

**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
FIGR BRANDS, INC., FIGR NORFOLK INC.
AND CANADA'S ISLAND GARDEN INC.**

Applicants

**FACTUM OF THE APPLICANTS
(Amended and Restated Initial Order and SISP Approval Order)**

January 27, 2021

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FACTUM OF THE APPLICANTS

PART I: OVERVIEW

1. FIGR Brands, Inc. ("**FIGR Brands**"), FIGR Norfolk Inc. ("**FIGR Norfolk**"), and Canada's Island Garden Inc. ("**CIG**", and together with FIGR Brands and FIGR Norfolk, the "**Applicants**" or the "**FIGR Group**") are seeking the granting of an amended and restated initial order (the "**Amended and Restated Initial Order**") and an order approving a sale and investment solicitation process (the "**SISP Approval Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").
2. On January 21, 2021, the FIGR Group obtained an initial order (the "**Initial Order**") under the CCAA, which, among other things, granted a stay of proceedings until January 31, 2021 (the "**Stay of Proceedings**"), appointed FTI Consulting Canada Inc. ("**FTI**") as monitor of the Applicants (in such capacity, the "**Monitor**"), approved interim financing, and granted certain limited charges over the Property. The relief sought in the Initial Order was limited to that which was reasonably necessary for the ordinary course business operations of the Applicants during the initial 10-day Stay of Proceedings.
3. The Applicants are now seeking further relief under the CCAA to supplement the limited relief obtained under the Initial Order.
4. On this motion, the Applicants are seeking the following relief (among other things) pursuant to the Amended and Restated Initial Order:
 - (a) elevating the priority of the Charges ahead of all Encumbrances (as defined in the Initial Order);
 - (b) an increase the Directors' Charge and the DIP Lender's Charge (each as defined below) to the maximum amounts of \$2,700,000 and \$8,000,000 (plus interest and costs), respectively; and

(c) an extension to the Stay of Proceedings to and including March 31, 2021.

5. The Applicants also seek the approval of a sale and investor solicitation process (the "SISP") pursuant to the SISP Approval Order.

PART II: FACTS

6. The facts underlying this motion are more fully set out in the affidavit of Michael Devon, sworn January 21, 2021 (the "**January 21 Affidavit**"), the affidavit of Michael Devon, sworn January 25, 2021 (the "**January 25 Affidavit**"), the Pre-Filing Report of FTI, as proposed monitor dated January 21, 2021, and the First Report of the Monitor dated January 27, 2021 (the "**First Report**").¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the January 21 Affidavit or the January 25 Affidavit, as applicable.

A. Need for CCAA Protection and the Granting of the Initial Order

7. Since commencing operations, the Norfolk Facility and the CIG Facility have been cash flow negative. Both facilities are dependent on the indirect subsidiaries of New Pyxus International for direct and indirect funding. Those indirect subsidiaries advised the FIGR Group that they were no longer willing to provide funding without an exit strategy.

8. As a result, the Applicants urgently required the breathing space and stability afforded by the CCAA to run an orderly sale process while maintaining business operations in the ordinary course and in compliance with the cannabis regulatory regime, with a view to maximizing stakeholder value. To that end, the Applicants sought the Initial Order.

9. Among other things, the Initial Order:

¹ Affidavit of Michael Devon sworn on January 21, 2021 [January 21 Affidavit]; Pre Filing Report of FTI Consulting Canada Inc. dated January 21, 2021 [Pre Filing Report]; Affidavit of Michael Devon sworn on January 25, 2021 [January 25 Affidavit]; First Report of FTI Consulting Canada Inc. dated January 27, 2021 [First Report].

- (a) appointed FTI as Monitor;
- (b) granted the initial 10-day Stay of Proceedings;
- (c) approved the Applicants' ability to borrow under a debtor-in-possession credit facility (the "**DIP Loan**");
- (d) authorized the Applicants to make certain pre-filing payments with the consent of the Monitor and the DIP Lender; and
- (e) granted the following charges (collectively, the "**Charges**") over the Applicants' Property: (i) the Administration Charge up to a maximum amount of \$600,000; (ii) the Directors' Charge up to a maximum amount of \$2,000,000; (iii) the DIP Lender's Charge up to a maximum amount of \$2,500,000; and (iv) the Intercompany Charge.

