewed capex initiatives that would result in long term savings; and
- (e) took steps to improve its retention of flight crews and AMEs.¹⁷

18. Additionally, in September 2023, the Applicant retained a financial advisor, Capital Canada Limited, to solicit interest in the Business and the Applicant. Such efforts did not result in any offers. Skylink has also continued to pursue new business opportunities and consider

¹⁵ Dennhardt Affidavit at para 25, Application Record, Tab 2, p 19.

¹⁶ Dennhardt Affidavit at para 26, Application Record, Tab 2, p 19.

¹⁷ Dennhardt Affidavit at para 27, Application Record, Tab 2, p 20.

other alternative financing opportunities, although these efforts have not yielded any material success to-date.¹⁸

19. The Applicant is almost entirely reliant on UPS to generate revenue. It has become apparent that the UPS Contract is not economically sustainable given, among other things, the changes to the operating environment and inflationary costs, for which adjustments are not provided for in the UPS Contract.¹⁹

20. An urgent restructuring of the UPS Contract is required for the Applicant to remain viable and to return to profitability. While Momentum is prepared to continue to provide limited support to the Business in the short term to determine whether such negotiations can be successful, it is not prepared to continue to support the Business with the UPS Contract on its current terms. All discussions to date have been preliminary in nature. While the Applicant remains optimistic that its longstanding relationship with UPS will be able to be restructured, it requires the protection of the CCAA court in the meantime given its nominal and eroding cash position and its need for additional liquidity. The Applicant intends to use these proceedings to immediately commence discussions with UPS and, if no resolution can be reached in the short term, it will consider returning to court to seek approval of a sale process for its assets and Business.²⁰

DIP Term Sheet

21. Momentum has agreed to provide Skylink with interim funding in connection with its CCAA proceedings. Skylink and Momentum have entered into a DIP Term Sheet dated March 8, 2024 (the “**DIP Term Sheet**”) pursuant to which Momentum (in such capacity, the “**DIP Lender**”) has agreed to a debtor-in-possession (“**DIP Facility**”) to the Applicant as follows²¹:

¹⁸ Dennhardt Affidavit at para 28, Application Record, Tab 2, p 20.

¹⁹ Dennhardt Affidavit at para 29, Application Record, Tab 2, p 20.

²⁰ Dennhardt Affidavit at para 30, Application Record, Tab 2, p 21.

²¹ Dennhardt Affidavit at para 53, Application Record, Tab 2, p 25.

	<u>Description</u>
Borrower	Skylink
Lender	Momentum
DIP Facility	Non-revolving facility in the maximum aggregate principal amount of \$2.5 million
Permitted Uses	To fund working capital and professional fees in accordance with the Cash Flow Forecast, Recoverable Expenses (defined below) and such other costs and expenses as Skylink and Momentum may agree in writing.
Initial Advance	Up to a maximum of \$1.35 million
Comeback Advances	Up to a maximum of \$2.5 million
Interest	15%
Recoverable Expenses	Fees of the DIP Lender as outlined in the DIP Term Sheet including related legal fees.
Security	Super Priority DIP Lender's Charge, subject to the Administration Charge and the TD Loan Security
Maturity	The earliest of: April 30, 2024, the closing of a sale transaction, implementation of a plan, termination of CCAA proceedings or conversion to a bankruptcy; and the occurrence of an Event of Default (defined below).
Conditions Precedent to the Initial Advance and Subsequent Advances	<p>Conditions precedent to the Initial Advance include customary conditions for DIP facilities, including approval of the DIP Term Sheet, granting of the Initial Order and no outstanding Event of Default (defined below).</p> <p>Conditions precedent to subsequent advances include the granting of an amended and restated initial order ("ARIO").</p>
Events of Default	<p>Events of default include events of default customary for DIP facilities and including:</p> <p>If the Initial Order is not granted by no later than March 11, 2024</p> <p>If the ARIO if not granted by March 21, 2024</p> <p>Enforcement by TD on any of the TD Loan Security or the Momentum guarantee</p> <p>Cumulative variance for disbursements in the first month is more than 115% of the budgeted disbursements</p>

22. The DIP Facility is contingent, among other things, upon the granting of a priority charge over the assets, property and undertaking of the Applicant in favour of the DIP Lender, which will rank subordinate to the Administration Charge and the TD Loan Security but in priority to the Directors' Charge.²²

23. The proposed initial borrowing under the DIP Facility is limited to \$1.35 million being the amount projected to be required in the first 10 days of the CCAA proceedings.²³

Proposed Treatment of TD in the CCAA Proceedings

24. Under the proposed CCAA Application:

- (a) TD will receive all scheduled payments of principal and interest;
- (b) Momentum is providing a DIP Facility of \$2.5 million to fund the proposed CCAA proceedings and Skylink's operating expenses during the CCAA proceedings. The Cash Flow Statement includes over \$450,000 of capital expenditures on Skylink's aircraft, which is TD's primary collateral. The capital expenditures enhance the value of the aircraft for the benefit of TD;
- (c) The proposed DIP Lender's Charge to secure the DIP Facility is proposed to rank subordinate to the TD Loan Security – the funding Momentum is using to fund the DIP Facility is being sourced from an injection of fresh capital into Momentum and not from existing working capital;
- (d) The TD secured line of credit, which is projected to be \$300,000 as of the date of the CCAA application, will be paid down pursuant to the usual sweep and not re-drawn during the CCAA proceedings; and
- (e) The proposed Directors' Charge is proposed to be subordinate to the TD Loan Security.²⁴

²² Dennhardt Affidavit at para 54, Application Record, Tab 2, p 27.

