

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

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY*  
*ACT*, RSC 1985, c B-3, AS AMENDED**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO  
MAKE A PROPOSAL OF SHAW-ALMEX INDUSTRIES LIMITED  
OF THE TOWN OF PARRY SOUND, IN THE PROVINCE OF  
ONTARIO**

**Applicants**

**FACTUM OF THE APPLICANTS  
(RE: CCAA INITIAL ORDER AND SISP APPROVAL ORDER)**

May 8, 2025

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**TO: THE SERVICE LIST**

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## **PART I – OVERVIEW**

1. Shaw-Almex Industries Limited (“**SAIL**”) and Shaw Almex Fusion, LLC (“**Fusion**” and together with SAIL, the “**Applicants**”) are in the business of providing customized solutions for all aspects of conveyor belt systems (the “**Business**”). The Applicants are part of a global enterprise operating under the “Shaw Almex” name (the “**Almex Group**”). The Almex Group has 15 locations, plus exclusive distributors, across six continents worldwide.<sup>1</sup>

2. While the Business has been successfully operating for over 70 years, the Applicants have experienced significant financial and operational challenges over the past 24 months that have caused an acute liquidity crisis that has imperiled the Almex Group.<sup>2</sup>

3. The financial challenges currently facing the Applicants are associated with, among other things, significant issues securing a new reliable supplier of rubber, increased operational costs due to external market factors, insufficient financial reporting and controls overseen by the former Chief Financial Officer, and losses suffered as a result of currency hedging transactions.<sup>3</sup>

4. In light of these challenges and the Applicants’ cash flow crisis, SAIL commenced proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the “**NOI Proceeding**”) in order to pursue a restructuring of the Business with a principal focus on the implementation of a sale, refinancing and investment solicitation process (“**SISP**”) <sup>4</sup>

5. Given the international nature of the Almex Group’s operations, the Applicants are now seeking relief under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (“**CCAA**”) in order to stabilize the Applicants’ local and international operations and preserve the

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<sup>1</sup> Affidavit of Andrew Hustrulid, sworn May 8, 2025, Tab 2 of the Motion Record of the Applicants (the “**Hustrulid Affidavit**”) at para 8.

<sup>2</sup> Hustrulid Affidavit, para 9.

<sup>3</sup> Hustrulid Affidavit, para 10.

<sup>4</sup> Hustrulid Affidavit, para 11.

optionality of filing international recognition proceedings, if necessary.<sup>5</sup> In particular, the Applicants are seeking from the Ontario Superior Court of Justice (Commercial List) (the “**Court**”):

- (a) an order in the form appended at Tab 3 of the Applicants’ motion record (the “**Initial Order**”) that seeks conventional first day relief;
- (b) an order in the form appended at Tab 5 of the Applicants’ motion record (the “**SISP Approval Order**”) that, among other things, approves a SISP substantially in the form attached as Schedule “A” to the SISP Approval Order;<sup>6</sup> and
- (c) an order in the form appended at Tab 6 of the Applicants’ motion record (the “**Discharge Order**”) that, among other things, approves the fees and activities of FTI Consulting Canada Inc. (“**FTI**”) in its capacity as proposal trustee (in such capacity, the “**Proposal Trustee**”) and discharges FTI as Proposal Trustee.

6. If the proposed Initial Order is granted, the Applicants will be able to continue to secure the necessary interim financing and benefit from the requisite breathing room to address their current financial circumstances and maximize the value of their Business for the benefit of all stakeholders.

7. At present, the Applicants intend to use the CCAA proceeding to: (a) work with FTI (the “**Monitor**”) to implement a comprehensive operational and financial restructuring plan including downsizing certain aspects of their operations and exploring avenues to decrease operational costs; (b) conduct the SISP with the ultimate goal of maximizing value for the Applicants’ stakeholders and the continuation of the Business as a going concern; and (c) complete certain orders in order to generate cash flow for the Applicants.

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<sup>5</sup> Hustrulid Affidavit, para 11

<sup>6</sup> Hustrulid Affidavit, para 6.

8. The Applicants have been in frequent discussions with their primary stakeholder Royal Bank of Canada (“**RBC**”) with respect to this motion and the Applicants’ restructuring plans. RBC supports the relief but as a term of further interim financing requires that FTI as Monitor be given enhanced powers, which the Applicants and Timothy Shaw support in order to obtain such financing and which FTI supports and consents to as well.<sup>7</sup>

## **PART II – FACTS**

9. The facts with respect to this motion are summarized below but are more fully set out in the Affidavit of Andrew Hustrulid, sworn May 8, 2025 (the “**Hustrulid Affidavit**”).

### **A. The Applicants and the Business**

10. The Applicants are in the business of providing state-of-the-art conveyor belt vulcanizing equipment technology, services and expertise. The Business leverages cutting-edge engineering and technology to provide customized solutions for all aspects of conveyor systems including development, setup, training, monitoring, and maintenance.<sup>8</sup>

11. The Business was commenced over sixty-seven years ago in Parry Sound, Ontario as a small, family-run operation. Since that time, the Applicants have grown significantly and become an industry leader with 2,500 customers across 123 countries worldwide. Their customers are in a diverse range of industries including mining, steel mills, ports, power generation, package handling, and aerospace.<sup>9</sup>

12. SAIL is the parent company of the subsidiaries of the Almex Group and the primary operating company of the Almex Group. In particular, SAIL manufactures the majority of the Business’ products and ships them to its subsidiaries or local distributors worldwide. SAIL’s

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<sup>7</sup> Hustrulid Affidavit, para 13.

<sup>8</sup> Hustrulid Affidavit, para 14.

<sup>9</sup> Hustrulid Affidavit, para 15.

