

Court File No. _____

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **TREES
CORPORATION, ONTARIO CANNABIS HOLDINGS CORP., MIRACULO INC.,
2707461 ONTARIO LTD., OCH ONTARIO CONSULTING CORP., AND 11819496
CANADA INC.****

Applicants

**FACTUM OF THE APPLICANTS
(returnable on December 22, 2023)**

December 21, 2023

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PART I - OVERVIEW

1. Trees Corporation (“**Trees**”), and its subsidiaries Ontario Cannabis Holdings Corp. (“**OCH**”), Miraculo Inc. (“**Miraculo**”), 2707461 Ontario Ltd., operating as Camp Cannabis (“**Camp Cannabis**”), OCH Ontario Consulting Corp. (“**Ontario Consulting**”), and 11819496 Canada Inc., doing business as Trees Cannabis (“**118**”) (collectively, the “**Applicants**”) seek protection from their creditors and certain other ancillary relief pursuant to an initial order (the “**Initial Order**”) made under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), substantially in the form of the proposed order attached to the Application Record at Tab 3.
2. The Applicants are in the business of selling cannabis through retail channels and operate 13 cannabis retail stores operating in Ontario and British Columbia. Over the last three years, the Applicants have suffered significant losses in the tens of millions of dollars.
3. The Applicants financial difficulties have been driven by, among other things, the following factors: (a) fierce competition; (b) increased operating costs; and (c) strict regulation of the cannabis industry imposed by the federal and provincial governments. In addition, the Applicants have incurred significant legal costs in the pursuit of raising working capital. Collectively, these factors have limited revenue and increased costs, leading to the current liquidity crisis.
4. The Applicants have received demand letters and Notices of Intention to Enforce Security on December 15, 2023 and December 21, 2023, from several secured creditors. Without

the protection offered by a stay of proceedings, secured creditors would be in a position to enforce upon their security and possibly disrupt business operations as early as December 27, 2023.

5. The Applicants require debtor-in-possession financing to fund its operations in the next ten days. The Applicants have entered into a debtor-in-possession term sheet with the DIP Lender (as defined below) which provides the Applicants with an initial advance of \$350,000 if the Initial Order is granted.
6. Without the stay of proceedings and the approval of the debtor-in-possession financing, the Applicants are unable to meet their obligations as they become due. Further, the most likely alternative to a CCAA proceeding is the cessation of operations and a piecemeal liquidation of the Applicants' assets, to the detriment of the Applicants' landlords, lenders, customers, and 102 employees.
7. The Applicants request the protection of the CCAA to, among other things: (a) maintain operations for the benefit of its employees and other stakeholders; (b) disclaim unprofitable leases; (c) streamline their remaining operations with a view to generating a profit; (d) commence a court-approved sale and investment solicitation process with the assistance of the Monitor to identify bids that will maintain the Applicants as a going concern and maximize value for the creditors and stakeholders; and (e) address the current capital structure of the Applicants.

PART II - THE FACTS

8. The facts with respect to this application are briefly summarized below and are more fully set out in the Holmgren Affidavit. Capitalized terms used herein that are not otherwise defined shall have the meaning ascribed to them in the Holmgren Affidavit.

Urgency and the Pressing Need for Relief

9. On December 15, 2023, Trees received demand letters and Notices of Intention to Enforce Security from several holders of the Trees Secured Debentures who appear to be the senior secured creditors of Trees and are owed approximately \$500,000. Absent the stay of proceedings requested in the Initial Order, these secured creditors will be in a position to enforce upon their security and disrupt business operations as early as December 27, 2023.¹
10. Further, on December 21, 2023, Ontario Cannabis Holdings Corp. received demand letters and Notices of Intention to Enforce Security from CJ Marketing Ltd. and Arthur Minh Tri Nguyen-Cao. These secured creditors are owed approximately \$1.3 million pursuant to secured grid promissory notes. Absent the stay of proceedings requested in the Initial Order, these secured creditors will be in a position to enforce upon their security and disrupt business operations as early as January 2, 2024.²
11. In addition, as a result of its liquidity issues, certain of the Applicants are in default of their rent obligations. One of the landlords holds a consent to judgment, has obtained a signed

¹ Application Record of the Applicants dated December 21, 2023 (the “**Application Record**”), Tab 2, Affidavit of Jeffrey Holmgren, sworn on December 21, 2023 (the “**Holmgren Affidavit**”) at paras 8 and 79; Pre-Filing Report of the Proposed Monitor dated December 21, 2023 (the “**Pre-Filing Report**”) at para 28.

