

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 TRICHOME FINANCIAL CORP., TRICHOME JWC ACQUISITION
CORP., MYM NUTRACEUTICALS INC., TRICHOME RETAIL CORP., MYM
INTERNATIONAL BRANDS INC., AND HIGHLAND GROW INC.**

Applicants

**FACTUM OF THE APPLICANTS
(Returnable November 7, 2022)**

November 7, 2022

BENNETT JONES LLP
One First Canadian Place, Suite 3400
P.O. Box 130
Toronto, ON M5X 1A4

Sean Zweig (LSO# 57307I)
Tel: (416) 777-6254
Email: zweigs@bennettjones.com

Joshua Foster (LSO# 79447K)
Tel: (416) 777-7906
Email: fosterj@bennettjones.com

Lawyers for the Applicants

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PART I: OVERVIEW

1. Trichome Financial Corp., Trichome JWC Acquisition Corp., MYM Nutraceuticals Inc., Trichome Retail Corp., MYM International Brands Inc. and Highland Grow Inc. (collectively, the "**Applicants**") seek relief pursuant to an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").
2. Through their licensed operating subsidiaries, the Applicants cultivate, process and sell premium and ultra-premium cannabis for the adult-use market in Canada (the "**Canadian Business**"). Collectively, the Applicants employ approximately 226 people who work predominantly at the Applicants' facilities in Kitchener, Ontario, and Antigonish, Nova Scotia (collectively, the "**Licensed Facilities**").
3. Following months of liquidity challenges, the Applicants are now facing a severe liquidity crisis, have limited cash on hand and are generally unable to meet their obligations as they become due. As a result of the Applicants' financial circumstances, Trichome JWC Acquisition Corp. ("**TJAC**") is in breach of several covenants, representations and warranties under its existing asset-based loan (the "**ABL**") from Cortland Credit Lending Corporation ("**Cortland**"), in its capacity as administrative agent (in such capacity, the "**Agent**"), for and on behalf of the Applicants' senior secured lenders (collectively, the "**Lenders**"). Moreover, TJAC is no longer able to satisfy the conditions precedent to obtaining further advances under the ABL.
4. Absent access to debtor-in-possession ("**DIP**") financing, a stay of proceedings (the "**Stay of Proceedings**") and related relief, the Applicants will be forced to immediately cease their operations. Together, these CCAA proceedings and the relief sought in the proposed Initial Order will provide the breathing room and stability required to continue the Canadian Business'

operations while the Applicants develop a Court-supervised sale and investor solicitation process ("**SISP**") and explore other value maximizing restructuring transactions.

5. The Applicants have limited the relief sought in the proposed Initial Order to that which is reasonably necessary to maintain the *status quo* and continue the Canadian Business in the ordinary course during the initial 10-day Stay of Proceedings (the "**Initial Stay Period**").

PART II: FACTS

6. The facts underlying this application are more fully set out in the affidavit of Michael Ruscetta, sworn November 7, 2022 (the "**Initial Order Affidavit**").¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the Initial Order Affidavit.

A. The Applicants' Corporate Structure

7. The Applicants are comprised of Trichome Financial Corp. ("**Trichome**") and five of its directly or indirectly wholly owned subsidiaries. Each of the Applicants, except for Highland Grow Inc. ("**Highland**"), is incorporated or was continued under the *Business Corporations Act*, R.S.O. 1990, c. B. 16, as amended (the "**OBCA**"). Highland is incorporated under the *Companies Act*, R.S.N.S. 1989, c. 81, as amended (the "**NSCA**").²

8. With the exception of Trichome, which is a direct subsidiary, the Applicants are indirect wholly owned subsidiaries of IM Cannabis Corp. ("**IMCC**"). IMCC is a publicly traded international cannabis company operating in Israel, Canada and Germany (the "**International Company**"). IMCC is not an Applicant in these proceedings.³

¹ Affidavit of Michael Ruscetta sworn on November 7, 2022 [Initial Order Affidavit], Applicant's Application Record dated November 7, 2022 at Tab 2 [Application Record].

² *Ibid* at paras 16, 20, 24-25, 33, 35, Application Record at Tab 2.

³ *Ibid* at paras 5-6, Application Record at Tab 2.

B. The Applicants' Business

9. Trichome was created to address the lack of credit availability in the cannabis market and at inception, operated as a specialty finance company focused on providing tailored credit-based capital solutions to the Canadian and legal international cannabis industry.⁴

10. As the Canadian cannabis industry rationalized and consolidated, Trichome shifted its focus from specialty finance to acquiring cannabis assets at compelling valuations, and financially and operationally restructuring such assets. This shift in focus ultimately resulted in Trichome's acquisition of substantially all of the assets of James E. Wagner Cultivation Corporation ("**JWC**") through Trichome's designee, TJAC (the "**JWC Acquisition**"). The JWC Acquisition was consummated in consensual and Court-supervised restructuring proceedings commenced by JWC and its wholly-owned subsidiaries (collectively, the "**JWC Vendors**") under the CCAA in April 2020 (the "**JWC CCAA Proceedings**").⁵

11. TJAC is now one of Trichome's two operating subsidiaries through which the Canadian Business is conducted. TJAC holds a Standard Cultivation, Standard Processing and Sale for Medical Purposes license and a Standard Cultivation and Standard Processing license, and focuses on the cultivation, processing and sale of premium cannabis for the adult-use market in Canada under the "WAGNERS" brand.⁶

12. Highland is Trichome's second operating subsidiary. Highland became an indirect subsidiary of Trichome pursuant to a statutory plan of arrangement under the *Business Corporations Act*, S.B.C. 2002, c. 57, as amended, among IMCC, Trichome and MYM

⁴ *Ibid* at para 42, Application Record at Tab 2.

⁵ *Ibid* at paras 17-18, 21-23, 42, Application Record at Tab 2.