Canadian operations are supported by approximately 80 employees: 45 salaried employees and 35 union employees.<sup>10</sup>

13. Fusion is an indirect subsidiary of SAIL and is the other principal manufacturing operation of the Almex Group. Specifically, Fusion primarily manufactures Almex presses and Fusion rubber products from a sales, manufacturing, and distribution facility located in Atlanta, Georgia. Fusion's American operations are presently supported by approximately 4 employees.<sup>11</sup>

14. The operations of the Applicants are functionally and operationally integrated such that the Fusion's United States operations cannot operate independently of SAIL's Canadian operations.<sup>12</sup>

15. Other than SAIL and Fusion, the other principal manufacturing operations of the Almex Group are conducted by three of SAIL's subsidiaries: Shaw Almex Mine Equip. (Tianjin) Co. Ltd. in China, Fonmar Group S.L. in Spain, and Shaw Almex Pacific Pty. Ltd. in Australia.<sup>13</sup>

16. The remaining companies within the Almex Group operate primarily as sales and distribution centres with limited ability to modify or finish machinery being shipped from North America to their local markets.<sup>14</sup>

## **B. Cash Management System**

17. SAIL maintains five bank accounts: two with the Bank of Nova Scotia, two with RBC, and one with HSBC. These accounts are used for handling Canadian and U.S. customer payments, supplier bills, wages, and other operational costs in both Canadian Dollars ("**CAD**") and U.S. Dollars ("**USD**"). SAIL no longer has any active credit cards after RBC froze its 16 credit cards.<sup>15</sup>

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<sup>10</sup> Hustrulid Affidavit, paras 20 and 23.

<sup>11</sup> Hustrulid Affidavit, paras 26-29.

<sup>12</sup> Hustrulid Affidavit, para 28.

<sup>13</sup> Hustrulid Affidavit, para 31.

<sup>14</sup> Hustrulid Affidavit, para 32.

<sup>15</sup> Hustrulid Affidavit, paras 34-35

18. Fusion has two USD bank accounts: one with HSBC and one with Truist. These accounts are used for the payments of USD supplier bills and receiving customer funds. There is also a debit card tied to the Truist account that is used to make small USD payments.<sup>16</sup>

19. The Applicants are seeking Court approval to continue using their current cash management system during the CCAA proceedings, with oversight from the Monitor, to ensure transparency and operational continuity.<sup>17</sup>

### **C. Assets and Liabilities**

20. As of December 31, 2024, the Applicants' liabilities significantly exceed the book value of their assets by approximately \$32 million.<sup>18</sup>

#### **(i) Assets**

21. The 2022 FS (as defined in the Hustrulid Affidavit) shows that SAIL had assets valuing approximately \$25.7 million as of December 31, 2022. The 2024 FS (as defined in the Hustrulid Affidavit) show that SAIL's assets have decreased to a book value of approximately \$24.6 million as of December 31, 2024.<sup>19</sup>

22. The 2022 FS show that Fusion had assets valuing approximately \$6 million. The 2024 FS show that, as of December 31, 2024, Fusion's assets have decreased to a book value of approximately \$4.4 million.<sup>20</sup>

#### **(ii) Liabilities**

23. The 2022 FS show that SAIL had liabilities of approximately \$35.9 million as of December

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<sup>16</sup> Hustrulid Affidavit, paras 36-37.

<sup>17</sup> Hustrulid Affidavit, para 38.

<sup>18</sup> Hustrulid Affidavit, para 39.

<sup>19</sup> Hustrulid Affidavit, para 42.

<sup>20</sup> Hustrulid Affidavit, para 44.

31, 2022. The 2024 FS show that, as of December 31, 2024, SAIL's liabilities have increased to approximately \$45.7 million.<sup>21</sup>

24. The 2022 FS shows that Fusion had liabilities of approximately \$4 million as of December 31, 2022. The 2024 FS shows that, as of December 31, 2024, Fusion's liabilities have increased to approximately \$15.9 million.<sup>22</sup>

#### **D. Creditors**

25. As of March 2025, the Applicants owe approximately \$27.5 million to their secured creditors. The Applicants' primary secured creditors are RBC, Business Development Bank of Canada ("**BDC**"), BDC Capital Inc., two counterparties to agreements for the sale of future receipts, and various entities that advanced equipment financing to the Applicants.<sup>23</sup>

26. The Applicants are current in their government remittances, property taxes, and wages except that Fusion has USD \$195,000 owed to its employees with respect to unpaid prior bonuses and \$134,000 for payroll accruing during the week of May 2, 2025 but which was unpaid due to lack of funds.<sup>24</sup>

27. The Applicants' primary unsecured liabilities include approximately \$5.7 million in trade payables, \$2.1 million owed to Monex and Corpay for currency hedging transactions, \$270,541 owed by Fusion to its Georgia facility landlord, and numerous default judgments totalling over \$470,000.<sup>25</sup>

28. The Applicants are also involved in multiple ongoing lawsuits in Canada and the U.S., which represent contingent liabilities. The claims in these lawsuits total over \$180,000 CAD and

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<sup>21</sup> Hustrulid Affidavit, para 46.

<sup>22</sup> Hustrulid Affidavit, para 48.

<sup>23</sup> Hustrulid Affidavit, para 50.

<sup>24</sup> Hustrulid Affidavit, paras 76-79.

<sup>25</sup> Hustrulid Affidavit, para 80.

\$309,000 USD. The Applicants have not had sufficient resources to adequately respond to all of the litigation such that many of the actions have not been defended by the Applicants.<sup>26</sup>

**E. The Applicants' Financial Difficulties and the Need for Relief under the CCAA**

29. The Applicants' financial difficulties are derived from a combination of operational and financial challenges including, *inter alia*, significant issues securing a new reliable supplier of rubber, increased operational costs due to external market factors, and losses suffered as a result of currency hedging transactions.<sup>27</sup>

30. The principal operational challenges arose out of supplier issues. Particularly, the purchase by Continental of WCCO, the parent company of Calendaring Specialties Inc (CSI), in 2022 of a rubber calendaring company previously used by the Almex Group for the supply of product for manufacturing its rubber consumable products. Being a competitor, Continental decided to cease supplying the Almex Group, which forced it to locate a new supplier. The supplier that SAIL located and secured, the Passaic Rubber Company, unfortunately supplied material that were defective and resulted in the Almex Group having to issue credits to its customers in the amount of approximately \$756,000 in order to mitigate the damage to customer relationships. Ultimately the Applicants severed its relationship with Passaic Rubber Company and secured a new supplier.<sup>28</sup>

31. Additionally, the finances of the Business was mismanaged by failing to implement sufficient financial reporting and controls. SAIL was also entered into various currency hedging agreements with foreign exchange companies such as Monex and Corpay. These agreements involved large amounts and were executed at a time that where there was a significant decline in the value of the Canadian dollar relative to the U.S. dollar, which resulted in margin calls as high

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<sup>26</sup> Hustrulid Affidavit, paras 81-82.