B. The Applicants' Activities Since the Granting of the Initial Order

10. Since the granting of the Initial Order, the Applicants, with the assistance of the Monitor, have taken steps to stabilize and continue their ordinary course business operations. In that time, a limited portion of the DIP Loan was advanced to allow the Applicants to pay their critical expenses, including payroll and certain obligations to key vendors.

11. With the assistance of the Monitor, the Applicants have continued ordinary course operations, prepared and executed a communications plan to apprise their suppliers, employees and other stakeholders (including Health Canada and the provincial cannabis boards) of these CCAA proceedings (the "**CCAA Proceedings**"), developed the SISF and prepared materials for the hearing of this motion.²

² First Report, *ibid* at para 13; January 25 Affidavit *ibid* at para 10.

C. The SISP

12. The SISP was developed by the FIGR Group and the Monitor, in consultation with the DIP Lender. Pursuant to the proposed SISP, the Monitor, together with its affiliate FTI Capital Advisors – Canada ULC, with the assistance of the Applicants and in consultation with the DIP Lender, will solicit interest in, and opportunities for a sale or investment in the FIGR Group's assets and business, in whole or in part. The SISP was designed to be broad and flexible and contemplates one or more of a restructuring, recapitalization or other form of reorganization of the business and affairs of the Applicants as a going concern or a sale of all, substantially all or one or more components of the Property and the FIGR Group's business operations (the "**Business**") (each an "**Opportunity**").³

13. The SISP provides for, *inter alia*, (i) solicitation of interest, which was commenced by the Monitor on January 22, 2021, (ii) a Phase 1 Bid Deadline of 5pm Eastern Time on February 26, 2021, and (iii) a Phase 2 Bid Deadline to be specified in the Phase 2 Bid Process Letter.⁴

14. The SISP requires the Monitor, with the assistance of the Applicants and in consultation with the DIP Lender, to prepare a list of known potential bidders ("**Known Potential Bidders**"). The Monitor will apprise the market of the SISP by arranging for notice of the SISP to be published in The Globe and Mail (National Edition), HortiDaily.com, and any other newspaper or journal the Monitor considers appropriate.⁵

15. The Monitor, with the assistance of the Applicants, and in consultation with the DIP Lender, will prepare a process summary (the "**Teaser Letter**"), describing the Opportunity and the SISP and inviting recipients of the Teaser Letter to express their interest. The Applicants will prepare a non-disclosure agreement (the "**NDA**") in form and substance satisfactory to the Monitor. The Monitor will then send

³ First Report, *ibid* at para 17; January 25 Affidavit, *ibid* at para 25.

⁴ First Report, *ibid* at para 16; January 25 Affidavit, *ibid* at paras 23 and 26.

⁵ First Report, *ibid* at paras 18 and 19; January 25 Affidavit, *ibid* at paras 29 and 30.

the Teaser Letter and the NDA to each Known Potential Bidder by no later than February 4, 2021, and then to another party who requests a copy of same. As noted, the Monitor already began sending the Teaser Letter and the NDA to Known Potential Bidders on January 22, 2021.⁶

16. Each Potential Bidder must provide the Monitor and the Applicants with an NDA executed by it, and a letter setting forth the identity of, and contact information for, such Potential Bidder. Parties who do so will constitute "Phase 1 Qualified Bidders".

17. A Phase 1 Qualified Bidder that wishes to pursue the Opportunity must deliver a non-binding letter of intent ("LOI") to the Monitor and the Applicants in accordance with the SISP by no later than the Phase 1 Bid Deadline.⁷

18. To be a Qualified LOI, the LOI must:

- (a) in the case of a Sale Proposal, contain, among other things, (i) the purchase price or price range in Canadian dollars, (ii) a description of the Property that is expected to be subject to the Opportunity and of any of the Property expected to be excluded, (iii) evidence of the financial capability of the Phase 1 Qualified Bidder to consummate the transaction and the expected structure and financing of the transaction, and (iv) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction; and
- (b) in the case of an Investment Proposal, contain, among other things, (i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization, (ii) the aggregate amount of the equity and/or debt investment to be made, (iii) key assumptions supporting the Phase

⁶ First Report, *ibid* at paras 16, 20 and 21; January 25 Affidavit, *ibid* at para 28 and 29.