⁶ *Ibid* at para 44, Application Record at Tab 2.

International Brands Inc. ("MYM"). Highland holds a single Standard Cultivation, Standard Processing and Sale for Medical Purposes license, and has focused on the cultivation, processing and sale of ultra-premium cannabis for the adult-use market in Canada under the "Highland Grow" brand.⁷

13. While TJAC and Highland operate the Licensed Facilities, Trichome centrally manages all aspects of the Canadian Business from Ontario. This includes managing the Company's financial position, cash management, and strategic and other decision-making.⁸

14. The Applicants currently employ approximately 226 people and engage 12 consultants subject to consulting arrangements. The Applicants' employees are non-unionized and there are no pension, retirement or deferred compensation plans for their benefit.⁹

C. Assets and Liabilities

15. As of the date of the Initial Order Affidavit, the Applicants have approximately \$300,000 of cash on hand.¹⁰ As at June 30, 2022, the Company had total assets with a book value of approximately \$113.8 million and total liabilities with a book value of approximately \$124.8 million.¹¹

16. The Applicants' liabilities and financial position are discussed in detail in the Initial Order Affidavit.¹² Certain of the Applicants' liabilities are discussed below.

⁷ *Ibid* at paras 27-28, 45, Application Record at Tab 2.

⁸ *Ibid* at para 46, Application Record at Tab 2.

⁹ *Ibid* at paras 58, 61, Application Record at Tab 2.

¹⁰ *Ibid* at para 80, Application Record at Tab 2.

¹¹ *Ibid* at paras 82, 84, Application Record at Tab 2.

¹² *Ibid* at paras 80-113, Application Record at Tab 2.

1. The ABL Agreement

17. On May 14, 2021, TJAC entered into a credit agreement (the "**Original ABL Agreement**") among Cortland, in its capacity as the Agent for the Lenders, TJAC, as borrower, and Trichome, as the initial guarantor. Pursuant to an instrument of assumption and joinder dated August 27, 2021, Highland, MYM International Brands Inc. ("**MYMB**"), Trichome Retail Corp. ("**TRC**") and MYM (collectively, the "**Guarantors**") also became parties to the Original ABL Agreement (as amended, the "**ABL Agreement**"). As of October 28, 2022, approximately \$4.73 million of principal is owing to the Agent under the ABL Agreement, and as of November 1, 2022, there was an additional \$79,000 of interest accrued month-to-date.¹³

18. Each of the Applicants is an obligor under the ABL Agreement and has provided various security to the Agent to secure the payment and performance of all of TJAC's present and future indebtedness and other obligations to the Agent and the Lenders thereunder.¹⁴

2. The Second Lien Trichome Loans

19. Trichome provided DIP financing to the JWC Vendors (the "**JWC DIP**") to facilitate their continued operations during the JWC CCAA Proceedings. Upon closing the JWC Acquisition, approximately \$7 million of the then outstanding JWC DIP was assumed in the form of a secured convertible debenture dated August 28, 2020 issued by TJAC in favour of Trichome (as amended, the "**Secured Debenture**"). The balance of the JWC DIP, plus TJAC's anticipated future funding requirements were funded by way of a secured grid promissory note dated August 28, 2020 issued

¹³ *Ibid* at paras 87, 91, Application Record at Tab 2.

¹⁴ *Ibid* at para 92, Application Record at Tab 2.

by TJAC in favour of Trichome (the "**Secured Promissory Note**", and together with the Secured Debenture, the "**Secured Trichome Loans**").¹⁵

20. As of September 30, 2022, approximately \$20.6 million (inclusive of accrued interest) and approximately \$7.1 million (inclusive of accrued interest) are owing to Trichome under the Secured Promissory Note and the Secured Debenture, respectively.¹⁶

21. As continuing security for the payment of all amounts owing under the Secured Trichome Loans, TJAC granted a security interest in favour of Trichome in, among other things, all of its present and future undertaking and all personal property in which TJAC, at any time, has any right, title or interest (excluding any consumer goods). Pursuant to a guarantee dated May 14, 2021 (the "**Initial Guarantee**"), the payment of all of TJAC's obligations to Trichome, and the security granted in respect thereof, are postponed to the payment of TJAC's indebtedness under the ABL Agreement and subordinated to the security interests held by the Agent in respect of the Obligations (as defined in the Initial Guarantee).¹⁷

3. Other Secured Obligations

22. TJAC has also granted a security interest in favour of Kempfenfelt, a Division of Bennington Financial Corp., in connection with a forklift leased by TJAC.¹⁸

23. There are no other security registrations against any of the Applicants.¹⁹

¹⁵ *Ibid* at para 97, Application Record at Tab 2.

¹⁶ *Ibid* at para 99, Application Record at Tab 2.

¹⁷ *Ibid* at paras 100-101, Application Record at Tab 2.

¹⁸ *Ibid* at para 103, Application Record at Tab 2.

¹⁹ *Ibid* at paras 102-103, Application Record at Tab 2.

4. Unsecured Indebtedness

24. The Applicants have a number of unsecured obligations. Among others, these obligations include the following:

- (a) *Indebtedness to IMCC* – IMCC has provided an unsecured loan to Trichome pursuant to a grid promissory note dated June 28, 2021 (the "**IMCC Promissory Note**"). As of September 30, 2022, approximately \$12.5 million (inclusive of accrued interest) is owing by Trichome to IMCC under the IMCC Promissory Note.²⁰
- (b) *Employee Liabilities* – The Applicants' bi-weekly payroll obligations are approximately \$491,000 for their salaried and hourly employees. While the Applicants are current with respect to their payment of payroll and the remittance of employee source deductions, save for certain consulting fees and withholding tax (as described below), their ability to meet their future payroll obligations, including on November 8, 2022, is contingent on the granting of the relief sought in the proposed Initial Order.²¹
- (c) *Accounts Payable* – As at November 1, 2022, the Applicants' invoiced trade accounts payable balance to vendors, third party suppliers and service providers was approximately \$7.7 million, of which approximately \$7.4 million is overdue.²²
- (d) *Excise, Sales and Withholding Taxes* – As at October 31, 2022, the Applicants had approximately \$847,000 in excise tax arrears (net of deposits and a surety bond),

²⁰ *Ibid* at paras 104-105, Application Record at Tab 2.