²³ Dennhardt Affidavit at para 55, Application Record, Tab 2, p 27.

²⁴ Supplemental Dennhardt Affidavit at para 8.

PART III - ISSUES, LAW & ANALYSIS

The Receivership Application Should be Dismissed

A. The Receivership Application is Not the Preferred Process

25. In recent years there have been a number of instances where the Court has been faced with competing receivership and CCAA applications. This has been most often the case in the context of real property insolvencies. In their article “*Receivership Versus CCAA in Real Property Development: Constructing a Framework for Analysis*”, the authors outline four driving factors in a Court’s determination of contested receivership vs CCAA applications: (a) any prejudice to secured creditors; (b) the benefits (or lack thereof) to secured creditors; (c) the likelihood of success; and (d) the interests of other stakeholders (or lack thereof) and policy reasons the CCAA was meant to serve.²⁵

26. In “*Should I CCAA Stay or Should I BIA Go: A Review and Analysis of Judicial Treatment of Competing CCAA and BIA Applications*”, the authors identified six consistently considered factors similar to those noted above in determining whether a Court should grant a receivership or CCAA Order: (a) the relationship between the debtor and creditors; (b) value maximization and cost minimization; (c) the availability of new financing; (d) the effects on stakeholders; (e) the behaviour of the parties; and (f) the need for the CCAA’s greater discretionary relief.²⁶

27. In *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al.*²⁷, the Court noted that all contested applications must be judged independently on their merits. Courts have similarly held that the Court should consider the interests of all stakeholders to

²⁵ Jeremy Opolsky, Jacob Babad and Mike Noel, *Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis*, 2020 18 *Annual Review of Insolvency Law* 199, [2020 CanLII Docs 3602](#).

²⁶ Emma Newbery, Liam Byrne and Valerie Cross, *Should I CCAA Stay or Should I BIA Go: A Review and Analysis of Judicial Treatment of Competing CCAA and BIA Applications*, 2023 21 *Annual Review of Insolvency Law*, [2023 CanLII Docs 3088](#)

²⁷ *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al.* [2018 ON SC 7382](#) at para 56.

determine which process was more appropriate.²⁸ Where it is clear that a large numbers of stakeholders would be negatively affected by a receivership, the Court has decided in favour of granting a CCAA instead.²⁹

28. In the current matter, all factors weigh in favour of the granting of the CCAA Application and dismissal of the Receivership Application. Specifically,

- (a) There is little to no prejudice to TD in waiting a short period of time while Skylink pursues its restructuring;³⁰
- (b) Skylink has never missed a payment of principal or interest on the TD Loan Facility;³¹
- (c) During the CCAA proceeding, TD will continue to be paid its principal and interest payments; the line of credit will be paid down to \$0 and not re-drawn;³²
- (d) The proposed DIP Facility and DIP Lender's Charge (as well as the Directors' Charge) are not proposed to not prime the TD Loan Security – the funds being used by Momentum to fund the DIP Facility are from an injection of fresh capital into Momentum and not from existing working capital;³³
- (e) Unlike in retail or other industries where collateral value may diminish in an insolvency, allowing the Applicant to proceed under the CCAA will not erode or diminish TD's collateral, being primarily the aircraft. In fact, through the CCAA the value of the aircraft is likely to increase or at least be preserved given that the Cash Flow Forecast provides for funding (on a subordinated basis) of capex and maintenance;³⁴
- (f) The Applicant employs close to 100 full, part time and contract employees whose payroll must be funded by March 12, 2024 in order for employees to be paid on

²⁸ *Romspen Investment Corp. v. 6711162 Canada Inc.*, [2014 ONSC 2781](#), as cited in *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#); *Re Pacific Shores Resort & Spa Ltd.*, [2011 BCSC 1775](#) [**Pacific Shores**].

²⁹ [Pacific Shore](#) at paras 57-58.

³⁰ Supplemental Dennhardt Affidavit at paras 8 and 10.

³¹ Supplemental Dennhardt Affidavit at para 8(a).

³² Supplemental Dennhardt Affidavit at para 8(a) and 8(d).

³³ Supplemental Dennhardt Affidavit at para 8(c).

³⁴ Supplemental Dennhardt Affidavit at paras 9, 10 and 8(a).