² Holmgren Affidavit at paras 8, 97-98, Application Record at Tab 2; Pre-Filing Report at para 30.

judgment in the amount of \$120,000, and is in a position to take enforcement steps against the Applicants, including garnishing their bank accounts.³

12. The Applicants' financial difficulties are exacerbated by their existing secured and unsecured loan obligations and certain settlements entered into by the Applicants. For example, the Trees Secured Debentures accrue interest at an annual rate of 58.8%. Although the Applicants have not paid interest to date, this interest rate has significantly increased the total amount outstanding, continues to accrue, the Trees Secured Debentures have matured, and the holders have demanded repayment.⁴
13. Further, the Applicants entered into settlement agreements with former management and certain legal advisors. These settlement agreements require the Applicants to make monthly payments of \$15,000, depleting the Applicants' liquidity for operations.⁵
14. Historically, the Applicants relied on debt and equity financing to sustain their business as a going concern. However, the Applicants' current capital structure is untenable because there are multiple secured creditors spread across several of the Applicants. Given the current state of the capital markets, the Applicants are unable to obtain debt or equity financing at a cost that the Applicants can service. Further, it is unclear that any third party will lend additional capital to the Applicants ranking behind the Applicants' current secured debt.⁶

³ Holmgren Affidavit at paras 113-115; Application Record at Tab 2.

⁴ Holmgren Affidavit at paras 12 and 77; Application Record at Tab 2.

⁵ Holmgren Affidavit at para. 13; Application Record at Tab 2.

⁶ Holmgren Affidavit at para. 14; Application Record at Tab 2.

15. In the months leading up to this application, the Applicants made efforts to raise additional liquidity and pursue strategic alternatives to address the liquidity situation. These efforts were not successful.⁷
16. The Applicants are insolvent and do not have the liquidity necessary to sustain their operations going forward or pay their obligations as they become due. Further, certain creditors have already taken steps to begin enforcement proceedings against the Applicants. These steps jeopardize the current operations of the Applicants in the ordinary course and could result in the cessation of operations and a loss of employment for most, if not all of the Applicants current employees. The Applicants seek the protection of the CCAA and the relief available thereunder to give effect to a restructuring plan and preserve the business as a going concern and the employment of substantially all of the Applicants' employees.⁸

Corporate Structure

17. Trees is a public corporation with its registered office located in Toronto, Ontario. Trees is the direct or indirect parent company of each of the Subsidiaries. In addition, Trees operates four licensed cannabis stores in British Columbia.⁹

⁷ Holmgren Affidavit at para 15; Application Record at Tab 2.

⁸ Holmgren Affidavit at para 19; Application Record at Tab 2.

⁹ Holmgren Affidavit at paras 24-25; Application Record at Tab 2.

18. Miraculo is a wholly owned subsidiary of Trees with a registered head office in Toronto, Ontario. Historically, Miraculo operated an online consumer education platform ancillary to the Applicants' retail stores. Currently, Miraculo has no business operations.¹⁰
19. OCH is the direct subsidiary of Trees and is a holding company with no active operations.¹¹
20. Ontario Consulting, Camp Cannabis and 118 operate the 9 Ontario retail stores. Each of their registered head offices are located in Toronto, Ontario.¹²

The Applicants' Business and Operations

21. Collectively, the Applicants operate 13 fully licensed retail cannabis stores in Ontario and British Columbia.¹³ These retail locations operate in a highly regulated environment pursuant to the *Cannabis Act* (Canada) and other applicable provincial and municipal legislation.
22. Each of the Applicants' retail stores are leased. Collectively, there are 14 lease agreements (the "**Leases**") to which the Applicants are tenants. One of the Leases is at a location that the Applicants have stopped operations, but the Lease is still in effect. The Applicants intend to disclaim this Lease if the Initial Order is granted. The Leases represent the Applicants' largest liabilities.¹⁴

¹⁰ Holmgren Affidavit at paras 26-29; Application Record at Tab 2.

¹¹ Holmgren Affidavit at paras 30-31; Application Record at Tab 2.

¹² Holmgren Affidavit at para 32-37; Application Record at Tab 2.

¹³ Holmgren Affidavit at para 38; Application Record at Tab 2.

¹⁴ Holmgren Affidavit at para 11; Application Record at Tab 2.