²¹ *Ibid* at para 110, Application Record at Tab 2.

²² *Ibid* at para 111, Application Record at Tab 2.

approximately \$268,000 in sales tax arrears, and approximately \$5.3 million in withholding tax arrears.²³

D. The Proposed DIP Facility

25. Given their liquidity issues, and as illustrated in the Cash Flow Forecast, the Applicants require DIP financing to fund their ongoing operations and pursue their restructuring efforts. To this end, TJAC, as borrower (in such capacity, the "**Borrower**"), Trichome, TRC, MYM, MYMB and Highland, as guarantors (together with the Borrower, the "**Credit Parties**"), and Cortland, as agent for and on behalf of the lenders party thereto (the "**DIP Lender**"), entered into a DIP facility agreement (the "**DIP Agreement**") on November 6, 2022 in respect of a DIP credit facility (the "**DIP Facility**").²⁴

26. The DIP Facility is a super-priority interim revolving credit facility. The maximum principal amount under the DIP Facility is the lesser of (i) \$4,875,000 (the "**Facility Limit**") and (ii) the Borrowing Base Amount, as calculated in accordance with the terms of the ABL Agreement, minus the amount of the Pre-Filing Obligations, plus the Over-Advance Amount (each as defined in the DIP Agreement).²⁵

27. The interest rate applicable to all advances under the DIP Facility is 14% per annum, due and payable in cash on the first business day of each month. In consideration for making the DIP Facility available to the Borrower, the Agent is entitled to a: (i) commitment fee equal to 2.0% of the Facility Limit; (ii) utilization fee of 2.4% per annum, calculated daily in accordance with the DIP Agreement on the unused portion of the DIP Facility; and (iii) \$100,000 deposit to cover the

²³ *Ibid*, Application Record at Tab 2.

²⁴ *Ibid* at para 136, Application Record at Tab 2.

²⁵ *Ibid* at para 137, Application Record at Tab 2.

DIP Lender's legal and other transaction expenses, which will be paid from the initial advance under the DIP Facility.²⁶

28. The DIP Facility is conditional upon the issuance of the proposed Initial Order approving the DIP Facility, and granting a Court-ordered charge over the Property (as defined in the Initial Order) in favour of the DIP Lender to secure all amounts advanced by the DIP Lender on behalf of the lenders under the DIP Facility (the "**DIP Lender's Charge**").²⁷ The DIP Facility is also subject to customary covenants, conditions precedent, and representations and warranties made by the Credit Parties to the DIP Lender.²⁸

29. The amount to be funded under the DIP Facility during the Initial Stay Period is limited to the amount necessary to ensure the continued operations of the Canadian Business during such time. The DIP Lender's Charge sought pursuant to the proposed Initial Order is correspondingly limited to the amount to be funded during the Initial Stay Period.²⁹

E. The Proposed Monitor

30. KSV Restructuring Inc. is the proposed monitor in these CCAA proceedings (in such capacity, "**Proposed Monitor**").³⁰

PART III: ISSUES

31. The issues to be considered on this application are whether:

- (a) each of the Applicants is a "debtor company" to which the CCAA applies;

²⁶ *Ibid* at para 138, Application Record at Tab 2.

²⁷ *Ibid* at para 142, Application Record at Tab 2.

²⁸ *Ibid* at para 141, Application Record at Tab 2.

²⁹ *Ibid* at para 141-142, Application Record at Tab 2.

³⁰ *Ibid* at para 122, Application Record at Tab 2.

- (b) Ontario is the appropriate venue for these CCAA proceedings;
- (c) the Stay of Proceedings should be granted;
- (d) the Court should approve the proposed DIP Facility and grant the DIP Lender's Charge;
- (e) the Applicants should be authorized to make certain pre-filing payments;
- (f) the Directors' Charge (as defined below) should be granted; and
- (g) the Administration Charge (as defined below) should be granted.

PART IV: LAW AND ANALYSIS

A. Each of the Applicants is a Debtor Company to which the CCAA Applies

32. The CCAA applies in respect of a "debtor company" or "affiliated debtor companies" whose liabilities exceed \$5 million.³¹ The CCAA defines a "debtor company" as "any company" that is, among other things, "insolvent".³²

1. Each Applicant is a Company and they are Collectively, Affiliated Companies

33. The term "company" is defined under the CCAA, in relevant part, as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province".³³ Pursuant to subsection 3(2) of the CCAA "companies are affiliated companies if

³¹ [Companies' Creditors Arrangement Act, RSC 1985, c C-36, s 3\(1\) \[CCAA\]](#); [MPX International Corporation, 2022 ONSC 4348 at para 46 \[MPX\]](#); [Laurentian University of Sudbury, 2021 ONSC 659 at para 25 \[Laurentian\]](#); [McEwan Enterprises Inc, 2021 ONSC 6453 at para 24 \[McEwan\]](#).

³² [Ibid](#) s 2(1), "debtor company". See also, [Laurentian](#), [ibid](#) at [para 25](#).