Friday March 15, 2024 – the employees are also a stakeholder in these proceedings whose interest should be considered, particularly where there is no prejudice to TD in doing so,³⁵

- (g) There is no substantive basis for the allegation that TD has lost faith in management;
- (h) Skylink is heavily regulated. Skylink holds domestic and international licenses issued by the Canadian Transportation Agency, Air Operator Certificate and Approved Maintenance Organization Certificates issued by Transport Canada. Transport Canada requires key personnel (post holders) to be in management and control of the operating airline. There is significant risk in a receivership that all key personnel would leave including those who are required to maintain the permits and licenses.³⁶
- (i) While the Administration Charge ranks in priority to TD, the Receiver's Charge and Receiver's Borrowing Charge would similarly rank in priority to TD in a receivership.³⁷
- (j) Skylink and UPS have a long standing and important relationship. Skylink is the single source provider of these services for UPS in Canada.³⁸ There is a reasonable likelihood that the restructuring will be successful.

29. Conversely, the Receivership Application would cause immediate, irreversible and completely unnecessary harm to the Business and would, likely destroy the Business and almost all of its value. Among other things,

- (a) It may mean the Applicant's employees will not receive their pay cheques on the 15th and would be immediately laid off or terminated;
- (b) There is significant risk that operations would immediately have to cease which could lead to:

³⁵ Supplemental Dennhardt Affidavit at para 11.

³⁶ Supplemental Dennhardt Affidavit at para 13.

³⁷ Supplemental Dennhardt Affidavit at para 9.

³⁸ Supplemental Dennhardt Affidavit at paras 13-15.

- (i) aircraft and crew could be stranded in remote areas of Canada;
- (ii) claims by employees that could rank in priority to TD;
- (iii) packages and shipments may not be delivered, resulting in liability to Skylink to UPS;
- (iv) UPS would be unable to deliver to the remote locations exclusively serviced by Skylink – Skylink is UPS’s sole provider of these services and there are no other service providers in Canada that could re-service UPS’ requirements; and
- (v) aircraft would risk ceasing to be air worthy if (i) not maintained in accordance with Transport Canada and manufacturer requirements; and/or (ii) required maintenance costs and capex were not provided for aircraft to meet regulatory standards.³⁹

30. The Receivership Application contains no information as to how all of the many regulatory issues, operational costs, collateral preservation requirements, insurance needs or other issues would be addressed in a receivership.⁴⁰ These are complicated matters all of which dictate towards a debtor led restructuring by an experienced and qualified management team.⁴¹

B. Receivership Should Not be favoured in Airline Restructuring

31. With respect to airline restructurings, it is apparent that the preferred process for any insolvency (other than an immediate shut down) is through debtor-in-possession proceedings either pursuant to the CCAA or the proposal process under the CCAA. The vast majority of airline insolvencies have proceeded as debtor-in-possession rather than through receiverships. Examples of such filings include: (a) Lynx Air; (b) Air Georgian; (c) Discovery Air; (d) Jetsgo; (e)

³⁹ Supplemental Dennhardt Affidavit at paras 10, 14.

⁴⁰ Supplemental Dennhardt Affidavit at para 11.

⁴¹ Supplemental Dennhardt Affidavit at paras 11 and 16.

Canadian Airlines; (f) Air Canada; and (g) Skylink Aviation Inc. (not related to the Applicant). In only very limited circumstances are receivers appointed, and almost inevitably lead to an immediate shut down, given the regulatory and operational issues involved with a receiver trying to operate an airline.

C. The Test for a Receivership Has Not Been Met

32. In any event, even in the absence of the proposed CCAA Application, TD has not met the test for the appointment of a Receiver. Pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“**BIA**”) and Section 101 of the *Courts of Justice Act* (Ontario), the Court may appoint a receiver where it “considers it to be just and convenient to do so”. Certain statutory requirements pursuant to Section 244 must be met before a secured creditor may enforce its security, namely issuance of a notice of intention to enforce security (“**NITE**”) on at least 10 days’ notice to the debtor.⁴²

33. TD issued its demand letter and NITE on March 8, 2024. Less than a day later, it served its application for appointment of a receiver and judgment against Momentum. The 10-day period has not expired. Neither the Applicant nor Momentum has not consented to an earlier enforcement of the security. The 10-day period is intended to provide breathing room to a debtor and an opportunity to consider the demand, negotiate and reorganize its financial affairs – exactly what the Applicant is attempting to do under the CCAA.⁴³ A receivership application at this time would deprive the Applicant and Momentum of the statutorily required notice period and the optionality it is intended to provide.

34. TD’s request in the alternative for the appointment of an interim receiver pursuant to Section 47 of the BIA must also be dismissed. Although Section 47(1) does not require the full

⁴² *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”), [s. 243\(1\)](#). *Courts of Justice Act*, RSO 1990, c. C.43, [s. 101](#).

⁴³ *CBJ Developments Inc. v. 1180554 Ontario Limited*, [2023 ONSC 6773 \(CanLII\)](#) at paras 16-20; *BIA*, s. 244.