<sup>27</sup> Hustrulid Affidavit, para 83.

<sup>28</sup> Hustrulid Affidavit, para 84.

as almost \$3 million per month and which further exacerbated the Applicants' financial difficulties.<sup>29</sup>

32. Given the above challenges, the Applicants' financial condition continued to deteriorate. It soon became clear that a long-term solution was needed to address the Applicants' liquidity constraints and ongoing financial challenges. As a result, in early 2025, the Applicants began canvassing the market for possible refinancing and sale transactions with the assistance of several advisors.<sup>30</sup>

33. While the Applicants were speaking to a number of potentially interested parties, there was no certainty on a possible transaction. As a result, on March 19, 2025, RBC issued a demand letter and a Notice of Intention to Enforce Security. Similarly, on March 28, 2025, BDC, the mortgagee on SAIL's real property located in Parry Sound, sent a demand and Notice of Intention to Enforce Security.<sup>31</sup>

34. In order to preserve the Applicants' value and ongoing operations, SAIL filed the Notice of Intention to File a Proposal on March 29, 2025.<sup>32</sup>

35. On April 25, 2025, the Court granted an order ("**Stay Extension Order**") in the NOI Proceeding that, among other things,

- (a) extended the time to file a proposal in the NOI Proceeding until May 13, 2025;
- (b) authorized SAIL to borrow up to a maximum principal amount of \$1,000,000 under a debtor-in-possession credit facility (the "**DIP Facility**") from RBC (in such capacity, the "**DIP Lender**"); and
- (c) granted the following charges, with the priority amongst them as set out below:

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<sup>29</sup> Hustrulid Affidavit, paras 85-86.

<sup>30</sup> Hustrulid Affidavit, paras 88-90.

<sup>31</sup> Hustrulid Affidavit, paras 91-92.

<sup>32</sup> Hustrulid Affidavit, para 93.

- (i) First – an “**Administration Charge**” in the amount of \$350,000, as security for the payment of professional fees and disbursements incurred and to be incurred by FTI, counsel to FTI, and counsel to SAIL, in connection with the NOI Proceeding; and
- (ii) Second – a “**DIP Lender’s Charge**” as security for SAIL’s obligations under the DIP Facility, in the maximum principal amount of \$1,000,000 plus fees and interest.<sup>33</sup>

36. Given the international nature of the Almex Group’s operations, the Applicants are now seeking relief under the CCAA in order to stabilize the Applicants’ local and international operations and preserve the optionality of filing international recognition proceedings, if necessary.<sup>34</sup>

#### **F. Proposed Amended DIP Financing**

37. As noted above, the Stay Extension Order approved a DIP Facility from RBC and a corresponding DIP Lender’s Charge in the maximum amount of \$1,000,000.<sup>35</sup>

38. The Applicants seek to increase the maximum borrowings under the DIP Facility and the DIP Lender’s Charge to the maximum amount of \$1,800,000. Specifically, the Applicants’ cash flow forecast (“**Cash Flow Forecast**”) demonstrates that the Applicants require this amount in interim financing to meet their ordinary course of business expenses and to fund the CCAA proceeding during the stay of proceedings.<sup>36</sup>

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<sup>33</sup> Hustrulid Affidavit, para 4.

<sup>34</sup> Hustrulid Affidavit, para 11.

<sup>35</sup> Hustrulid Affidavit, para 123.

<sup>36</sup> Hustrulid Affidavit, para 124.

39. The DIP Lender is providing the additional financing pursuant to an amended and restated debtor-in-possession loan agreement to be appended to the further report of FTI as the Proposal Trustee and proposed Monitor (the “**Amended DIP Term Sheet**”).<sup>37</sup>

40. The key terms and conditions of the Amended DIP Term Sheet are as follows:

- (a) the DIP Lender is the Applicants’ senior secured creditor, RBC;
- (b) a maximum loan amount of \$1,428,000;
- (c) interest accruing at a rate of 10% per annum; and
- (d) a maturity date of the earlier of: (a) May 31, 2025 or such later time as may be extended by the DIP Lender; (b) the sale of all or substantially all of the assets or equity interests of SAIL; (c) the date on which the stay of proceedings expires; or (d) on an Event of Default (as defined in the Amended DIP Term Sheet). The maturity date can be extended subject to the consent of the Monitor and the DIP Lender.

41. The DIP Lender requires all obligations under the Amended DIP Term Sheet to be secured by a Court-ordered priority charge, namely the DIP Lender’s Charge to be in priority to all security interests of creditors of the Applicants, but not the interests of BDC in the Parry Sound property subject to cost allocation at a later stage of this proceeding. The DIP Lender’s Charge will secure all the funds advanced to the Applicants under the DIP Facility. The DIP Lender’s Charge will not secure any obligations incurred prior to the filing of the NOI.<sup>38</sup>

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<sup>37</sup> Hustrulid Affidavit, para 125.

<sup>38</sup> Hustrulid Affidavit, paras 129-130.

42. The amount of the DIP Lender's Charge requested is necessary and limited to what is reasonably necessary for the continued operations of the Business in the ordinary course of business during the CCAA proceeding.<sup>39</sup>

#### **G. The SISP**

43. The Applicants developed the SISP, in consultation with the Monitor and the DIP Lender.<sup>40</sup> Capitalized terms used but not otherwise defined in this section have the meanings given to them in the SISP.

44. The SISP was designed to be broad and flexible in order to widely expose the Applicants' Business and property to the market and to provide a structured and orderly process for interested parties to perform due diligence and submit offers. The SISP is intended to solicit a broad range of potential transactions, including a sale or recapitalization.