³³ [Ibid](#) s 2(1), "company". See also, [Laurentian](#), [ibid](#) at [para 26](#).

one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person".³⁴

34. The Applicants comprise of Trichome and five of its directly or indirectly owned subsidiaries. Trichome, TJAC, TRC, MYM and MYMB are all incorporated or continued pursuant to the provisions of the OBCA, while Highland is incorporated under the NSCA. As such, each of the Applicants is a "company" within the ambit of the CCAA and collectively, the Applicants are affiliated companies.³⁵

2. Each of the Applicants is Insolvent and Collectively, Have Claims in Excess of \$5 Million

35. In the absence of a definition for the term "insolvent" under the CCAA, Courts have referred to the definition of "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C. c. B-3, as amended (the "**BIA**").³⁶ The BIA defines "insolvent person", in relevant part, as a person:

- (a) who is for any reason unable to meet his obligations as they generally become due;
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or

³⁴ *Ibid* s 3(2). Pursuant to subsection 3(4) of the [CCAA](#), a "company is a subsidiary of another company if (a) it is controlled by (i) that other company, (ii) that other company and one or more companies each of which is controlled by that other company, or (iii) two or more companies each of which is controlled by that other company; or (b) it is a subsidiary of a company that is a subsidiary of that other company."

³⁵ Initial Order Affidavit, *supra* note 1 at paras 16, 20, 24-25, 33, 35, Application Record at Tab 2.

³⁶ [Laurentian](#), *supra* note 31 at [para 30](#); [McEwan](#), *supra* note 31 at [para 25](#); [Re Target Canada Co, 2015 ONSC 303](#) at [para 26](#) [*Target*].

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.³⁷

36. The test for determining whether a company is an "insolvent person" under the BIA is disjunctive – satisfaction of any one of the above criteria is sufficient.³⁸

37. In addition to the BIA's disjunctive test, a company is also insolvent for the purposes of the CCAA if "there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of 'cash' to pay its debts as they generally become due in the future without the benefit of the [stay] and ancillary protection".³⁹

38. Applied here, each of the Applicants is insolvent. The Applicants have substantial liabilities, including TJAC's indebtedness to the Agent, which each of the remaining Applicants has guaranteed.⁴⁰ The Applicants are facing a significant liquidity crisis and do not have the wherewithal to satisfy their liabilities.⁴¹ Indeed, the Applicants have already ceased paying certain of their ordinary course obligations giving rise to substantial accounts payable. Given the Applicants' nominal cash on hand, the Applicants have no prospect of satisfying their obligations as they become due absent the relief sought under the proposed Initial Order.⁴²

³⁷ [Bankruptcy and Insolvency Act, RSC 1985, c. B-3](#), s 2, "insolvent person".

³⁸ [McEwan](#), *supra* note 31 at [para 26](#); [Laurentian](#), *supra* note 31 at [para 31](#).

³⁹ [Re Stelco Inc., \(2004\) 48 CBR \(4th\) 299 \(Ont Sup Ct\)](#) at paras [26, 40](#); [McEwan](#), *ibid* at [para 27](#); [Laurentian](#), *ibid* at [para 32](#).

⁴⁰ Initial Order Affidavit, *supra* note 1 at paras 84-85, Application Record at Tab 2.

⁴¹ *Ibid* at paras 9, 65-66, 98, 105-106, 111, 115-117, Application Record at Tab 2.

⁴² *Ibid* at para 80, Application Record at Tab 2.

39. Taken together, each of the Applicants is a debtor company, and collectively, affiliated debtor companies, whose liabilities exceed \$5 million to which the CCAA applies.

B. Ontario is the Appropriate Venue for these CCAA Proceedings

40. Pursuant to subsection 9(1) of the CCAA, an application under the CCAA 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".⁴³

41. With the exception of Highland, each of the Applicants' registered office is located in Toronto, Ontario. While Highland's registered office is in Halifax, Nova Scotia, its business, including its financial position, cash-management and strategic and other decision-making is centrally managed by Trichome from Toronto, Ontario.⁴⁴ For these reasons, Ontario is plainly the appropriate venue for these CCAA proceedings and this Court has jurisdiction to hear the Applicants' application.⁴⁵

C. The Stay of Proceedings Should be Granted

42. Section 11.02 of the CCAA provides this Court with the jurisdiction to impose a stay of proceedings for a period of not more than 10 days if it is satisfied that circumstances exist that make the order appropriate.⁴⁶

43. The jurisdiction vested in Courts to stay proceedings under section 11.02 "should be construed broadly to accomplish the legislative purposes of the CCAA".⁴⁷ These purposes include,

⁴³ [CCAA](#), *supra* note 31 s 9(1); [Target](#), *supra* note 36 at [para 29](#).

⁴⁴ Initial Order Affidavit, *supra* note 1 at para 46, Application Record at Tab 2.

⁴⁵ [Re Lydian International Limited, 2019 ONSC 7473](#) at [para 41](#) [*Lydian*]; [Target](#), *supra* note 36 at [paras 29-30](#).

⁴⁶ [CCAA](#), *supra* note 31, s 11.02. See also, [Re Boreal Capital Partners Ltd et al, 2021 ONSC 7802](#) at [para 15](#) [*Boreal*]; [Laurentian](#), *supra* note 31 at [para 35](#).

⁴⁷ [Canwest Global Communications Corp, 2011 ONSC 2215](#) at [para 24](#) [*Canwest*].

among others, enabling the continuation of the applicants' business and avoiding the social and economic costs of a liquidation.⁴⁸ Accordingly, a stay of proceedings will be appropriate where it maintains the *status quo* and provides applicants with breathing room while they seek to restore solvency and emerge from the CCAA on a going-concern basis.⁴⁹

44. Here, the proposed Stay of Proceedings is intended to prevent enforcement action by, among others, the Applicants' contractual counterparties and disruption to the Canadian Business. The proposed Stay of Proceedings will preserve the *status quo* and afford the Applicants the breathing space and stability required to advance their restructuring efforts, including developing a SISP and/or exploring other transaction alternatives. Additionally, it will permit the Applicants to continue to operate the Canadian Business as a going concern with minimal disruption. The continued and uninterrupted operation of the Canadian Business will preserve value for the Applicants' stakeholders and is in the best interests of, among others, the Applicants' employees, suppliers, regulators and landlords.⁵⁰

45. The Applicants submit that the proposed Stay of Proceedings is in the best interests of the Applicants and their stakeholders, is consistent with the purposes of the CCAA, and is appropriate in the circumstances.