10 day period to have expired under a NITE as a pre-requisite to the appointment of an interim receiver, pursuant to Section 47(3), an interim receiver may only be appointed if the Court is satisfied that such relief is “necessary for the protection of (a) the debtor’s estate; or (b) the interests of the creditor who sent the [NITE].”⁴⁴

35. In order to satisfy the test under Section 47(3), although a party need not prove an “actual immediate risk”, the Court must be satisfied that there is some risk to the assets that is “more than merely speculative.”⁴⁵ In most cases where interim receivers are appointed, there is immediate and tangible jeopardy to the assets including loss of insurance, misplacement of funds, complete failure on the part of the debtors to provide information or cooperate or other clear exposure to creditors.⁴⁶ None of those elements are present in the current case. Such an appointment is clearly unwarranted given, among other things: (a) there is no risk to the value of TD’s collateral, as stated above; (b) KSV will be appointed as an independent court appointed officer overseeing the CCAA proceedings; (c) TD will continue to receive all scheduled payments of principal and interest; and (d) the DIP Lender’s Charge and Directors’ Charge are subordinate to the TD Loan Security.⁴⁷ Although many factors may be taken into consideration by a Court when determining whether it is just and convenient to appoint a receiver, key considerations include (a) risk to the lender’s security; (b) the need to stabilize a business; (c) loss in confidence in the debtor’s management; (d) positions and interests of other stakeholders.⁴⁸

⁴⁴ BIA, [s. 47\(1\)](#) and [s. 47\(3\)](#)

⁴⁵ *Maxium Financial Services Inc. v. Corporate Cars Limited Partnership*, [2006 CanLII 40988 \(ON SC\)](#), para 15.

⁴⁶ *Maxim, supra.*; [Planet Energy \(B.C.\) Corp. v All Communications Network of Canada Co., et al.](#) (June 8, 2023), Toronto, Superior Court of Justice (Commercial List), BK-23-02943168-0031/BK-23-02943175-0031 (Endorsement of Justice Steele; [The Forest Road Company, LLC v Skyline 2 Productions Inc.](#) (August 17, 2021), Toronto, Superior Court of Justice (Commercial List), CV-21-00665781-00CL (Endorsement of Justice Cavanagh);

⁴⁷ Supplemental Dennhardt Affidavit at paras 8 and 10.

⁴⁸ Shaun Parsons, [The Tug-of War for Control: Considerations to Succeed between Dueling CCAA and Receivership Applications](#), *Canadian Association of Insolvency and Restructuring Professionals*, Spring/Summer 2023; *Macquarie Equipment Finance Limited v. Validus Power Corp. et al.*, [2023 ONSC 4772 \(CanLII\)](#) at para 5; *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, [2022 ONSC 6186 \(CanLII\)](#) at para 23.

36. In the current circumstance, it is not just or convenient to appoint a receiver over the assets of Skylink. Among other things: (a) there is no risk to TD's collateral in the CCAA and in fact, a receivership poses a greater risk to the aircraft security than the CCAA does; (b) the operations of the business have been stable to this point, the requirement for a CCAA is driven by the need for additional liquidity; (c) TD points only to an allegation that the Applicant did not notify TD sufficiently in advance of its proposed filing as the grounds for its loss in faith in management – there is no indication that the key personnel at the Applicant are incapable of managing the business including those who have been hired during the last year such as the Skylink president and vice-president of finance; and (d) a receivership only serves to harm other stakeholders, such as the Applicant's many employees, who risk not being paid or being immediately terminated.⁴⁹

The CCAA Initial Order Should be Granted

37. An Initial Order under the CCAA should be granted if it accords with the remedial purposes of the CCAA, which include rehabilitation, the avoidance of social and economic loss resulting from liquidation, and the building of consensus among interested stakeholders.⁵⁰

38. An Initial Order may include any relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course during the restructuring period.⁵¹

39. The Applicant is insolvent, has a minimal cash balance and, absent funding to be provided pursuant to the DIP Facility, will very shortly be unable to pay its obligations as they come due including its upcoming payroll.⁵² The relief being sought is restricted to what is reasonably necessary for the ongoing operation of the Business prior to the comeback hearing

⁴⁹ Supplemental Dennhardt Affidavit at paras 5 and 13-16.

⁵⁰ *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#) (CanLII), paras 15, 59, 70.

⁵¹ Section 11.02(1) CCAA.

⁵² Dennhardt Affidavit at para 31, Application Record, Tab 2, p 21.

including restricting funding to those costs that are necessary to be incurred in the first 10 days after the filing date.⁵³

The CCAA Applies

40. Relief under the CCAA is available to a “debtor company” or affiliated “debtor companies” where the total claims against such company or affiliated companies exceed \$5 million.⁵⁴

41. The CCAA defines a “company” to include any incorporated company having assets in Canada. A “debtor company” includes any company that is “bankrupt or insolvent”.⁵⁵ A financially troubled company is insolvent for the purposes of the CCAA if it is “reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.”⁵⁶

42. This Court has the jurisdiction to hear the application.⁵⁷ In this case, the Applicant is a debtor company to which the CCAA applies. Among other things:

- (a) The Applicant is incorporated pursuant to the *Business Corporations Act* (Ontario); its registered office is 55 St. Clair West, Suite 210, Toronto, Ontario;⁵⁸
- (b) The Applicant has assets and property located in Ontario;⁵⁹ and
- (c) The Applicant has liabilities significantly exceeding \$5 million.⁶⁰

43. The Applicant is insolvent. Although the book value of the Applicant’s assets is greater than its liabilities, the Applicant is facing a liquidity crisis as the UPS Contract is not sufficiently

⁵³ Dennhardt Affidavit at para 55, Application Record, Tab 2, p 27.