45. The SISP contemplates a two-phase sale process that will be administered by the Monitor over approximately six weeks, part of which has taken place prior to this motion but after FTI's appointment as Proposal Trustee. The SISP is designed to culminate in the closing of a transaction by no later than July 4, 2025.<sup>41</sup>

46. The SISP contemplates the following key milestones and deadlines:<sup>42</sup>

<b>Milestone</b>	<b>Deadline</b>
Commencement of the SISP	May 2, 2025
Deadline for the submission of LOIs (the " <b>LOI Deadline</b> ")	No later than 5:00 p.m. (Toronto Time) on May 22, 2025
Monitor to advise parties if they are a Qualified Bidder	No later than 5:00 p.m. (Toronto Time) on May 26, 2025

<sup>39</sup> Hustrulid Affidavit, para 131.

<sup>40</sup> Hustrulid Affidavit, para 139.

<sup>41</sup> Hustrulid Affidavit, para 142.

<sup>42</sup> Hustrulid Affidavit, para 147.

Deadline for the submission of Binding Offers (the “ <b>Bid Deadline</b> ”)	No later than 5:00 p.m. (Toronto Time) on June 12, 2025
Closing of transaction(s) arising from the SISP (“ <b>Target Closing Date</b> ”)	No later than July 4, 2025

47. The Monitor has already commenced the SISP by, among other things, compiling a list of known prospective bidders, preparing a virtual data room, and preparing and circulating a solicitation letter describing the SISP to approximately 70 prospective bidders.<sup>43</sup>

48. Phase 1 of the SISP involves soliciting non-binding Letters of Interest (“**LOIs**”) from potential bidders by the LOI Deadline, being May 22, 2025. The Monitor, in consultation with the Applicants and the DIP Lender, will review these LOIs to determine which parties qualify as a “**Qualified Bidder**” eligible to proceed to phase 2 (“**Phase 2**”).<sup>44</sup>

49. If no Qualified Bidders are identified, or if continuing with the SISP is deemed not to be in the best interests of the Applicants, Phase 2 will not proceed.<sup>45</sup>

50. If at least one Qualified Bidder is identified, Phase 2 of the SISP will commence, allowing the Qualified Bidders to conduct further due diligence and submit unconditional, binding offers by the Bid Deadline.<sup>46</sup>

51. At the conclusion of Phase 2 of the SISP, the Monitor and the Applicants will review and evaluate each offer received in consultation with the DIP Lender to determine if they are compliant with the criteria in the SISP. If no compliant bid is received, the SISP will be deemed concluded.<sup>47</sup>

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<sup>43</sup> Hustrulid Affidavit, para 152.

<sup>44</sup> Hustrulid Affidavit, paras 153-155.

<sup>45</sup> Hustrulid Affidavit, para 155.

<sup>46</sup> Hustrulid Affidavit, paras 155-156.

<sup>47</sup> Hustrulid Affidavit, para 160.

52. If at least one compliant bid is received, the Monitor and the Applicants, in consultation with the DIP Lender, will review and assess the bids based on the criteria identified in the SISP and choose the best or highest bid (the “**Successful Bid**”).<sup>48</sup>

53. Following the selection of a Successful Bid: (i) the Applicants will seek Court approval of the bid and the contemplated transaction; and (ii) close the transaction by the Target Closing Date of July 4, 2025.<sup>49</sup>

### **PART III – ISSUES**

54. The issues to be determined by this Court are:

- (a) whether the Applicants should be granted protection under the CCAA, including a stay of proceedings;
- (b) should the Amended DIP Term Sheet and DIP Lender’s Charge be approved;
- (c) should the Administration Charge be approved;
- (d) should the Applicants be permitted to pay certain pre-filing obligations with the consent of the Monitor and the DIP Lender;
- (e) should FTI be appointed as Monitor with enhanced powers;
- (f) should Fusion be authorized to act as foreign representative for the Applicants;
- (g) should the SISP be approved; and
- (h) should the Discharge Order be granted?

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<sup>48</sup> Hustrulid Affidavit, para 161.

<sup>49</sup> Hustrulid Affidavit, para 162.

## **PART IV – LAW & ARGUMENT**

### **A. This Court Should Grant Protection to the Applicants Under the CCAA**

55. The Court may order that a NOI proceeding under the *Bankruptcy and Insolvency Act* (“**BIA**”) be continued under the CCAA where the debtor satisfies a three-part test: (1) the debtor has not filed a proposal under the BIA; (2) the proposed continuation is consistent with the purposes of the CCAA; and (3) the debtor has provided the Court with the information that would otherwise form part of an initial CCAA application under section 10(2) of the CCAA.<sup>50</sup> These factors are met in this case.

#### **(i) The Applicants are Debtor Corporations to which the CCAA Applies**

56. The Applicants are “debtor companies” as that term is defined under the CCAA. Pursuant to section 2 of the CCAA, a “debtor company” is defined as a company that is insolvent within the meaning of the BIA<sup>51</sup> which provides that a person is insolvent if it is unable to meet its obligations as they generally become due, has ceased paying current obligations in the ordinary course of business, or whose aggregate property is not at fair valuation sufficient to enable payment of all its obligations due and accruing due.<sup>52</sup>

57. The CCAA applies in respect of a “debtor company” or “affiliated company” where the total claims against the debtor or affiliate exceeds \$5 million.<sup>53</sup> Companies that are part of an affiliated group do not need to individually satisfy the definition of insolvency if the group, taken as a whole, is insolvent, and if it is appropriate that all the companies in the group be included as part of the CCAA orders and restructuring proceeding.<sup>54</sup>

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<sup>50</sup> *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”), [s 11.6](#). (*Re*) *Clothing for Modern Times Ltd.*, 2011 ONSC 7522 (“**Clothing**”) at [para 9](#). These factors were applied in *In the Matter of The Body Shop Canada Limited*, 2024 ONSC 3882 (“**Body Shop**”) at [para 10](#) and *Comstock Canada Ltd. (Re)*, 2013 ONSC 4756 (“**Comstock**”) at [paras 36-45](#).

<sup>51</sup> CCAA, [S. 2](#).

<sup>52</sup> CCAA, [S. 2](#); *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, [S. 2](#).

<sup>53</sup> CCAA, [S. 3\(1\)](#).

<sup>54</sup> *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 at [paras 25-30](#).