D. The Proposed DIP Facility and DIP Lender's Charge Should be Approved

46. Subsection 11.2(1) of the CCAA authorizes this Court to approve DIP financing and grant a corresponding charge in an amount it considers appropriate – having regard to the debtor company's cash flow statement – where the secured creditors likely to be affected by the charge

⁴⁸ *Ibid*; *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60 at para 15 [*Century Services*].

⁴⁹ *Century Services*, *ibid* at para 14; *Target*, *supra* note 36 at para 8; *Canwest*, *ibid* at paras 24-25.

⁵⁰ Initial Order Affidavit, *supra* note 1 at paras 119-121, Application Record at Tab 2.

are given notice thereof.⁵¹ A charge granted pursuant to subsection 11.2(1) of the CCAA may not secure an obligation that exists before the proposed order is made.⁵² Each of statutory prerequisites to approving the DIP Facility and granting the proposed DIP Lender's Charge are satisfied in this case.

1. The Proposed DIP Facility is Limited to what is Reasonably Necessary

47. On an initial application, subsection 11.2(5) of the CCAA requires this Court to be 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 the initial 10-day stay period.⁵³

48. Subsection 11.2(5) of the CCAA espouses the general approach of Courts to limit DIP financing to "what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period".⁵⁴ As Hainey J. affirmed in *Re Clover Leaf Holdings Company*, DIP financing will be reasonably necessary under subsection 11.2(5) of the CCAA where it provides the applicants with the liquidity necessary to "keep the lights on", ensure the continued operations of the applicants' business and preserve enterprise value while a restructuring is pursued.⁵⁵

49. As described above, the Applicants are facing a severe liquidity crisis, have limited cash on hand and have accrued significant accounts payable, the majority of which are overdue and owed to essential suppliers. The amount to be funded under the DIP Facility during the Initial Stay Period has been limited to that which is necessary to ensure the continued operations of the

⁵¹ [CCAA](#), *supra* note 31 s 11.2(1); [Boreal](#), *supra* note 46 at [para 23](#); [Re Just Energy Corp.](#), 2021 ONSC 1793 at [para 52](#) [*Just Energy*]; [Re MJardin Group Inc.](#), 2022 ONSC 3338 at [para 29](#);

⁵² [CCAA](#), *ibid*; [Boreal](#), *ibid*.

⁵³ [CCAA](#), *ibid* s 11.2(5); [Boreal](#), *ibid* at [para 24](#); [MPX](#), *supra* note 31 at [para 55](#).

⁵⁴ [Re Royal Oak Mines Inc.](#), [1999] 6 CBR (4th) 314 (Ont Sup Ct) at [para 24](#); [Just Energy](#) *supra* note 51 at [para 58](#); [Re Clover Leaf Holdings Company](#), 2019 ONSC 6966 at [para 20](#) [*Clover Leaf*]; [Miniso International Hong Kong Limited v Migu Investments Inc.](#), 2019 BCSC 1234 at [para 80](#) [*Miniso*].

⁵⁵ [Clover Leaf](#), *ibid* at [paras 20-21](#); [Miniso](#), *ibid* at paras [86](#), [88](#).

Canadian Business and maintain the *status quo*. Without access to the DIP Facility, the Applicants will be forced to immediately cease their operations to the detriment of their stakeholders.⁵⁶ In the circumstances, the Applicants submit that subsection 11.2(5) is plainly satisfied.

2. The Proposed DIP Facility Satisfies the Criteria in Subsections 11.2(1) and 11.2(4) of the CCAA

50. When determining whether to grant a charge securing DIP financing, subsection 11.2(4) directs Courts to consider the following non-exhaustive factors:

- (a) the period during which the applicants are expected to be subject to the CCAA proceedings;
- (b) how the applicants' business and financial affairs are to be managed during the CCAA proceedings;
- (c) whether the applicants' management has the confidence of their major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the applicants;
- (e) the nature and value of the applicants' property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the proposed monitor's report, if any.⁵⁷

⁵⁶ Initial Order Affidavit, *supra* note 1 at paras 9, 65-66, 117, 148, Application Record at Tab 2.

⁵⁷ [CCAA](#), *supra* note 31 s 11.2(4); [Just Energy](#), *supra* note 51 at [para 61](#).

51. Having regard to the foregoing factors and the requirements of subsection 11.2(1) of the CCAA, the following supports the approval of the DIP Facility and the granting of the DIP Lender's Charge:

- (a) the Applicants are facing a severe liquidity crisis, have limited cash on hand and are overdue on several of their obligations, including to certain third party suppliers of goods and services essential to the Canadian Business;
- (b) the Cash Flow Forecast substantiates the urgent need for DIP financing to provide the Applicants with the liquidity necessary to continue the Canadian Business' ordinary course operations;
- (c) the amount to be funded under the DIP Facility is appropriate having regard to the Cash Flow Forecast and the amount that is proposed to be funded during the Initial Stay Period;
- (d) the DIP Facility will preserve the value and going concern operations of the Canadian Business, which is in the best interests of the Applicants and their stakeholders;
- (e) the DIP Facility is conditional on the granting of the DIP Lender's Charge, which does not secure any obligations incurred prior to these CCAA proceedings;
- (f) under the terms of the Proposed Initial Order, the DIP Lender's Charge will not rank in priority to any Encumbrances (as defined in the Initial Order) in favour of any person that has not been served with notice of the within application; and