⁷ First Report, *ibid* at para 23; January 25 Affidavit, *ibid* at paras 26 and 30.

1 Bidder's valuation, (iv) the underlying assumptions regarding the pro forma capital structure, (v) an indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the transaction, and (vi) any other terms or conditions of the Investment Proposal that the Phase 1 Qualified Bidder believes are material to the transaction.⁸

19. Following the Phase 1 Bid Deadline, the Monitor, in consultation with the Applicants and the DIP Lender, will assess the Qualified LOIs to determine whether each Phase 1 Qualified Bidder constitutes a Phase 2 Qualified Bidder.⁹

20. Once the Applicants and the Monitor, in consultation with the DIP Lender, determine the manner in which to proceed to Phase 2 of the SISF, the Applicants and the Monitor, in consultation with the DIP Lender, will prepare a bid process letter for Phase 2 (the "**Bid Process Letter**"). The Bid Process Letter will be: (i) sent by the Monitor to all Phase 2 Qualified Bidders as soon as practically possible following the Phase 1 Bid Deadline, and (ii) posted by the Monitor on the Monitor's Website.¹⁰

21. Phase 2 Qualified Bidders that wish to make a formal offer to purchase or make an investment in the Applicants or their Property or Business shall submit a binding offer (a "**Phase 2 Bid**") to the Monitor and the Applicants by no later than the date set out in the Bid Process Letter (the "**Phase 2 Bid Deadline**"). Following the Phase 2 Bid Deadline, the Applicants and the Monitor will assess the Phase 2 Bids received and the Monitor, in consultation with the Applicants and the DIP Lender, will designate the most competitive bids that comply with certain requirements to be Qualified Bids.¹¹

22. The Monitor and the Applicants, in consultation with the DIP Lender, will:

⁸ First Report, *ibid* at paras 26; January 25 Affidavit, *ibid* at para 32.

⁹ First Report, *ibid* at paras 28; January 25 Affidavit, *ibid* at para 33.

¹⁰ First Report, *ibid* at paras 30; January 25 Affidavit, *ibid* at paras 36.

¹¹ First Report, *ibid* at paras 31 and 32; January 25 Affidavit, *ibid* at paras 38 and 39.

- (a) review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated between the Applicants, the Monitor and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations; and
- (b) identify the Successful Bid and the Phase 2 Qualified Bidder, for any particular Property or the Business in whole or part.

23. The determination of any Successful Bid by the Applicants, with the assistance and approval of the Monitor, and in consultation with the DIP Lender, shall be subject to approval by the Court.¹²

PART III: ISSUES

24. The issues to be considered on this motion are whether:

- (a) this Court should extend the Stay of Proceedings as granted in the Initial Order;
- (b) this Court should increase the amount of the Directors' Charge and the DIP Lender's Charge;
- (c) the Charges should prime the beneficiaries of the Encumbrances who were not served with the application for the Initial Order and rank in priority to all Encumbrances; and
- (d) the SISP should be approved.

B. The Stay of Proceedings Should be Extended

1. The Extension of the Stay of Proceedings is Appropriate in the Circumstances

25. The Stay of Proceedings expires on January 31, 2021. Section 11.02(2) of the CCAA gives this Court the authority to grant an extension of the Stay of Proceedings for any period it "considers

¹² First Report, *ibid* at paras 33 and 34; January 25 Affidavit, *ibid* at paras 43 and 44.

necessary".¹³ To do so, this Court must be satisfied that circumstances exist that make the order appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.¹⁴

26. A stay of proceedings is appropriate where it provides the debtors with breathing room while they seek to restore their solvency and emerge from their restructuring on a going concern basis.¹⁵ Further, a stay of proceedings will be appropriate where it advances the purposes of the CCAA – including "avoiding the social and economic effects of bankruptcy".¹⁶

27. As detailed in the January 21 Affidavit, the Applicants require the Stay of Proceedings to prevent enforcement action from their creditors.¹⁷ Moreover, the Applicants require the Stay of Proceedings to preserve the value of their business, maintain their ordinary course operations without disruption, and conduct the SISP.¹⁸

28. Without the Stay of Proceedings, the Applicants will face the immediate cessation of their business. The inevitable result will be a liquidation or bankruptcy of the Applicants, the antithesis of the CCAA.