23. The Applicants hold a variety of licenses and permits issued by the applicable regulatory authority in each province that the Applicants operate in. These permits and licenses provide the Applicants with the necessary authority to possess and sell cannabis to the public at their retail locations.¹⁵
24. The applicable regulatory authorities in Ontario and British Columbia require all Cannabis Products are purchased from the provincially prescribed distributor of Cannabis Products. In Ontario, it is the Ontario Cannabis Store. In British Columbia, it is the British Columbia Liquor Distribution Branch.¹⁶ Both authorities set a fixed price for all Cannabis Products, preventing market participants from obtaining more favourable pricing for cannabis products.
25. The Applicants have an aggregate of 102 total employees located in Ontario, British Columbia and Alberta as well as four full-time contractors. The Applicants do not maintain any pension plans, defined contribution plans, or any deferred compensation plans.¹⁷

The Applicants' Financial Position

26. The Applicants have been operating at a loss for several years. Pursuant to the 2022-23 Annual Statements, the Applicants reported a net loss of approximately \$12.4 million.¹⁸ Further, in the Applicants 2023 Q2 Statements, the Applicants reported a net loss of approximately \$1.2 million.

¹⁵ Holmgren Affidavit at paras 40-44; Application Record at Tab 2.

¹⁶ Holmgren Affidavit at para 45; Application Record at Tab 2.

¹⁷ Holmgren Affidavit at para 51; Application Record at Tab 2.

¹⁸ Holmgren Affidavit at para 66; Application Record at Tab 2.

27. In the 2022-23 Annual Statements, the Applicants reported total liabilities of approximately \$11.6 million and total assets of approximately \$11.4 million. In the 2023 Q2 Statements, the Applicants reported total liabilities of approximately \$13.4 million and total assets of approximately \$12.3 million. A significant component of the Applicants' assets include intangibles and the Applicants' right to use leases that cannot be easily monetized.¹⁹

Liabilities of the Applicants

28. The Applicants have numerous secured creditors. The total secured debt obligations of the Applicants as at December 21, 2023 are summarized below:

- (a) **Trees:** Total secured debt of approximately \$1,657,500, inclusive of interest;
- (b) **OCH:** Total secured debt of approximately \$2,210,000, inclusive of interest; and
- (c) **Ontario Consulting:** Total secured debt of approximately \$9,500,000, inclusive of interest.²⁰

29. In addition, the Applicants have significant unsecured liabilities, as set out in more detail in the Holmgren Affidavit.²¹

The DIP Term Sheet

30. In order to fund the operations of the Applicants during these CCAA proceedings, the Applicants seek to gain access to debtor-in-possession financing. Given the Applicants

¹⁹ Holmgren Affidavit at para 67; Application Record at Tab 2.

²⁰ Pre-Filing Report at paras 27-31.

²¹ Holmgren Affidavit at paras 111-119; Application Record at Tab 2.

current financial position, the Applicants do not believe that any other third party would be interested in providing such financing on similar terms and on the timeline required by the Applicants.²²

31. Accordingly, on December 21, 2023, the DIP Term Sheet was entered into between the Applicants and One Plant Retail Corp. (the “**DIP Lender**”).²³
32. Among other things, the DIP Term Sheet includes the following material terms:
- (a) **DIP Facility**: non-revolving loan up to the maximum amount of \$800,000;
 - (b) **Advances**: the initial advance under the DIP Facility shall be \$350,000 during the Initial Stay Period. Subsequent advances shall be made by the DIP Lender to the Borrowers as needed in installments of not less than \$100,000, as approved by the Monitor;
 - (c) **Interest Rate**: Accrues at fifteen percent (15%) per annum on the outstanding indebtedness. Interest shall be calculated on the daily outstanding balance owing under the DIP Facility, not in advance, and shall accrue and be paid as described further below; and
 - (d) **Fees**: The Applicants shall pay a commitment fee of \$50,000 and all reasonable costs and expenses of the DIP Lender associated with the negotiation and preparation of the DIP Term Sheet and the CCAA proceedings.²⁴
33. Pursuant to the DIP Term Sheet, the DIP Facility must be repaid in full by the date that is the earliest of: (a) the Maturity Date of February 29, 2024; (b) the closing of a transaction;

²² Holmgren Affidavit at para 14; Application Record at Tab 2.

²³ Holmgren Affidavit at para 147; Application Record at Tab 2.

²⁴ Holmgren Affidavit at para 148; Application Record at Tab 2.

(c) any Order made by the Court replacing Ernst & Young Inc. as Monitor; (d) the date on which the CCAA proceedings are terminated for any reason, including if one or more of the Applicants become bankrupt, whether voluntarily or involuntarily; and (e) the occurrence of an Event of Default (as defined in the DIP Term Sheet).²⁵

PART III - ISSUES

34. The issues in respect of the relief being sought under the Initial Order are as follows:

- (a) Are the Applicants entitled to seek protection under the CCAA?
- (b) Should a stay of proceedings be granted in respect of the Applicants?
- (c) Should the Court appoint EY as Monitor?
- (d) Should the Court grant the CCAA Charges?