- (g) the Proposed Monitor is supportive of the DIP Facility and the DIP Lender's Charge, and does not believe that creditors will be materially prejudiced as a result of their approval.⁵⁸

E. The Applicants Should be Authorized to Make Certain Pre-Filing Payments

52. To preserve continuity in the Canadian Business, the proposed Initial Order authorizes (but does not require) the Applicants to pay amounts owing for goods and services actually supplied to the Applicants prior to, on, or after the date of the Initial Order. Importantly, such payments may only be made with the consent of the Monitor and the DIP Lender, with the Monitor considering, among other factors, whether (i) the supplier or service provider is essential to the Canadian Business and ongoing operations of the Applicants and the payment is required to ensure ongoing supply, (ii) making such payment will preserve, protect or enhance the value of the Property or the Canadian Business, and (iii) making such payment is required to address regulatory concerns.⁵⁹

53. This Court's jurisdiction under section 11 of the CCAA to permit payment of pre-filing obligations where such payment is essential to the ongoing business operations of the applicants, is well established.⁶⁰ In accordance with section 11.001 of the CCAA, where the Court exercises its discretion to grant relief under section 11 on an initial application, the relief must be reasonably necessary for the continued operations of the debtor company in the ordinary course of business.⁶¹

⁵⁸ Initial Order Affidavit, *supra* note 1 at paras 9, 65-66, 80, 84-85, 114-117, 136, 141-142, 148, Application Record at Tab 2; Pre-Filing Report of KSV Restructuring Inc dated November 7, 2022 s 5.1 at paras 1-2 and s 6.3 at para 1 [Monitor's Report]; Draft Initial Order at para 37, Application Record at Tab 3.

⁵⁹ Initial Order Affidavit, *supra* note at para 143, Application Record at Tab 2.

⁶⁰ *McEwan*, *supra* note 31 at [para 32](#); *Re Performance Sports Group Ltd*, 2016 ONSC 6800 at [para 24](#) [*Performance Sports*]; *Boreal*, *supra* note 46 at [paras 20-21](#); *Target*, *supra* note 36 at [paras 62-65](#); *MPX*, *supra* note 31 at [paras 69-70](#).

⁶¹ *CCAA*, *supra* note 31 s 11.001.

54. In authorizing such payments, including upon an initial application under the CCAA, Courts have considered, among other factors:

- (a) whether the applicants have sufficient inventory of the goods on hand to meet their needs;
- (b) whether the goods and services were integral to the business of the applicants;
- (c) the applicants' need for the uninterrupted supply of the goods and services;
- (d) the effect on the applicants' operations and ability to restructure if they could not make pre-filing payments;
- (e) the fact that no payments would be made without the consent of the Court-appointed monitor; and
- (f) the Court-appointed monitor's willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized.⁶²

55. Applying these factors, the Applicants submit that the requested relief to pay pre-filing amounts in the manner prescribed by the proposed Initial Order is appropriate, given that:

- (a) the Canadian Business, including the Applicants' ability to fulfill purchase orders, is dependent on the continued and uninterrupted supply of certain key goods and services;

⁶² [McEwan](#), *supra* note 31 at [para 33](#); [MPX](#), *supra* note 31 at paras [69-70](#); [Performance Sports](#), *supra* note 60 at [paras 24-25](#); [Re Cinram International Inc.](#), 2012 ONSC 3767 at [para 37](#) and [Schedule "C"](#) at [para 68](#).

- (b) absent authorization to make the proposed pre-filing payments, the Applicants are concerned that their third party suppliers may cease providing goods and services to the Applicants;
- (c) a disruption in the supply of essential goods and services to the Applicants could imperil the continued operations of the Canada Business to the detriment of the Applicants' restructuring efforts and their stakeholders;
- (d) the proposed pre-filing payments for essential goods and services can only be made with the consent of the Monitor and the DIP Lender; and
- (e) the proposed Monitor has advised that, if appointed, it will engage with the Applicants to ensure that payments to suppliers in respect of pre-filing liabilities are limited to the extent reasonably possible.⁶³

F. The Directors' Charge Should be Granted

56. The Applicants are seeking a charge over the Property in the amount of \$967,000 to secure the indemnity of their respective directors and officers for liabilities they may incur during these CCAA proceedings (the "**Directors' Charge**").⁶⁴ The Directors' Charge is proposed to rank in priority to the DIP Lender's Charge but subordinate to the Administration Charge.

57. Section 11.51 of the CCAA authorizes this Court to grant a charge in favour of a debtor company's directors and officers in an amount it considers appropriate where the secured creditors

⁶³ Initial Order Affidavit, *supra* note 1 at paras 143-145, Application Record at Tab 2; Monitor's Report, *supra* note 58 s 7.0 at paras 1-4.

⁶⁴ *Ibid* at para 128, Application Record at Tab 2.

likely to be affected by the charge are given notice thereof.⁶⁵ Such a charge may not be granted if the Court is of the opinion that "adequate indemnification insurance for the director or officer" could be obtained by the debtor company at a reasonable cost.⁶⁶

58. A charge securing the indemnity of a debtor company's directors and officers is both "common place and essential to [...] the success of any possible restructuring" as it is not otherwise reasonable to expect a debtor company's directors and officers to continue.⁶⁷ The objective of such charges is to "keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring".⁶⁸

59. In granting charges securing the indemnity of a debtor company's directors and officers, Courts have considered, among other things, whether:

- (a) notice has been given to the secured creditors likely to be affected by the charge;
- (b) the amount of the proposed charge is appropriate given the directors' and officers' estimated exposure;
- (c) the charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct; and
- (d) the debtor company could obtain adequate indemnification insurance for the director at a reasonable cost.⁶⁹

⁶⁵ [CCAA](#), *supra* note 31 s 11.51(1)-(4); [Re Canwest Global Communications Corp.](#), [2009] OJ No 4286 (Ont Sup Ct) at [para 45](#) [[Canwest Global](#)]; [US Steel Canada Inc. Re.](#), 2014 ONSC 6145 at [para 20](#) [[US Steel](#)]; [Lydian](#), *supra* note 45 at [para 52](#).

