

**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  
NFC ACQUISITION GP INC., NFC ACQUISITION CORP. AND  
NFC LAND HOLDINGS CORP.**

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**FACTUM OF  
NFC ACQUISITION GP INC., NFC ACQUISITION CORP.,  
NFC LAND HOLDINGS CORP., NEW FOOD CLASSICS AND  
NFC ACQUISITION L.P.  
(Stay Extension Order and Westco Pre-Filing Lien Charge  
(returnable on February 16, 2012))**

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NFC Acquisition L.P.

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**PART 1 - THE FACTS**

**The Motion**

1. This factum is filed in support of the motion of NFC Acquisition GP Inc., NFC Acquisition Corp., NFC Land Holdings Corp. (collectively, the "Applicants"), New Food Classics ("NFC"), and NFC Acquisition L.P. ("Acquisition LP") (NFC and Acquisition LP being the "Partnerships", and together with the Applicants, the "NFC Entities") for certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), *inter alia*, an Order granting: (a) the extension of the Initial Stay Period (as defined below) to March 30, 2012 (the "Stay Period Extension"); and (b) the Westco Pre-Filing Lien Charge (as defined below) over the property of the NFC Entities.

2. Detailed facts in respect of this motion are more fully set out in the Affidavit of Brian Cram, sworn February 10, 2012, a copy of which is included in the Applicants' Application Record, dated February 10, 2012. Capitalized terms used but not defined herein have the meaning ascribed to them in the Initial Order (as defined below).

**Proceedings to Date**

3. On January 17, 2012, the Applicants made an application to the Court pursuant to the CCAA and the Ontario Superior Court of Justice (Commercial List) (the “Court”) made an order (the “Initial Order”) granting various relief to the NFC Entities under the CCAA, including, inter alia:

- (a) declaring that the Applicants are parties to which the CCAA applies;
- (b) declaring that the Partnerships shall, along with the Applicants, enjoy the benefits of the protections and authorizations provided by the Initial Order;
- (c) appointing FTI Consulting Canada Inc. as the monitor (the “Monitor”), an officer of this Court, to monitor the business and financial affairs of the NFC Entities;
- (d) staying all proceedings taken or that might be taken in respect of the NFC Entities, their directors and officers and the Monitor;
- (e) authorizing the NFC Entities to obtain and borrow debtor-in-possession financing from the DIP Lender under the DIP Agreement;
- (f) granting the following priority charges over the property of the NFC Entities:
  - the Administration Charge (to the maximum amount of \$350,000);
  - the Directors’ Charge (to the maximum amount of \$3,000,000); and
  - the DIP Lender’s Charge; and
- (g) approving the terms and provisions of the Sale Process and authorizing the NFC Entities and the Monitor to conduct the Sale Process.

Affidavit of Brian Cram, sworn February 10, 2012 [Cram Affidavit], Applicant’s Motion Record, Tab 2

#### **Extension of the Stay of Proceedings**

4. The Initial Order granted a stay of proceedings in respect of the NFC Entities until and including February 16, 2012, or such later date as may be ordered by the Court (the “Initial Stay Period”).

Cram Affidavit, Applicant’s Motion Record, Tab 2

5. Since the commencement of these proceedings, the NFC Entities have worked diligently to continue to operate their business as a going concern and to conduct and advance the Sale Process.

Cram Affidavit, Applicant's Motion Record, Tab 2

6. The Stay Period Extension is necessary to provide the NFC Entities and the Monitor with sufficient time to continue to conduct and advance the Sale Process. The Stay Period Extension is also necessary to provide stability to the NFC Entities' business and to permit them to continue to operate the business as a going concern.

Cram Affidavit, Applicant's Motion Record, Tab 2

7. The NFC Entities have acted and continue to act in good faith and with due diligence and it is not believed that any creditor will suffer any material prejudice as a result of the Stay Period Extension.

Cram Affidavit, Applicant's Motion Record, Tab 2

8. The DIP Lender and the Monitor support the Stay Period Extension.

Cram Affidavit, Applicant's Motion Record, Tab 2

### **Westco Pre-Filing Lien Charge**

9. Westco MultiTemp Distribution Centres Inc. ("Westco") supplies storage, handling and shipping/transportation services to the NFC Entities, and the continued provision of such services by Westco is integral to the continuation of the NFC Entities' business as a going concern.