58. The aggregate of the Applicants' available liquidity is not sufficient to enable payment of all of its obligations.<sup>55</sup> The Applicants also do not have the funds to continue paying their normal course obligations without right-sizing the Business and undertaking a restructuring within a CCAA proceeding. The Business of the Applicants involves both of the Applicants, such that it is appropriate for all Applicants to be included in these proceedings as "affiliated companies" under the CCAA.

**(ii) This Court is the Proper Forum**

59. Subsection 9(1) of the CCAA provides that an application under the CCAA may be made to the Court that has jurisdiction in the province where the debtor company has its "head office or chief place of business."<sup>56</sup>

60. SAIL's registered head office is located in Stoney Creek, Ontario.<sup>57</sup> The operations of the Applicants are functionally and operationally integrated, such that the Fusion's United States operations cannot operate independently of SAIL's Canadian operations.<sup>58</sup> Thus, this Court is the appropriate venue for these CCAA proceedings.

**(iii) The Initial Order Relief Sought is Reasonably Limited to What is Necessary**

61. Pursuant to s. 11.001 of the CCAA, the relief sought on an initial application is limited to what is reasonably necessary to continue the operations in the ordinary course during the initial stay period.<sup>59</sup> Whether particular relief is necessary to stabilize a debtor company's operations during the initial stay period is inherently a factual determination based on the circumstances.<sup>60</sup>

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<sup>55</sup> Hustrulid Affidavit, para 94.

<sup>56</sup> CCAA, [S. 9\(1\)](#).

<sup>57</sup> Hustrulid Affidavit, paras 16 and 21.

<sup>58</sup> Hustrulid Affidavit, para. 28.

<sup>59</sup> CCAA, [S. 11.001](#); *Lydian International Limited (Re)*, 2019 ONSC 7473 ("*Lydian*") at [paras 22-26](#).

<sup>60</sup> *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802 at [para 16](#).

62. The Applicants seek only the relief necessary to maintain the Business during the initial stay period. The Applicants have worked closely with the Monitor and DIP Lender to determine the necessary relief, including the size of the proposed charges, and have carefully considered whether the relief is necessary to protect the Applicants' assets and operations, as well as being in the interest of its creditors and stakeholders.<sup>61</sup>

**(iv) The Applicants Require the Protection of a Stay of Proceedings**

63. Under s. 11.02 of the CCAA, a Court may grant an Initial Order staying all proceedings in respect of a debtor company for a period of no more than 10 days if the Court is satisfied that circumstances exist that make the order appropriate.<sup>62</sup>

64. Courts have granted an initial stay period that is longer than 10 days in circumstances where a matter is being converted from a NOI proceeding. This is due to the prior notices delivered to creditors on the filing of a NOI and the consequent greater ability for creditors to engage than on most CCAA initial order hearings.<sup>63</sup> In order to avoid potentially unnecessary motions and hearings, both in terms of cost and expense to the parties and demands on judicial resources, the Applicants request an initial stay period until May 30, 2025.

65. A stay of proceedings is appropriate where it provides a debtor with "breathing room" while the debtor seeks to restore solvency and emerge from the CCAA on a going concern basis.<sup>64</sup>

66. The Applicants require the protection of a stay of proceedings to maintain the *status quo*, preserve the value of their Business, implement the SISP, and effect an operational restructuring.<sup>65</sup> The Applicants have many creditors and, absent a stay of proceedings, there is a risk that individual creditors such as RBC, BDC, and unsecured creditors will seek to enforce their

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<sup>61</sup> Hustrulid Affidavit, para 104.

<sup>62</sup> CCAA, [S. 11.02\(3\)](#).

<sup>63</sup> [Endorsement of Cavanagh J dated October 7, 2021 in Medifocus Inc \(Re\), Court File No CV20-00669781-00CL](#). See also the initial order granted in [Cannmart Labs \(Re\); Body Shop, paras 19-20](#)

<sup>64</sup> *Lydian* at [para 22](#).

<sup>65</sup> Hustrulid Affidavit, paras 108-109.

rights in multiple proceedings without regard for the Applicants' survival or maximization of their value. Such circumstances would be detrimental to the Applicants' customers, suppliers, and employees.<sup>66</sup>

## **B. The Amended DIP Term Sheet And DIP Lender's Charge Should Be Approved**

67. The Applicants seek approval of the Amended DIP Term Sheet and a DIP Lender's Charge over the Applicants' assets, property and undertakings in favour of the DIP Lender. The proposed DIP Lender's Charge ranks behind the Administration Charge and BDC's mortgage but above all other encumbrances.

68. Section 11.2 of the CCAA permits the Court to grant the DIP Facility and the DIP Lender's Charge on notice to those secured creditors that would be affected and in an amount that the Court considers appropriate having regard to the Applicants' cash flow forecast.<sup>67</sup>

69. In determining whether the DIP Lender's Charge is appropriate, the Court is required to consider the following factors under section 11.2(4) of the CCAA: (a) the period during which the company is expected to be subject to proceedings under the CCAA; (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, if any.<sup>68</sup>

When an application for interim financing is made at the same time as an initial application, the applicant must additionally satisfy the Court that the terms of the loan are "limited to what is

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<sup>66</sup> Hustrulid Affidavit, para 109.

<sup>67</sup> CCAA, [S. 11.2\(1\)](#).

<sup>68</sup> CCAA, [S. 11.2\(4\)](#). See for e.g. *Lydian International Limited (Re)*, 2020 ONSC 4006 at [paras 67-68](#); *In Re Hudson's Bay Company*, 2025 ONSC 1530 ("*Hudson's Bay*") at [para 84](#).

reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period”.<sup>69</sup>

70. Based on the above factors, the DIP Facility and the DIP Lender’s Charge should be approved by this Court, in priority to all other encumbrances, for the following reasons:

- (a) the Cash Flow Forecast demonstrates that further interim financing is required to provide the Applicants with the required liquidity for continued operations in the ordinary course. Ordinary course operations will preserve the value and going concern operations of the Applicants’ Business, which is in the best interests of the Applicants and their stakeholders including mortgagees of facilities regularly used in the Business such as that in Parry Sound;
- (b) the Applicants are not able to obtain interim financing without a charge given that the DIP Facility requires the DIP Lender’s Charge;
- (c) the DIP Lender is SAIL’s primary secured creditor, RBC;
- (d) the Applicants’ Business will be managed in the normal course by its management with the oversight of the Monitor;
- (e) in accordance with subsection 11.2(1) of the CCAA, notice has been given to the registered secured creditors to be primed by the DIP Lender’s Charge;<sup>70</sup>
- (f) the proposed DIP Lender’s Charge does not secure any pre-filing obligations of the Applicants; and
- (g) the Monitor supports this relief and believes the economic terms of the DIP Facility are reasonable in the circumstances.