PART IV - LAW & ARGUMENT

(a) The Applicants are Entitled to Seek and Should Obtain Protection Under the CCAA

Each Applicant is a “Debtor Company” Under the CCAA with Debts Totaling More than \$5 Million

35. The CCAA applies to a “debtor company” or “affiliated debtor companies” where the total amount of claims against either the debtor or its affiliates exceed \$5 million.²⁶ The

²⁵ Holmgren Affidavit at para 149; Application Record at Tab 2.

²⁶ CCAA, s. 3(1); [Cinram International Inc., Re, 2012 ONSC 3767 at paras 54-57.](#)

Applicants are affiliated debtor companies with total claims that exceed \$5 million.²⁷ Accordingly, the Applicants are entitled to seek, and should obtain protection under the CCAA.

36. Pursuant to section 2 of the CCAA, the definition of “company” includes any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province.²⁸
37. Each of the Applicants are companies incorporated pursuant to the *Canada Business Corporations Act* or the *Business Corporations Act* (Ontario).²⁹ Accordingly, each of the Applicants meet the CCAA definition of “company”.
38. A “debtor company” is defined in the CCAA to include any company that is bankrupt or insolvent.³⁰ The CCAA does not define insolvent, however, courts utilize the definition of insolvent person pursuant to the *Bankruptcy and Insolvency Act* (R.S.C. 1985, c. B-3) (“**BIA**”), which is defined as a person:
 - (a) who is for any reason unable to meet his obligations as they generally become due,
 - (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

²⁷ Holmgren Affidavit at para 67; Application Record at Tab 2.

²⁸ [CCAA section 2 \(“company”\)](#).

²⁹ Holmgren Affidavit at paras 24-37; Application Record at Tab 2.

³⁰ [CCAA section 2 \(“debtor company”\)](#).

- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.³¹
39. Additionally, in *Re Stelco Inc.*, Justice Farley expanded upon the definition of “insolvent” within the context of a CCAA to reflect the “rescue” emphasis of the CCAA, and includes situations in which a corporation is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring (the “**Stelco Test**”).³²
40. The Applicants are currently insolvent under both the BIA “insolvent person” test and the Stelco Test. As demonstrated in the Applicant’s 2022-23 Annual Statements and 2023 Q2 Statements, the Applicants are balance sheet insolvent and are generally unable to meet their obligations as they become due, and expect to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.³³
41. Accordingly, each of the Applicants is an “insolvent person” and a “debtor company” to which the CCAA applies.

³¹ [BIA section 2 \(“insolvent person”\)](#).

³² *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (Ont. Sup. Ct. J. [Commercial List]) at [paras. 25-26](#). [“*Stelco*”].

³³ Holmgren Affidavit at para 19; Application Record at Tab 2.

This Court has Jurisdiction Over the Applicants

42. 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.” Further, where the head office is located in one province or territory, and its chief operations are located in another, an application may be made in either jurisdiction.³⁴
43. Each of the Applicants have a registered head office that is located in Ontario. Further, a majority of the Applicants’ operations are based in Ontario (9/13 operating retail stores). Accordingly, the Ontario court is the appropriate venue for these CCAA proceedings.³⁵

The Relief Sought is Reasonably Necessary

44. Further to section 11.001 of the CCAA, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period.³⁶
45. The Applicants have worked with the Proposed Monitor to limit the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its businesses. In each case, the Applicants considered whether the requested relief is necessary for the immediate stabilization of their businesses to protect them and the interests of its various stakeholders. The Monitor is satisfied that the

³⁴ [CCAA, s. 9\(1\)](#).

³⁵ Holmgren Affidavit at paras 24-36; Application Record at Tab 2.

³⁶ [CCAA, s. 11.001](#).

relief being sought by the Applicants at this time is customary in CCAA proceedings in comparable circumstances.³⁷

46. The Applicants intend to start disclaiming the leases associated with its unprofitable stores during the initial 10-day stay period.³⁸ Approximately 37% of the Applicants' total liabilities are in respect of their lease obligations. As at September 30, 2023, these lease liabilities had an aggregate approximate value of \$4.95 million.³⁹
47. As detailed in the 2022-23 Annual Statements and the 2023 Q2 Statements, the Applicants are experiencing a significant cash liquidity crisis. Accordingly, it is reasonably necessary for the Applicants to disclaim the leases associated with their unprofitable stores as soon as possible in an effort to preserve their liquidity.
48. Although the landlords are not receiving notice of the initial application, section 32 of the CCAA provides a counterparty to a disclaimed contract with an opportunity to object to the disclaimer. Accordingly, the landlords are not prejudiced by this relief being granted at the initial application because they may afford themselves the usual procedure under the CCAA.