29. Since the granting of the Initial Order, the Applicants have acted and continue to act in good faith and with due diligence to advance their restructuring under the CCAA, while maintaining their ordinary course operations. The Monitor supports the requested extension to the Stay of Proceedings, and the Applicants are forecast to have sufficient liquidity to fund their obligations and the costs of the CCAA Proceedings through the end of the proposed extension.¹⁹

¹³ [Companies' Creditors Arrangement Act](#), RSC 1985, c C-36 s 11.02(2) [CCAA].

¹⁴ [Ibid.](#)

¹⁵ [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60](#) at para 14 [*Century Services*]; [Target Canada Co, 2015 ONSC 303](#) at para 8.

¹⁶ [Century Services](#), *ibid* at para 70.

¹⁷ January 21 Affidavit, *supra* note 1 at para 92.

¹⁸ January 25 Affidavit, *supra* note 1 at para 22.

¹⁹ *Ibid* at paras 10 and 51; First Report, *supra* note 1 at paras 52 and 53.

C. Increases to the Directors' Charges and the DIP Lender's Charge

30. Pursuant to the Initial Order, the Applicants obtained an Administration Charge, Directors' Charge, and DIP Lender's Charge in the amounts of \$600,000, \$2,000,000 and \$2,500,000 respectively. The quantum of each of the Charges sought in the Initial Order was informed by section 11.001 and subsection 11.2(5) of the CCAA, and the priority charges were limited to that which was reasonably necessary for the Applicants' continued operations in the ordinary course of business during the initial 10-day stay period. The Applicants are now seeking to increase the Directors' Charge and the DIP Lender's Charge to the maximum amounts of \$2,700,000 and \$8,000,000 (plus interest and costs), respectively. No increase is sought in respect of the Administration Charge.

1. The Directors' Charge Should be Increased

31. The Initial Order granted a charge over the Property in favour of the each of the Applicants' directors and officers (collectively, the "**Directors and Officers**") in respect of obligations and liabilities that they may incur after the commencement of the CCAA Proceedings up to a maximum amount of \$2,000,000.²⁰

32. The amount of the Directors' Charge at the time of the Initial Order was based on the Directors' and Officers' estimated potential exposure during the initial Stay of Proceedings. Pursuant to the Amended and Restated Initial Order, the Applicants seek to increase the Directors' Charge to \$2,700,000, the estimated maximum liability of the Directors and Officers during the CCAA Proceedings.²¹

²⁰ January 25 Affidavit, *ibid* at para 11.

²¹ *Ibid* at paras 11 and 12; First Report, *supra* note 1 at para 42.

33. In granting the Initial Order, this Court was satisfied that the requirements of section 11.51 of the CCAA were met, including that adequate insurance coverage could not be obtained at a reasonable cost.²²

34. The requirements of section 11.51 of the CCAA continue to be satisfied, given that:

- (a) the secured creditors likely to be affected by the Directors' Charge have now been provided with notice thereof;
- (b) the Directors' Charge is necessary to ensure the continued involvement of the Directors and Officers;
- (c) the Directors' Charge only covers obligations and liabilities incurred after the Initial Order and does not cover wilful misconduct or gross negligence;
- (d) the Applicants require the active involvement of the Directors and Officers in order to continue their business operations, and maintain their cultivation license issued by Health Canada; and
- (e) the Monitor is supportive of the Directors' Charge and believes that its quantum is reasonable in the circumstances.²³

2. The DIP Lender's Charge Should be Increased

35. Pursuant to the Initial Order, the DIP Lender was granted a charge on the Property up to a maximum amount of \$2,500,000 (the "**DIP Lender's Charge**"). The quantum of the DIP Lender's

²² [CCAA](#), *supra* note 13 s 11.51(3)-(4); [Canwest Global Communications Corp \(2009\), OJ No. 4286](#) at para 46; [U.S. Steel Canada Inc. \(Re\), 2014 ONSC 2523](#) at para 20.