⁵⁴ *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“CCAA”), [s.3](#).

⁵⁵ CCAA, [s.2](#).

⁵⁶ *Stelco Inc. (Re)*, [2004 CanLII 24933 \(ON SC\)](#) at para 26.

⁵⁷ CCAA, [s.9\(1\)](#).

⁵⁸ Dennhardt Affidavit at para 9, Application Record, Tab 2, p 15.

⁵⁹ Dennhardt Affidavit at para 12, Application Record, Tab 2, p 16.

⁶⁰ Dennhardt Affidavit at para 6, Application Record, Tab 2, p 15.

profitable to fund the Applicant's cost of operations, including its aircraft maintenance costs. In this regard, as of March 8, 2024, the Applicant's line of credit balance was approximately \$300,000 and it had a minimal cash balance. Without further funding, the Applicant is not projected to be able to fund its payroll due March 15, 2024. While Momentum recently provided emergency funding of \$1 million on an unsecured basis, it is not prepared to provide any further funding outside of a DIP Facility in a CCAA filing.⁶¹

44. The Applicant has complied with the requirements set out in Section 10(2) of the CCAA.⁶² Specifically:

- (a) A projected cash flow of the Applicant has been filed setting out such amounts on a weekly basis, together with the required accompanying report to the cash flow;⁶³ and
- (b) Copies of the Applicant's most recent financial statements have been filed with the Court.⁶⁴

The Stay of Proceedings Should be Granted

45. The stay of proceedings granted pursuant to an Initial Order ensures that creditor enforcement does not interfere with the company's ability to maintain operations while restructuring its affairs.⁶⁵ The stay of proceedings maintains the *status quo* while the company develops a plan for the benefit of its creditors. To obtain a stay of proceedings under the CCAA, the company must satisfy the Court that circumstances exist to make the order appropriate.⁶⁶

⁶¹ Dennhardt Affidavit at para 20, Application Record, Tab 2, p 18.

⁶² CCAA, [s 10\(2\)](#).

⁶³ Cash Flow Forecast for the period March 2, 2024 to April 26, 2024, Exhibit G to the Dennhardt Affidavit, Application Record, Tab 2G, p 149.

⁶⁴ Unaudited Financial Statements for Fiscal Year ended December 31, 2023, Exhibit B to the Dennhardt Affidavit, Application Record, Tab 2B, p 40.

⁶⁵ CCAA, [s 11.02](#).

⁶⁶ CCAA, [s 11.02\(3\)\(a\)](#).

46. The Court may grant a stay of proceedings for up to 10 days in respect of the initial application provided that it is satisfied that it is appropriate in the circumstances.⁶⁷

47. The threshold for a debtor company to obtain a stay of proceedings under the CCAA is low. The company only has to satisfy the Court that a stay of proceedings would “usefully further” its efforts to reorganize.⁶⁸

48. A debtor company is expected to act in good faith and with due diligence both before and after the commencement of proceedings under the CCAA; however, any in-depth analysis of good faith and due diligence is ordinarily deferred to subsequent applications.⁶⁹

49. The Applicant has worked diligently to arrange for funding for its continued operation while it pursues its restructuring in good faith and with due diligence in a cooperative manner with the proposed Monitor.

KSV Should be Appointed as Monitor

50. KSV Restructuring Inc. (“**KSV**” or the “**Proposed Monitor**”) is a licenced trustee within the meaning of section 2(1) of the BIA⁷⁰ and has consented to act as Court-appointed Monitor of the Applicant.⁷¹ KSV is qualified to act in such capacity under section 11.7 of the CCAA.⁷²

51. Neither KSV nor any of its representatives or affiliates has at any time in the past two years been: (a) a director, officer or employee of any member of the Applicant; (b) related to any member of the Applicant, or to any director or officer of any member of the Applicant; or (c) the

⁶⁷ CCAA, [s 11.02\(1\)](#).

⁶⁸ [Century Services](#), *supra* at para 70; *Industrial Properties Regina Limited v Copper Sands Land Corp.*, [2018 SKCA 36 \(CanLII\)](#) [“*Industrial Properties*”] at para 21.

⁶⁹ [Industrial Properties](#), *supra* at paras 22-23.

⁷⁰ BIA, [s 2\(1\)](#).

⁷¹ Consent to Act of KSV Restructuring Inc., Exhibit D, Dennhardt Affidavit, Application Record, Tab 2D, p 77.

⁷² CCAA, [s 11.7](#).

auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of any member of the Applicant.⁷³

52. The powers proposed to be granted to the Proposed Monitor in the Initial Order are consistent with those set out in the Model Order.