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<sup>69</sup> CCAA, [S. 11.2\(5\)](#). See for e.g. *Hudson’s Bay* at [para 85](#).

<sup>70</sup> CCAA, [S. 11.2\(1\)](#).

### C. The Administration Charge Should Be Granted

71. The Court granted an Administration Charge in the NOI Proceeding in the maximum amount of \$350,000. The Applicants seek to continue the Administration Charge in the same amount of \$350,000 in order to secure the fees and disbursements of the Monitor, its counsel, and the Applicants' counsel. The Applicants seek to have the Administration Charge rank as a first-priority charge.

72. Section 11.52 of the CCAA gives this Court jurisdiction to grant a priority charge for the fees and expenses of financial, legal and other advisors or experts. Courts have considered the following non-exhaustive factors in determining whether an administration charge is appropriate: (a) the size and complexity of the business being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an 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.<sup>71</sup>

73. An administration charge is considered fair and reasonable where its quantum is not, on a balance, disproportionate to the complexity of the business and restructuring.<sup>72</sup> In this case, the total Administration Charge of \$350,000 is reasonable and proportionate under the circumstances given the Applicants' Cash Flow Forecast for the stay of proceedings.

74. The proposed Administration Charge is necessary under the circumstances. The Monitor, its counsel and the Applicants' counsel are essential to these CCAA proceedings. Their roles are not duplicative and it is unlikely that these advisors will participate in the CCAA proceedings without the Administration Charge.<sup>73</sup> In addition, all stakeholders, including mortgagees of

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<sup>71</sup> *Canwest Publishing Inc.*, 2010 ONSC 222 [Pepall J.] ("**Canwest 2010**") at [para 54](#). See also *Springer Aerospace Holdings Limited*, 2022 ONSC 6581 ("**Springer**") at [paras 18-19](#); *Lydian* at [paras 46-47](#); *Hudson's Bay* at [para 100](#).

<sup>72</sup> See *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ONSC) [Pepall J.] ("**Canwest 2009**") at [para 40](#); *Springer* at [para 19](#).

<sup>73</sup> *Hustrulid Affidavit*, paras 120-122.

facilities regularly used in the Business, will benefit from the preservation of the chance of a going concern sale and possible purchase of such facilities by a purchaser on such basis.

**D. Payment of Pre-Filing Obligations with Approval of the Monitor and the DIP Lender**

75. The Initial Order authorizes, but does not require, the Applicants to pay up to \$250,000 owing for goods or services supplied to the Applicants prior to the date of the Initial Order, if in the opinion of the Applicants and the Monitor, the payment is necessary or desirable to avoid disruption to the operations of the Business or the property of the Applicants during the CCAA proceedings. These payments can only be made with the consent of both the Monitor and the DIP Lender.

76. The Court is empowered to grant such relief pursuant to the Court's general jurisdiction under s. 11 of the CCAA. Courts have routinely granted orders allowing CCAA applicants to pay pre-filing amounts to critical suppliers with the consent of the monitor.<sup>74</sup> In doing so, Courts have considered the following criteria: (a) whether the goods and services concerned are integral to the business; (b) the applicant's need for the uninterrupted supply of the goods or services; (c) the Monitor's support and willingness to work with the applicant to ensure that payments to suppliers in respect of pre-filing liabilities are appropriate; and (d) the effect on the applicant's ongoing operations and ability to restructure if it were unable to make pre-filing payments to its critical suppliers.<sup>75</sup>

77. The Applicants submit that this criteria is met. The Applicants rely heavily on a small number of suppliers and contractors who provide specialized services and materials. To avoid

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<sup>74</sup> See: *Cinram International Inc. (Re)*, 2012 ONSC 3767 at [para 23](#); *Springer* at [paras 25-27](#); *McEwan Enterprises Inc.*, 2021 ONSC 6453 at [paras 32-33](#) ("**McEwan**"); *Comstock* at [paras 44-45](#).

<sup>75</sup> *CCAA, s. 11*. See *Springer* at [para 25-27](#); *McEwan* at [para 33](#); *Canwest 2009* at [paras 41-43](#); *Canwest 2010* at [paras 47-51](#); *Hudson's Bay* at [para 114](#).

disruption to the Business, the Applicants seek the flexibility to make pre-filing payments as necessary to maintain the Business and avoid impairing their restructuring efforts.<sup>76</sup>

#### **E. The Monitor Should Be Appointed with Enhanced Powers**

78. Pursuant to s. 11.7 of the CCAA, the Court must appoint a person to monitor the business and financial affairs of a debtor company when an initial CCAA order is made.<sup>77</sup> Section 11.7(2) also sets out certain requirements for, and restrictions on, who may act as a monitor, including that a monitor must be a trustee within the meaning of subsection 2 of the BIA.

79. The Applicants seek to appoint FTI as Monitor in this CCAA proceeding. FTI is a trustee within the meaning of subsection 2(1) of the BIA and is not the auditor or accountant of any of the Applicants or subject to any of the other restrictions in s. 11.7(2) of the CCAA.

80. Section 23(1)(k) of the CCAA permits monitors to be granted enhanced powers depending on the applicable circumstances.<sup>78</sup> In this case, the DIP Lender requires such powers as a term of advancing funds that are necessary to support a going concern sale process, which the Applicants and Timothy Shaw as their director do not object to and which FTI as the proposed Monitor consents to and supports.<sup>79</sup>

#### **F. Fusion Should be Authorized to Act as Foreign Representative**

81. The Applicants are considering seeking recognition of these proceedings in the United States pursuant to Chapter 15 of the Bankruptcy Code. Accordingly, the Applicants seek the Court's authorization for Fusion to act as the foreign representatives with respect to the CCAA proceedings.