²³ January 21 Affidavit, *supra* note 1 at paras 102-106; Pre Filing Report, *supra* note 1 at paras 98-103; January 25 Affidavit, *supra* note 1 at para 18; Affidavit of Service of Aiden Nelms sworn January 26, 2021 [Affidavit of Service].

Charge sought in the Initial Order was commensurate with the amount of the DIP Loan reasonably necessary to fund the Applicants' ordinary course operations during the 10-day Stay of Proceedings.

36. The criteria supporting the granting of the DIP Loan and the corresponding DIP Lender's Charge in the Initial Order continue to apply – the Applicant is simply seeking to increase the quantum of the DIP Lender's Charge up to a maximum amount of \$8,000,000 (plus interest and costs), which is the maximum amount of the DIP Loan.²⁴

37. As required by subsection 11.2(1) of the CCAA, notice of the increase being sought has been provided to the secured creditors likely to be affected by it, and the DIP Lender's Charge does not secure obligations incurred prior to the Initial Order.²⁵ Additionally, the non-exhaustive factors enumerated in subsection 11.2(4) of the CCAA considered by courts when granting a charge in respect of interim financing support the proposed increase to the DIP Lender's Charge. These factors include:

- (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;

²⁴ January 25 Affidavit, *supra* note 1 at paras 13 and 14; First Report, *supra* note 1 at para 45.

²⁵ January 25 Affidavit, *ibid* at para 18; First Report, *ibid* at para 50; Affidavit of Service, *supra* note 23.

(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.²⁶

38. The considerations that satisfied these criteria at the Initial Order remain applicable, the most salient of which include that:

(a) the DIP Loan presents the only financing available to the Applicants in the circumstances, and as such, the only means of ensuring that the Applicants' obligations can be met and the immediate cessation of their business prevented;

(b) the Monitor is supportive of the proposed increase to the DIP Lender's Charge and does not believe that creditors will be materially prejudiced as a result of its approval;

(c) the DIP Loan and corresponding DIP Lender's Charge will preserve the value and going concern operations of the Applicants' business, which is in the best interests of the Applicants and their stakeholders;

(d) it is a condition of the DIP Loan that all funds advanced thereunder be secured by the DIP Lender's Charge;

(e) the DIP Lender is a related entity of the Applicants and is thus familiar with their business and operations; and

(f) the quantum of the DIP Loan and the DIP Lender's Charge are appropriate having regard to the Applicants' cash-flow statement.²⁷

²⁶ [CCAA](#), *supra* note 13 s 11.2(4).

²⁷ January 21 Affidavit, *supra* note 1 at paras 89-91 and 107; Pre-Filing Report, *supra* note 1 at paras 92-94; January 25 Affidavit, *supra* note 1 at para 15; First Report, *supra* note 1 at para 45.

D. The Charges Should Rank in Priority to All Encumbrances

39. With respect to the foregoing relief, the Applicants adopt and rely on their prior submissions regarding the appropriateness of the Charges and their relative priority as set out in the Applicants' Factum dated January 21, 2021. The Charges granted in the Initial Order currently rank subordinate to any Encumbrance in favour of any person who did not receive notice of the application for the Initial Order.²⁸

40. The Applicants have at this time have provided notice of the within motion to all parties holding an Encumbrance.²⁹ As such, the Applicants are proposing that the Charges be given priority over all Encumbrances.³⁰ The priority proposed in respect of the Charges is appropriate given:

- (a) priority for charges of this nature is routinely provided for in CCAA proceedings;
- (b) no secured creditor has advised the Applicants that they are opposed to the proposed priority of the Charges; and
- (c) no priority is being sought over properly perfected purchase money security interests or super priority statutory deemed trusts.