The Administration Charge Should be Approved

53. The Applicant is seeking the Administration Charge in favour of the Proposed Monitor, the Proposed Monitor's counsel and the Applicant's counsel to secure payments of their reasonable fees and disbursements incurred both prior to filing and after in the initial maximum amount of \$350,000.⁷⁴

54. Section 11.52 of the CCAA expressly provides that the Court has jurisdiction to grant an administration charge where it concludes that (a) the notice has been given to the secured creditors likely to be affected by the charge; (b) the amount is appropriate; (c) the charges should extend to all of the proposed beneficiaries.⁷⁵

55. In *Re Canwest Global Communications Corp.*⁷⁶ and *Re Canwest Publishing Inc.*,⁷⁷ administration charges were granted pursuant to section 11.52(1). In *Canwest Publishing*, Justice Pepall provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;

⁷³ Pre-Filing Report of KSV Restructuring Inc., as Proposed Monitor, dated March 8, 2024 ("**Pre-Filing Report**"), s 1.4, para 4.

⁷⁴ Dennhardt Affidavit at para 39, Application Record, Tab 2, pp 22 and 23.

⁷⁵ CCAA, [s 11.52](#).

⁷⁶ *Re Canwest Global Communications Corp.*, [2009 CanLII 55114 \(ON SC\)](#) [*"Canwest Global"*] at para 40.

⁷⁷ *Re Canwest Publishing Inc.*, [2010 ONSC 222 \(CanLII\)](#) [*"Canwest Publishing"*] at para 54.

- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.⁷⁸

56. The Administration Charge is appropriate in the circumstances:

- (a) The beneficiaries of the charge will provide the required legal and financial advice during the course of these proceedings;
- (b) There is no anticipated duplication of roles; and
- (c) The proposed Monitor has indicated it believes the amount of the Administration Charge is appropriate in the circumstances.⁷⁹

57. The cost of the restructuring is intended to create value either through (a) the successful restructuring of the UPS Contract; or (b) an orderly sale process for the sale of the aircraft, in a manner that ensures they do not become stranded, cease to be air worthy or otherwise diminishes or destroys value.⁸⁰ The proposed costs and corresponding Administration Charge are controlled and for a limited period of time to allow the Applicant to pursue its restructuring in a condensed period of time.

The Directors' Charge Should be Approved

58. The Applicant is seeking the Directors' Charge in favour of the officers and directors of the Debtors in the amount of \$480,000. This represents an estimate of accruals of amounts that are potentially director liability obligations between payment cycles.⁸¹

59. As at the current date, wages, vacation pay and statutory employee deductions are accruing in the ordinary course with no arrears due and unpaid as at the date hereof.⁸²

⁷⁸ [Canwest Publishing](#), *supra* at para 54.

⁷⁹ Dennhardt Affidavit at paras 40 and 41, Application Record, Tab 2, p 23.

⁸⁰ Supplemental Dennhardt Affidavit at para 8.

⁸¹ Dennhardt Affidavit at para 47, Application Record, Tab 2, p 24.

60. Pursuant to section 11.51 of the CCAA, the Court has specific authority to grant a charge to the directors and officers of a company as security for an indemnity provided by the Applicant in respect of certain statutory obligations. In order to grant such a charge, the Court must be satisfied that (a) notice has been given to the secured creditors likely to be affected by the charge; (b) the amount is appropriate; (c) the debtor could not obtain adequate indemnification insurance at reasonable cost; and (d) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.⁸³

61. The Applicant maintains directors' and officers' liability insurance (the "**D&O Insurance**") for the directors and officers of the Applicant. The current D&O Insurance policies provide a total of up to \$5 million in primary coverage.⁸⁴

62. The benefit of the Directors' Charge will only be available to the extent that a liability is not covered by the D&O Insurance.⁸⁵

63. While the D&O Insurance is available, the directors and officers of the Applicant cannot be certain that the insurance providers will not seek to deny coverage on the basis that the D&O Insurance does not cover a particular claim or that coverage limits have been exhausted.⁸⁶

64. The Applicant is unlikely to have sufficient funds available to satisfy any contractual indemnities to the directors or officers should the directors or officers need to call upon those indemnities.⁸⁷

⁸² Dennhardt Affidavit at para 44, Application Record, Tab 2, pp 23-24.

⁸³ CCAA, [s 11.51](#).

⁸⁴ Dennhardt Affidavit at para 46, Application Record, Tab 2, p 24.

⁸⁵ Dennhardt Affidavit at para 48, Application Record, Tab 2, p 24.

⁸⁶ Dennhardt Affidavit at para 49, Application Record, Tab 2, pp 24-25.

⁸⁷ Dennhardt Affidavit at para 50, Application Record, Tab 2, p 25.

65. The Proposed Monitor believes the quantum of the charge is reasonable in view of the potential liabilities faced by these directors and officers in the post-filing period.⁸⁸

The DIP Facility Should be Approved

66. The Applicant is seeking approval of the DIP Facility pursuant to the DIP Term Sheet during the pendency of the CCAA proceedings.⁸⁹ In order to secure the obligations of the Applicant under the DIP Term Sheet, the Applicant is seeking a priority charge (the “**DIP Lender’s Charge**”).⁹⁰

67. The proposed DIP Lender’s Charge will rank subsequent to the Administration Charge and the TD Loan Security, but in priority to the proposed Directors’ Charge and any other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (an “**Encumbrance**”). The Applicant is not aware of any such other Encumbrances.⁹¹

68. In determining whether to grant a charge to secure the interim financing sought, it is submitted that the Court should review the following factors described in section 11.2 of the CCAA:

- (a) whether notice has been given to secured creditors who are likely to be affected by the subject charge;
- (b) whether the amount of the interim financing to be secured by the charge is appropriate and necessary having regard to the Applicant’s cash flow statement;
- (c) whether the charge secures an obligation that would exist before the order is made; and

⁸⁸ Dennhardt Affidavit at para 51, Application Record, Tab 2, p 25; Pre-Filing Report, s 5.2, para 7.