⁶⁶ [CCAA](#), *ibid* s 11.51(3); [Canwest Global](#), *ibid*.

⁶⁷ [US Steel](#), *supra* note 65 at [paras 20-22](#).

⁶⁸ [Canwest Global](#), *supra* note 65 at [paras 45-48](#); [Timminco Ltd. Re.](#), 2012 ONSC 506 at [para 66](#) [[Timminco](#)]; [MPX](#), *supra* note 31 at [para 66](#).

⁶⁹ [Lydian](#), *supra* note 45 at [paras 52-54](#); [MPX](#), *ibid* at [paras 66-68](#); [McEwan](#), *supra* note 31 at [para 53](#); [Canwest Global](#), *ibid* at [paras 47-48](#).

60. Here, the Applicants submit that it is appropriate for this Court to exercise its jurisdiction to grant the proposed Directors' Charge, given that:

- (a) the Applicants' existing claims-made insurance policies under which the directors and officers are beneficiaries (the "**Insurance Policies**") are subject to a relatively small annual limit and a number of exclusions, exceptions and carve-outs, and are intended for the benefit of the entire International Company;
- (b) the Applicants are unable to acquire alternative or additional directors' and officers' liability insurance capable of adequately supplementing the Insurance Policies;
- (c) the Applicants require the continued involvement of their directors and officers in order to continue operating the Canadian Business, especially given the strict regulatory environment in which the Applicants operate and the security clearances required of certain directors and officers;
- (d) the directors and officers have indicated that their continued service during these CCAA proceedings is conditional upon the granting of the Directors' Charge;
- (e) the Directors' Charge only covers obligations and liabilities that the Applicants' directors and officers incur after the commencement of the CCAA proceedings and does not indemnify the directors and officers in the event of willful misconduct or gross negligence;
- (f) the amount of the Directors' Charge is reasonable in the circumstances and, in consultation with the Proposed Monitor, has been limited to the potential exposure of the Applicants' directors and officers during the Initial Stay Period;

- (g) under the terms of the Proposed Initial Order, the Directors' Charge will not rank in priority to any Encumbrances in favour of any person that has not been served with notice of the within application; and
- (h) the Proposed Monitor is supportive of the proposed Directors' Charge.⁷⁰

G. The Administration Charge Should be Granted

61. The Applicants are seeking a Court-ordered charge over the Property in the amount of \$750,000 to secure the professional fees and disbursements of the Proposed Monitor, along with counsel to the Proposed Monitor and the Applicants, at their standard rates and charges, incurred prior and subsequent to the granting of the Initial Order (the "**Administration Charge**").⁷¹

62. Section 11.52 of the CCAA vests this Court with jurisdiction to grant an administration charge on notice to the secured creditors likely to be affected thereby in favour of, among others, a Court-appointed monitor, its legal advisors and any legal experts engaged by the debtor company.⁷² As this Court held in *Re U.S. Steel Canada Inc.*, it is essential to the success of any CCAA restructuring "to order a super-priority in respect of charges securing professional fees and disbursements".⁷³

63. The following list of non-exhaustive factors may inform a Court's decision to grant an administration charge:

- (a) the size and complexity of the business being restructured;

⁷⁰ Initial Order Affidavit, *supra* note 1 at paras 128-135, Application Record at Tab 2; Monitor's Report, *supra* note 58 s 6.2 at paras 1-4; Draft Initial Order at para 37, Application Record at Tab 3.

⁷¹ Initial Order Affidavit, *supra* note 1 at para 124, Application Record at Tab 2.

⁷² *CCAA*, *supra* note 31 s 11.52(1)-(2); *US Steel*, *supra* note 65 at [para 20](#); *Canwest Global*, *supra* note 65 at [paras 37-38](#); *MPX*, *supra* note 31 at [para 62](#); *McEwan*, *supra* note 31 at [para 49](#); *Lydian*, *supra* note 45 at [para 44](#).

⁷³ *US Steel*, *ibid* at [para 22](#). See also, *Timminco*, *supra* note 68 at [para 66](#).

- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the monitor.⁷⁴

64. In this case, the Applicants submit that it is appropriate for this Court to exercise its jurisdiction and grant the proposed Administration Charge, given that:

- (a) the Applicants require the knowledge, expertise and continued participation of the beneficiaries of the Administration Charge during these CCAA proceedings;
- (b) the beneficiaries of the Administration Charge have, and will continue to, contribute to these CCAA proceedings and assist the Applicants with continuing the Canadian Business in the ordinary course;
- (c) the beneficiaries of the Administration Charge do not have the benefit of retainers, and now have significant accrued fees;
- (d) the Applicants have no other means of retaining the beneficiaries of the Administration Charge, and each beneficiary is performing distinct functions;
- (e) under the terms of the Proposed Initial Order, the Administration Charge will not rank in priority to any Encumbrances in favour of any person that has not been served with notice of the within application; and

⁷⁴ *Lydian*, *supra* note 45 at [paras 46-48](#); *McEwan*, *supra* note 31 at [paras 49-50](#); *MPX*, *supra* note 31 at [para 63-64](#); *Target*, *supra* note 36 at [paras 73-75](#).

(f) the Proposed Monitor is supportive of the Administration Charge.⁷⁵

PART V: RELIEF REQUESTED

65. The Applicants submit that the relief sought on the within application is appropriate in the circumstances and consistent with prior orders of this Court,⁷⁶ and respectfully request that the proposed form of Initial Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF NOVEMBER 2022

Bennett Jones LLP
BENNETT JONES LLP

⁷⁵ Initial Order Affidavit, *supra* note 1 at paras 124-127, Application Record at Tab 2; Monitor's Report, *supra* note 58 s 6.1 at paras 1-5; Draft Initial Order at para 37, Application Record at Tab 3.