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<sup>76</sup> Hustrulid Affidavit, paras 133-137.

<sup>77</sup> CCAA, [S 11.7](#).

<sup>78</sup> See for example *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, [2020 QCCA 659](#) at paras. 61-62 and 77-82, and *Re Nortel Networks Corporation et al*, [2014 ONSC 6973](#) at para. 31.

<sup>79</sup> Hustrulid Affidavit, paras 167-168.

82. Section 56 of the CCAA grants the Court unfettered authority to appoint “any person or body” to act as a representative for the purpose of having CCAA proceedings recognized in any jurisdiction outside of Canada, including the U.S.<sup>80</sup>

83. Courts have consistently encouraged the principles of comity and cooperation between courts in cross-border insolvencies to enable enterprises to implement cross-border restructurings. Permitting Fusion to seek recognition of these proceedings in the United States is necessary and appropriate in the circumstances because, among other things, the Applicants operate a cross-border business that is operationally integrated. Authorizing Fusion to act as foreign representative and seek recognition of these proceedings in the United States is consistent with and gives full effect to these principles.

#### **G. The SISP Should be Approved**

84. The remedial nature of the CCAA confers broad powers to the Court to facilitate restructurings, including the power to approve a sale and investment solicitation process in relation to a CCAA debtor and its business and assets, prior to or in the absence of a plan of compromise and arrangement.<sup>81</sup>

85. In *Nortel*, the Court identified several factors to be considered in determining whether to approve a sales process, which have since been consistently applied:

- (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 bona fide reason to object to a sale of the business?

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<sup>80</sup> CCAA, [S. 56](#)

<sup>81</sup> *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC) (“*Nortel*”) at [paras 47-48](#); CCAA, [ss. 11](#) and [36](#).

(d) Is there a better viable alternative?<sup>82</sup>

86. This Court has noted that Section 36 of the CCAA directly applies only in the context of the approval of a sale, not of a sales process.<sup>83</sup> Nevertheless, the *Nortel* criteria for approving a sales process should be evaluated in light of the considerations that may ultimately apply when seeking approval for a concluded sale under Section 36 of the CCAA.<sup>84</sup> As such, this Court is entitled to consider whether the proposed SISP is likely to satisfy the requirements that the process be fair and that the best price has been obtained, whether the Monitor supports the SISP, as well as the extent to which creditors were consulted and other relevant factors.<sup>85</sup>

87. In other CCAA cases, courts have also considered the following factors: (a) the fairness, transparency and integrity of the proposed process; (b) the commercial efficacy of the proposed process in light of the specific circumstances; and (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.<sup>86</sup>

88. In consideration of the above criteria and factors, the SISP should be approved as:

- (a) the Applicants are insolvent, unable to indefinitely continue operations in their current state without interim financing and must restructure to maintain the viability of the Business. The sale process will canvass interest with the intention of soliciting a bid to continue the Business on a going concern basis;
- (b) the broad flexibility afforded by the SISP is designed to solicit the highest value available for the property and Business, suggesting that the value that results from

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<sup>82</sup> *Nortel*, at [para 49](#). See for e.g. *Re Fresh City Farms and Mama Earth Organics*, 2024 ONSC 2016 (“**Fresh City**”) at [para 29](#); *In Re Hudson’s Bay Company*, 2025 ONSC 1897 at [para 48](#).

<sup>83</sup> *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ONSC) (“**Brainhunter**”) at [para 17](#).

<sup>84</sup> *Brainhunter*, at [para 16](#).

<sup>85</sup> CCAA, [s. 36\(3\)](#).

<sup>86</sup> *Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107 at [paras. 20-21](#); *CCM Master Qualified Fund v. bluetip Power Technologies*, 2012 ONSC 1750 at [para 6](#).

any sale transaction will benefit the Applicants' stakeholders. The SISP will canvass the market for a variety of potential transaction structures including one or more of a restructuring, recapitalization, or some 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 Business of the Applicants;

- (c) the Amended DIP Term Sheet requires a sales process to be commenced;
- (d) the SISP was developed by the Applicants, with the assistance of the Monitor and the DIP Lender;
- (e) the Applicants and the Monitor believe that the milestones of the proposed SISP will provide sufficient time to canvass the market in a fair and transparent manner;
- (f) the SISP will cause minimal interruption to ongoing operations;
- (g) any Successful Bids will be subject to Court approval at which time the Court can review the execution and implementation of the SISP to ensure the factors of section 36 of the CCAA are satisfied; and
- (h) the Monitor and the DIP Lender are supportive of the proposed SISP.

#### **H. This Court Should Issue the Discharge Order**

89. If the NOI Proceeding is converted into the CCAA proceeding, the NOI Proceeding will be terminated. The Discharge Order sought on this motion contains the following three key features:

- (a) it approves the conduct and fees of FTI as Proposal Trustee and counsel to the Proposal Trustee, including costs to terminating the NOI Proceeding;
- (b) it releases the Proposal Trustee, counsel to the Proposal Trustee, and counsel to the Company from all claims relating to the NOI Proceeding, other than claims arising from gross negligence or wilful misconduct; and

(c) it discharges the Proposal Trustee.

90. A similar discharge order has been sought and granted in other matters where the debtor company continued their NOI proceedings under the CCAA.<sup>87</sup>

91. As Chief Justice Morawetz held in *Re Target Canada Co.*, “there are good policy and practical reasons to approve of [a] Monitor’s activities and providing a level of protection for [a] Monitor during the CCAA process”.<sup>88</sup> This policy rationale applies equally to trustees, including proposal trustees, and received discharging their functions under the BIA.<sup>89</sup> Having regard to the policy described in *Target*, FTI requests that this Court approve the conduct of the Proposal Trustee and its counsel because they have acted with diligence and in good faith in respect of their obligations and duties in the NOI Proceeding and have made substantial contributions in the NOI Proceeding, including assisting the Applicants in their efforts to stabilize their operations.