E. The SISP Should be Approved

41. The remedial nature of the CCAA confers broad powers to facilitate restructurings, including the power to approve a sale process in relation to a CCAA debtor's business and assets, prior to or in the absence of a plan of compromise and arrangement.³¹

²⁸ The Applicants' Factum dated January 21, 2021 at paras 57- 71.

²⁹ January 25 Affidavit, *supra* note 1 at para 18; Affidavit of Service *supra* note 23.

³⁰ Amended and Restated Order dated January 29, 2021 at para 42.

³¹ [Nortel Networks Corporation \(Re\), 2009 ONSC 39492](#) at paras 47-48 [*Nortel*]; CCAA, *supra* note 13 s 11, s 36.

42. In *Nortel*, the Court identified several factors to be considered in determining whether to approve a sale process:

- (a) Is a sale warranted at this time?
- (b) Will the sale be of benefit to the whole "economic community"?
- (c) Do any of the debtors' creditors have a *bonafide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?³²

43. While not technically applicable at the sale process stage, the factors set out in subsection 36(3) of the CCAA have also been considered when deciding whether to approve a sale process:

- (a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) Whether the monitor approved the process leading to the proposed sale or disposition;
- (c) Whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) The extent to which the creditors were consulted;
- (e) The effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.³³

³² *Nortel*, *ibid* at para 49; *Brainhunter Inc. (Re)*, 2009 ONSC 72333 at para 13; *Danier Leather Inc. (Re)*, 2016 ONSC 1044 at para 23.

³³ *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 2523 at para 8.

44. In consideration of the above criteria and factors, the SISP should be approved as:
- (a) a sale of the Business will maximize value and allow the Applicants to continue as a going concern in the best interests of all stakeholders;
 - (b) to date, no creditor has objected to the SISP (notwithstanding that the Applicants' previewed their intention to seek approval of the SISP in the January 21 Affidavit) and in the circumstances the Applicants do not believe any creditor has a reasonable basis to object to the SISP;
 - (c) the SISP will benefit the whole economic community as the SISP is designed and intended to solicit the highest and best bid, and provide a market test for the benefit of all stakeholders;
 - (d) the DIP Lender has been consulted and involved throughout and is supportive of the SISP;
and
 - (e) the Monitor is supportive of the approval of the SISP.

45. The Applicants submit that the SISP provides an appropriate framework that will fairly canvass the market to obtain the best offer for the Business, which will maximize value for the Applicants' stakeholders.³⁴

46. For the above reasons, the Applicants submit that the SISP should be approved.

³⁴ January 25 Affidavit, *supra* note 1 at paras 45-50; First Report, *supra* note 1 at paras 39 and 40.

PART IV: RELIEF REQUESTED

47. The Applicants submit that they meet all of the qualifications required to obtain the requested relief and requests that this Court grant the proposed form of Amended and Restated Initial Order and SISP Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Bennett Jones

January 27, 2021

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*Brainhunter Inc. \(Re\)*, 2009 ONSC 72333](#)
2. [*Canwest Global Communications Corp \(2009\)*, OJ No. 4286](#)
3. [*Century Services Inc v Attorney General \(Canada\)*, 2010 SCC 60](#)
4. [*Danier Leather Inc. \(Re\)*, 2016 ONSC 1044](#)
5. [*Nortel Networks Corporation \(Re\)*, 2009 ONSC 39492](#)
6. [*Target Canada Co*, 2015 ONSC 303](#)
7. [*U.S. Steel Canada Inc, Re*, 2014 ONSC 6145](#)
8. [*U.S. Steel Canada Inc, \(Re\)*, 2015 ONSC 2523](#)

SCHEDULE B – STATUTES RELIED ON

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

Section 11

General Power of Court

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Section 11.001

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.

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.

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.

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.

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.

Section 36

Restriction on disposition of business assets

(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and 6(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

**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 FIGR BRANDS, INC., FIGR NORFOLK
INC. AND CANADA'S ISLAND GARDEN INC.**

Court File No.: CV-21-00655373-00CL

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