⁷⁶ [*In the Matter of a Plan of Compromise or Arrangement of FIGR Brands, Inc., FIGR Norfolk Inc. and Canada's Island Garden Inc.*](#) (January 21, 2021), Toronto, CV-21-00655373-00CL (Order) (ONSC); [*In the Matter of a Plan of Compromise or Arrangement of Superette Inc., Superette Ontario Inc., 2659198 Ontario Inc., 2662133 Ontario Inc., 2662134 Ontario Inc. and 2662135 Ontario Inc.*](#) (August 30, 2022), Toronto, CV-22-00686245-00CL (Order) (ONSC); [*In the Mater of a Plan of Compromise or Arrangement of MPX International Corporation, BioCannabis Products Ltd., Canveda Inc., The CinG-X Corporation, Spartan Wellness Corporation, MPXI Alberta Corporation, MCLN Inc., and Salus BioPharma Corporation*](#) (July 25, 2022), Toronto, CV-22-00684542-00CL (Order) (ONSC).

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [Canwest Global Communications Corp, 2011 ONSC 2215.](#)
2. [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60.](#)
3. [In the Matter of a Plan of Compromise or Arrangement of FIGR Brands, Inc., FIGR Norfolk Inc. and Canada's Island Garden Inc.](#) (January 21, 2021), Toronto, CV-21-00655373-00CL (Order) (ONSC).
4. [In the Matter of a Plan of Compromise or Arrangement of MPX International Corporation, BioCannabis Products Ltd., Canveda Inc., The CinG-X Corporation, Spartan Wellness Corporation, MPXI Alberta Corporation, MCLN Inc., and Salus BioPharma Corporation](#) (July 25, 2022), Toronto, CV-22-00684542-00CL (Order) (ONSC).
5. [In the Matter of a Plan of Compromise or Arrangement of Superette Inc., Superette Ontario Inc., 2659198 Ontario Inc., 2662133 Ontario Inc., 2662134 Ontario Inc. and 2662135 Ontario Inc.](#) (August 30, 2022), Toronto, CV-22-00686245-00CL (Order) (ONSC).
6. [Laurentian University of Sudbury, 2021 ONSC 659.](#)
7. [McEwan Enterprises Inc, 2021 ONSC 6453.](#)
8. [Miniso International Hong Kong Limited v Migu Investments Inc, 2019 BCSC 1234.](#)
9. [MPX International Corporation, 2022 ONSC 4348](#)
10. [Re Boreal Capital Partners Ltd et al, 2021 ONSC 7802.](#)
11. [Re Canwest Global Communications Corp, \[2009\] OJ No 4286 \(Ont Sup Ct\).](#)
12. [Re Cinram International Inc, 2012 ONSC 3767.](#)
13. [Re Clover Leaf, 2019 ONSC 6966.](#)
14. [Re Just Energy Corp, 2021 ONSC 1793.](#)
15. [Re Lydian International Limited, 2019 ONSC 7473.](#)
16. [Re MJardin Group Inc, 2022 ONSC 3338.](#)
17. [Re Performance Sports Group Ltd, 2016 ONSC 6800.](#)
18. [Re Royal Oak Mines Inc, \[1999\] 6 CBR \(4th\) 314 \(Ont Sup Ct\).](#)
19. [Re Stelco Inc, \(2004\) 48 CBR \(4th\) 299 \(Ont Sup Ct\).](#)
20. [Target Canada Co, 2015 ONSC 303.](#)
21. [Timminco Ltd, Re, 2012 ONSC 506.](#)
22. [US Steel Canada Inc, Re, 2014 ONSC 6145.](#)

SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

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

Section 2, "Insolvent Person"

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

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

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

Section 2(1), "Company"

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*)

Section 2(1), "Company"

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*)

Section 3

Application

(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.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

R.S., 1985, c. C-36, s. 31997, c. 12, s. 1212005, c. 47, s. 125.

Section 9

Jurisdiction of court to receive applications

(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.

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

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. R.S., 1985, c. C-36, s. 111992, c. 27, s. 901996, c. 6, s. 1671997, c. 12, s. 1242005, c. 47, s. 128.

Section 11.001

Relief reasonably necessary

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136

Section 11.02

Stays, etc. – initial application

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

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

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

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

Restriction

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

2005, c. 47, s. 128, 2007, c. 36, s. 62(F)2019, c. 29, s. 137.

Section 11.2

Interim financing

(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.

1997, c. 12, s. 1242005, c. 47, s. 1282007, c. 36, s. 652019, c. 29, s. 138.

Section 11.51

Security or charge relating to director's indemnification

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

Priority

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

Restriction — indemnification insurance

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

Negligence, misconduct or fault

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

2005, c. 47, s. 1282007, c. 36, s. 66.

Section 11.52

Court may order security or charge to cover certain costs

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

2005, c. 47, s. 1282007, c. 36, s. 66

**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 TRICHOME FINANCIAL CORP., TRICHOME JWC ACQUISITION CORP.,
MYM NUTRACEUTICALS INC., TRICHOME RETAIL CORP., MYM
INTERNATIONAL BRANDS INC., AND HIGHLAND GROW INC.**

Court File No.: _____

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS
(Returnable November 7, 2022)

BENNETT JONES LLP

3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

Sean Zweig (LSO# 57307I)

Tel: (416) 777-6254

Email: zweigs@bennettjones.com

Joshua Foster (LSO# 79447K)

Tel: (416) 777-7906

Email: fosterj@bennettjones.com

Lawyers for the Applicants