⁸⁹ Dennhardt Affidavit at para 53, Application Record, Tab 2, p 25.

⁹⁰ Dennhardt Affidavit at para 39, Application Record, Tab 2, pp 22-23.

⁹¹ Dennhardt Affidavit at paras 56 and 57, Application Record, Tab 2, pp 27-28.

(d) the enumerated factors in subsection 11.2(4) of the CCAA.⁹²

69. Importantly, fresh capital is being injected into Momentum to provide Momentum with capital to fund the DIP Facility⁹³.

70. There are no known parties, other than TD (whose security is not being primed) whose interested may be affected by the proposed DIP Lender's Charge.⁹⁴

71. The DIP Term Sheet will provide the Applicant with essential funding to continue operations while the CCAA proceedings. The proposed initial maximum borrowing amount is \$1.35 million which amount is required within the first 10 days of the CCAA proceedings as set out in the Applicant's cash flow and includes, notably required funding for the Applicant's payroll for March 15, 2024.⁹⁵

72. The proposed DIP Lender's Charge does not secure any pre-filing obligations.

73. The Court should consider the following when considering subsection 11.2(4) of the CCAA: (a) the period during which the Debtor is expected to be subject to proceedings under the CCAA; (b) how the Debtor's business and financial affairs are to be managed during the proceedings; (c) whether the Debtor's management has the confidence of its major creditors; (d) whether the DIP financing would enhance the prospects of a viable compromise or arrangement; (e) the nature and value of the Applicant's property; (f) whether any creditor would be materially prejudiced as a result of the security or charge; and (g) the proposed Monitor's report.⁹⁶

⁹² CCAA, [s 11.2](#).

⁹³ Supplemental Dennhardt Affidavit at para. 8(c).

⁹⁴ Dennhardt Affidavit at para 59, Application Record, Tab 2, p 28.

⁹⁵ Dennhardt Affidavit at para 55, Application Record, Tab 2, p 27; Cash Flow Forecast for the period March 2, 2024 to April 26, 2024, Exhibit G, Dennhardt Affidavit, Application Record, Tab 2G, p 149.

⁹⁶ CCAA, [s 11.2\(4\)](#).

74. In the present circumstances:

- (a) Absent an Event of Default, the proposed funding under the DIP Term Sheet will be made available through the end of April, 2024;⁹⁷
- (b) Without the funding under the DIP Term Sheet, the Applicant will be unable to continue operations or make crucial payments including its upcoming payroll;⁹⁸
- (c) The proposed Monitor has reviewed the DIP Term sheet with other interim financing facilities approved by Canadian courts in CCAA proceedings commenced between 2021 and 2023 and has concluded the cost of the proposed DIP Facility is within the range of similar facilities recently approved by the Court and other Canadian courts in CCAA and other restructuring proceedings;⁹⁹
- (d) It is unlikely any other lender would provide DIP funding on a subordinated basis to TD;¹⁰⁰
- (e) there are no structuring, facility, standby or other fees being charged by the DIP Lender under the DIP Facility other than reasonable legal fees of the Lender;¹⁰¹
- (f) The proposed Monitor has indicated it believes that the DIP Lender's Charge is in the best interest of the Applicant and its stakeholders;¹⁰² and
- (g) Momentum has advised it will not provide any further funding absent the granting of the DIP Lender's Charge.¹⁰³

The Authorization to Make the Pre-Filing Payments Should be Approved

75. The Applicant is requesting that they be authorized, but not required, to pay pre-filing amounts owing in respect of its outstanding credit card balances that are critical to their business and ongoing operations up to a maximum of \$250,000.¹⁰⁴

⁹⁷ Dennhardt Affidavit at para 53, Application Record, Tab 2, pp 25-26.

⁹⁸ Dennhardt Affidavit at para 52 Application Record, Tab 2, p 25.

⁹⁹ Pre-Filing Report, s 4.1, para 1(d).

¹⁰⁰ Pre-Filing Report, s. 4.1, para 1(f).

¹⁰¹ Pre-Filing Report, s 4.1, para 1(g).

¹⁰² Pre-Filing Report, s 4.1, para 2.

¹⁰³ Dennhardt Affidavit at para 8, Application Record, Tab 2, p 15.