92. FTI also requests that this Court approve the fees of the Proposal Trustee and its counsel. As the Court of Appeal for Ontario held in *Bank of Nova Scotia v Diemer*, this Court does not undertake a line-by-line analysis of the invoices. Rather, the guiding principles on fee approvals of this nature is whether the fees are fair, reasonable, and proportionate given the value of the Applicants’ assets and liabilities, as well as the complexity of the Applicants’ Business and the NOI Proceedings.<sup>90</sup> The Applicants submit that they are.

## **PART V – RELIEF REQUESTED**

93. For the reasons stated above, the Applicants request an Initial Order, the SISP Approval Order and the Discharge Order.

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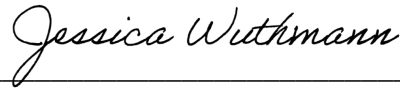
<sup>87</sup> *Body Shop*, [para 29](#).

<sup>88</sup> *Target Canada Co. (Re)*, 2015 ONSC 7574 at [para 22](#).

<sup>89</sup> *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400 at [para 66](#); *KEB Hana as Trustee v. Mizrahi Commercial (THE ONE) LP et al.*, 2024 ONSC 1678 at [para 40](#).

<sup>90</sup> *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at [paras 33 and 45](#); *Fresh City* at [para 47](#).

**PURSUANT TO RULE 4.06(2.1), THE UNDERSIGNED** certifies that they are satisfied as to the authenticity of every authority cited in this factum.

  
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**JESSICA WUTHMANN (LSO#72442W)**

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8<sup>th</sup> DAY OF MAY, 2025.**

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/s RECON

**RECONSTRUCT LLP**

## **SCHEDULE “A”**

### **List of Authorities**

1.	<a href="#"><u>(Re) Clothing for Modern Times Ltd., 2011 ONSC 7522</u></a>
2.	<a href="#"><u>In the Matter of The Body Shop Canada Limited, 2024 ONSC 3882</u></a>
3.	<a href="#"><u>Comstock Canada Ltd. (Re), 2013 ONSC 4756</u></a>
4.	<a href="#"><u>First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299</u></a>
5.	<a href="#"><u>Lydian International Limited (Re), 2019 ONSC 7473</u></a>
6.	<a href="#"><u>Boreal Capital Partners Ltd et al. (Re), 2021 ONSC 7802</u></a>
7.	<a href="#"><u>Endorsement of Cavanagh J dated October 7, 2021 in Medifocus Inc (Re), Court File No CV20-00669781-00CL.</u></a>
8.	<a href="#"><u>Cannmart Labs (Re)</u></a>
9.	<a href="#"><u>Lydian International Limited (Re), 2020 ONSC 4006</u></a>
10.	<a href="#"><u>In Re Hudson’s Bay Company, 2025 ONSC 1530</u></a>
11.	<a href="#"><u>Canwest Publishing Inc, 2010 ONSC 222</u></a>
12.	<a href="#"><u>Springer Aerospace Holdings Limited, 2022 ONSC 6581</u></a>
13.	<a href="#"><u>Canwest Global Communications Corp. (Re), 2009 CanLII 55114 (ONSC)</u></a>
14.	<a href="#"><u>Cinram International Inc. (Re), 2012 ONSC 3767</u></a>
15.	<a href="#"><u>McEwan Enterprises Inc., 2021 ONSC 6453</u></a>
16.	<a href="#"><u>Nortel Networks Corporation (Re), 2009 CanLII 39492 (ON SC)</u></a>
17.	<a href="#"><u>Re Fresh City Farms and Mama Earth Organics, 2024 ONSC 2016</u></a>
18.	<a href="#"><u>In Re Hudson’s Bay Company, 2025 ONSC 1897</u></a>
19.	<a href="#"><u>Brainhunter Inc. (Re), 2009 CanLII 72333 (ONSC)</u></a>
20.	<a href="#"><u>Walter Energy Canada Holdings, Inc., 2016 BCSC 107</u></a>
21.	<a href="#"><u>CCM Master Qualified Fund v. bluetip Power Technologies, 2012 ONSC 1750</u></a>
22.	<a href="#"><u>Target Canada Co. (Re), 2015 ONSC 7574</u></a>
23.	<a href="#"><u>Triple-I Capital Partners Limited v 12411300 Canada Inc., 2023 ONSC 3400</u></a>
24.	<a href="#"><u>KEB Hana as Trustee v. Mizrahi Commercial (THE ONE) LP et al., 2024 ONSC 1678</u></a>
25.	<a href="#"><u>Bank of Nova Scotia v Diemer, 2014 ONCA 851</u></a>

## **SCHEDULE “B”**

### **Statutory Authorities**

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

**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;

#### **Application**

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

#### **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.

## Jurisdiction of court to receive applications

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

## 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.

## General power of court

**11** 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.

## Relief reasonably necessary

**11.001** 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.

## Stays, etc. — initial application

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

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

### **Burden of proof on application**

(3) The court shall not make the order unless

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

### **Restriction**

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

### **Interim financing**

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

### **Priority — secured creditors**

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

### **Priority — other orders**

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

### **Factors to be considered**

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;

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

### **Additional factor — initial application**

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

### **Court may order security or charge to cover certain costs**

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

- **(a)** the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- **(b)** any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- **(c)** any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

### **Priority**

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

### ***Bankruptcy and Insolvency Act matters***

**11.6** Notwithstanding the [Bankruptcy and Insolvency Act](#),

- **(a)** proceedings commenced under Part III of the [Bankruptcy and Insolvency Act](#) may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

- **(b)** an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in [section 116](#) of the [Bankruptcy and Insolvency Act](#) but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from
  - **(i)** the operation of [subsection 50.4\(8\)](#) of the [Bankruptcy and Insolvency Act](#), or
  - **(ii)** the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the [Bankruptcy and Insolvency Act](#).

### **Court to appoint monitor**

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

### **Restrictions on who may be monitor**

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

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

### **Court may replace monitor**

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

### **Restriction on disposition of business assets**

**36 (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.

#### **Authorization to act as representative of proceeding under this Act**

**56** The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY*  
ACT, RSC 1985, c B-3, AS AMENDED

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF SHAW-ALMEX INDUSTRIES LIMITED

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

**FACTUM OF THE APPLICANTS**  
**(INITIAL ORDER)**

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