Cram Affidavit, Applicant's Motion Record, Tab 2

10. Westco has accrued and unpaid statutory lien claims under applicable legislation in respect of the NFC Entities' products on hand in Westco's warehouse on January 17, 2011.

Cram Affidavit, Applicant's Motion Record, Tab 2

11. Pursuant to a letter agreement among the Monitor, the NFC Entities, Westco, the DIP Lender and TD Mezzanine Partners Management Ltd. ("TD"), a secured creditor of the NFC Entities, in connection with the supply of post-filing services by Westco to NFC, the NFC Entities agreed to request a Court-ordered charge in favour of Westco in and to the Property (as

such term is defined in the Initial Order) as security for Westco's verified lien amount, which amount shall not exceed \$450,000, ranking in priority immediately subordinate to the Administration Charge (as such term is defined in the Initial Order), but otherwise in priority to the Directors' Charge and the DIP Lender's Charge (each such term, as defined in the Initial Order). The NFC Entities are not seeking to have the Westco Pre-Filing Lien Charge prime existing PPSA registrants, aside from the existing secured claims of the DIP Lender and TD, each of which has been provided with notice of this motion.

Cram Affidavit, Applicant's Motion Record, Tab 2

12. In addition to aiding the NFC Entities in continuing to operate their business as a going concern, the continued post-filing supply of services by Westco and the granting of the Westco Pre-Filing Lien Charge will help the NFC Entities' cash flow and facilitate the NFC Entities successfully completing the Sale Process, thereby preserving value and maximizing recoveries for the NFC Entities' stakeholders.

Cram Affidavit, Applicant's Motion Record, Tab 2

13. the Westco Pre-Filing Lien Charge will rank ahead in priority to the Directors' Charge, and the directors and officers of the NFC Entities consent to the creation and such priority ranking of the Westco Pre-Filing Lien Charge.

Cram Affidavit, Applicant's Motion Record, Tab 2

14. The DIP Lender and TD consent to the creation and priority ranking of the Westco Pre-Filing Lien Charge.

Cram Affidavit, Applicant's Motion Record, Tab 2

15. The Monitor is supportive of the Westco Pre-Filing Lien Charge.

Cram Affidavit, Applicant's Motion Record, Tab 2

## **PART II - THE LAW**

### **Extension of Stay of Proceedings**

16. Pursuant to Section 11.02 of the CCAA, the Court may extend the stay of proceedings with respect to a debtor company or debtor companies where: (a) circumstances exist that make

the order appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

11.02(2) Stays, etc. — other than initial application - 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.

11.02(3) Burden of proof on application - 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.

CCAA, Sections 11.02(2), 11.02(3)

17. In *Re Canwest Global Communications Corp.*, the Court, in granting an extension of the stay of proceedings, found that such extension would provide the necessary stability to allow the debtors to continue working towards a resolution that would result in the continuation of their businesses as a going concern. The Court cited the following factors:

- (a) the cash flow forecast indicated that the debtors had sufficient cash resources to operate throughout the extension of the stay period;
- (b) the monitor supported the extension;
- (c) there was a lack of opposition to the motion; and

- (d) the debtors had acted and were continuing to act in good faith and with due diligence.

*Re Canwest Global Communications Corp.*, [2009] O.J. No. 4788  
(Ont. S.C.J.) at para. 43, Brief of Authorities of the Applicants,  
Tab 1

18. The Initial Stay Period expires on February 16, 2012. The Stay Period Extension is necessary to provide the NFC Entities and the Monitor with sufficient time to continue to conduct and advance the Sale Process. The Stay Period Extension is also necessary to provide stability to the NFC Entities' business and to permit them to continue to operate the business as a going concern.

Cram Affidavit, Applicant's Motion Record, Tab 2

19. In addition, the NFC Entities are approximately \$100,000 ahead of their cash flow projections, have not been off-side such projections at any time since the commencement of these proceedings and such projections project that the NFC Entities will have sufficient funding to continue operating for the duration of the Stay Period Extension, provided that further credit approval by the DIP Lender is forthcoming, as more fully described in the Cram Affidavit.