76. The ongoing use of these credit cards is crucial to the Business as employees (including the Applicant's pilot group) are often traveling and required to incur expenses in the course of their employment. In order to ensure ongoing access to the credit cards, specific relief is being requested to pay the outstanding balances on the pre-filing balances on those credit cards.¹⁰⁵

77. The Court is authorized to grant such relief in the circumstances.¹⁰⁶

PART IV - ORDER REQUESTED

78. For these and the other reasons noted above, the Applicant therefore requests: (a) that the Receivership Application be dismissed; and (b) an Order substantially in the form of the draft Initial Order included in the Application Record by granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of March, 2024.



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¹⁰⁴ Dennhardt Affidavit at paras 24 and 60 Application Record, Tab 2, pp 19 and 28.

¹⁰⁵ Dennhardt Affidavit at para 24 Application Record, Tab 2, p 19.

¹⁰⁶ CCAA, [s 11.4](#); [Canwest Global](#), *supra* at para 41.

SCHEDULE “A”

LIST OF AUTHORITIES

1. Jeremy Opolsky, Jacob Babad and Mike Noel, Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis, 2020 18 *Annual Review of Insolvency Law* 199, [2020 CanLII Docs 3602](#)
2. Emma Newbery, Liam Byrne and Valerie Cross, Should I CCAA Stay or Should I BIA Go: A Review and Analysis of Judicial Treatment of Competing CCAA and BIA Applications, 2023 21 *Annual Review of Insolvency Law*, [2023 CanLII Docs 3088](#)
3. *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al.* [2018 ON SC 7382](#)
4. *Romspen Investment Corp. v. 6711162 Canada Inc.*, [2014 ONSC 2781](#), as cited in *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#)
5. *Re Pacific Shores Resort & Spa Ltd*, [2011 BCSC 1775](#)
6. *CBJ Developments Inc. v. 1180554 Ontario Limited*, [2023 ONSC 6773 \(CanLII\)](#)
7. *Maxium Financial Services Inc. v. Corporate Cars Limited Partnership*, [2006 CanLII 40988 \(ON SC\)](#)
8. [Planet Energy \(B.C.\) Corp. v All Communications Network of Canada Co., et al.](#) (June 8, 2023), Toronto, Superior Court of Justice (Commercial List), BK-23-02943168-0031/BK-23-02943175-0031 (Endorsement of Justice Steele)
9. [The Forest Road Company, LLC v Skyline 2 Productions Inc.](#) (August 17, 2021), Toronto, Superior Court of Justice (Commercial List), CV-21-00665781-00CL (Endorsement of Justice Cavanagh);
10. Shaun Parsons, [The Tug-of War for Control: Considerations to Succeed between Dueling CCAA and Receivership Applications](#), *Canadian Association of Insolvency and Restructuring Professionals*, Spring/Summer 2023
11. *Macquarie Equipment Finance Limited v. Validus Power Corp. et al.*, [2023 ONSC 4772 \(CanLII\)](#)
12. *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, [2022 ONSC 6186 \(CanLII\)](#)
13. *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#) (CanLII)
14. *Stelco Inc. (Re)*, [2004 CanLII 24933 \(ON SC\)](#)
15. *Industrial Properties Regina Limited v Copper Sands Land Corp.*, [2018 SKCA 36 \(CanLII\)](#)
16. *Re Canwest Global Communications Corp.*, [2009 CanLII 55114 \(ON SC\)](#)

17. *Re Canwest Publishing Inc.*, [2010 ONSC 222 \(CanLII\)](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of [section 2](#) of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

debtor company means any company that

- (a) is bankrupt or **insolvent**,
- (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed **insolvent** within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,
- (c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or
- (d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is **insolvent**; (*compagnie débitrice*)

Application

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

Jurisdiction of Courts

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

Security or charge relating to director's indemnification

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

Priority

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

Restriction — indemnification insurance

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

Negligence, misconduct or fault

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

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.

Priority

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

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of [subsection 2\(1\)](#) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

- (a)** if the trustee is or, at any time during the two preceding years, was
 - (i)** a director, an officer or an employee of the company,
 - (ii)** related to the company or to any director or officer of the company, or
 - (iii)** the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or
- (b)** if the trustee is
 - (i)** the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or
 - (ii)** related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of [subsection 2\(1\)](#) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

Bankruptcy and Insolvency Act, RSC 1985, c B-3

trustee or licensed trustee means a person who is licensed or appointed under this Act. (*syndic ou syndic autorisé*)

Interim receiver means a person appointed under subsection 47(1).

Appointment of interim receiver

47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

- (a)** the taking of possession by a receiver, within the meaning of [subsection 243\(2\)](#), of the debtor's property over which the interim receiver was appointed,
- (b)** the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- (c)** the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a)** the debtor's estate; or
- (b)** the interests of the creditor who sent the notice under subsection 244(1).

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b)** exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c)** take any other action that the court considers advisable.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

- (a) whose right to realize or otherwise deal with his security is protected by [subsection 69.1\(5\)](#) or (6); or
- (b) in respect of whom a stay under [sections 69 to 69.2](#) has been lifted pursuant to [section 69.4](#).

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).

Courts of Justice Act, RSO 1990, c C.43,**INTERLOCUTORY ORDERS****Injunctions and receivers**

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36,
AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
SKYLINK EXPRESS INC.

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

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