Cram Affidavit, Applicant's Motion Record, Tab 2

20. The Westco Pre-Filing Lien Charge will rank ahead in priority to the Directors' Charge, and the directors and officers of the NFC Entities consent to the creation and such priority ranking of the Westco Pre-Filing Lien Charge.

Cram Affidavit, Applicant's Motion Record, Tab 2

21. The Monitor and DIP Lender are supportive of the Stay Period Extension and the NFC Entities are not aware of any creditor who opposes the Stay Period Extension.

Cram Affidavit, Applicant's Motion Record, Tab 2

22. As more fully described in the Cram Affidavit, the NFC Entities have acted and continue to act in good faith and with due diligence and it is not believed that any creditor will suffer any material prejudice as a result of the Stay Period Extension.

Cram Affidavit, Applicant's Motion Record, Tab 2

### **Westco Pre-Filing Lien Charge**

23. Pursuant to Section, 11 of the CCAA, a Court may, subject to the restrictions set out in the CCAA, make any order that it considers appropriate in the circumstances.

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.

24. In *Century Services v. Canada (Attorney General)*, Justice Deschamps noted the wide discretion afforded to Courts by Section 11 and held that orders granted under that section should advance the policy objectives underlying the CCAA, which is to avoid the social and economic losses that may result from insolvency.

*Century Services v. Canada (Attorney General)*, 2010 SCC 60 at paras. 66-69, Brief of Authorities of the Applicants, Tab 2

25. The granting of the Westco Pre-Filing Lien Charge will advance the policy objectives underlying the CCAA by helping the NFC Entities' cash flow and facilitating the NFC Entities successfully completing the Sale Process, thereby preserving value and maximizing recoveries for the NFC Entities' stakeholders. The continuation of supply of storage, handling and shipping/transportation services by Westco to the NFC Entities is integral to the continuation of the NFC Entities' business as a going concern.

Cram Affidavit, Applicant's Motion Record, Tab 2

26. Westco is the NFC Entities' major warehouse and freight supplier, and the inventory stored at its premises is needed to service customers and provide them with their product orders. In addition to aiding the NFC Entities in continuing to operate their business as a going concern, the continued post-filing supply of services by Westco and the granting of the Westco Pre-Filing Lien Charge will help the NFC Entities' cash flow and facilitate the NFC Entities successfully completing the Sale Process, thereby preserving value and maximizing recoveries for the NFC Entities' stakeholders.

Cram Affidavit, Applicant's Motion Record, Tab 2



27. As described above, the Westco Pre-Filing Lien Charge will rank in priority immediately subordinate to the Administration Charge, but otherwise in priority to the Directors' Charge and the DIP Lender's Charge. In addition, the NFC Entities are not seeking to have the Westco Pre-Filing Lien Charge prime existing PPSA registrants, aside from the existing secured claims of the DIP Lender and TD, each of which has been provided with notice of this motion.

Cram Affidavit, Applicant's Motion Record, Tab 2

28. The Westco Pre-Filing Lien Charge will rank ahead in priority to the Directors' Charge, and the directors and officers of the NFC Entities consent to the creation and such priority ranking of the Westco Pre-Filing Lien Charge.

Cram Affidavit, Applicant's Motion Record, Tab 2

29. The DIP Lender and TD consent to the creation and priority ranking of the Westco Pre-Filing Lien Charge.

Cram Affidavit, Applicant's Motion Record, Tab 2

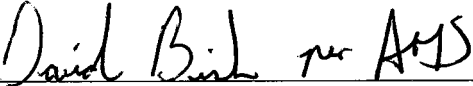
30. The Monitor is supportive of the Westco Pre-Filing Lien Charge.


Cram Affidavit, Applicant's Motion Record, Tab 2

**PART III - ORDER REQUESTED**

31. The NFC Entities, therefore, request an order substantially in the form of the draft order included in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

  
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David Bish

  
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Adam M. Slavens

Lawyers for NFC Acquisition GP Inc.,  
NFC Acquisition Corp.,  
NFC Land Holdings Corp.,  
New Food Classics and  
NFC Acquisition L.P.

**SCHEDULE “A”**

**LIST OF AUTHORITIES**

1. *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4788 (Ont. S.C.J.)
2. *Century Services v. Canada (Attorney General)*, 2010 SCC 60

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Court File No.: CV-12-9554-00CL

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(Commercial List)

Proceeding commenced at Toronto

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