³⁷ Pre-Filing Report at para 62.

³⁸ Holmgren Affidavit at para 11; Application Record at Tab 2.

³⁹ Holmgren Affidavit at para 111; Application Record at Tab 2.

(b) The Stay of Proceedings is Necessary and Should be Granted

49. Section 11.02 of the CCAA allows this Court to grant an order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.⁴⁰
50. In exercising their discretionary authority to grant a stay under the CCAA, the Court must be informed by the purpose behind the CCAA, which should be broadly and liberally interpreted.⁴¹
51. The purpose of the CCAA is to, among other things, maintain the status quo for the debtor company for a period while it consults with its stakeholders with a view to continuing operations for the benefit of both the debtor company and its stakeholders. The power to grant a stay of proceedings should be construed broadly to facilitate the legislative purpose of the CCAA and preserve the value of the ongoing operations of a business.⁴²
52. The Applicants require a Stay of Proceedings to provide them with the necessary breathing room to, among other things: (a) maintain operations for the benefit of its employees and other stakeholders; (b) disclaim unprofitable leases; (c) streamline their remaining operations with a view to generating a profit; (d) commence a court-approved sale and investment solicitation process with the assistance of the Monitor to identify bids that will maintain the Applicants as a going concern and maximize value for the creditors and

⁴⁰ [CCAA, s. 11.02\(1\)](#).

⁴¹ [Stelco Inc. \(Re\)](#), 2005 CarswellOnt 1188 (Ont. C.A.) at [paras 23-26](#); [Nortel Networks Corporation \(Re\)](#), 2009 CarswellOnt 4467 (Ont. Sup. Ct. J. [Commercial List]) at [paras. 31](#) and [47](#); [Sino-Forest Corporation \(Re\)](#), 2012 ONSC 2063 at [para. 40](#).

⁴² [Lehndorff General Partner Ltd.](#), [1993 CarswellOnt 183](#) (O.C.J. Gen. Div. [Commercial List]) at [paras 5-7](#).

stakeholders; and (e) compromise the various secured and unsecured debt obligations that are causing the Applicants current liquidity issues.⁴³

53. Without the protection of the CCAA, the Applicants will be unable to meet their obligations as they become due. If the Applicants are not afforded the protection of the CCAA, it is likely that there will be significant disruptions to the Applicants' business that will force them to shut down operations to the ultimate detriment to the Applicants' landlords, suppliers, lenders, customers, and employees.
54. For the foregoing reasons, the initial Stay of Proceedings should be granted on the terms sought herein.

(c) EY Ought to be Appointed as Monitor

55. The Applicants are seeking the appointment of EY as the Proposed Monitor in their CCAA proceedings. While EY meets the requirements of subsection 11.7(1) of the CCAA, it is subject to one of the restrictions set out in section 11.7(2) of the CCAA, in that Ernst & Young LLP, an affiliate of EY, previously acted as Trees' auditor in the two-year period prior to the CCAA application. The last period audit by Ernst & Young LLP was December 31, 2021. Ernst & Young LLP resigned in its capacity as auditor effective May 10, 2022, and a new auditor was appointed subsequently.⁴⁴

⁴³ Holmgren Affidavit at para. 122; Application Record at Tab 2.

⁴⁴ Pre-Filing Report at paras 8-9.

56. Accordingly, in view of the restriction set out in section 11.7(2) of the CCAA, the appointment of EY as Monitor notwithstanding the prior audit relationship between Ernst & Young LLP and Trees must be specifically authorized by the Court.
57. With respect to this authorization, the Proposed Monitor has confirmed:
- (a) Ernst & Young LLP no longer acts as auditor to any of the Applicants and has not acted as such in over 19 months;
 - (b) None of the members of EY working or expected to work on the Monitor engagement had any involvement in the prior audit work done by Ernst & Young LLP for Trees;
 - (c) EY and Ernst & Young LLP have put in place the usual measures to ensure confidentiality and prevent any disclosure of information between their respective representatives in connection with this matter;
 - (d) EY is not aware of any conflict of interest or loss of independence arising from Trees' prior relationship with Ernst & Young LLP as its auditor, and it does not believe that the former audit role held by Ernst & Young LLP creates any real or perceived reasonable apprehension of bias or impartiality on the part of EY as Proposed Monitor; and
 - (e) EY has consented to act as Monitor in these proceedings, if the Court chooses to appoint it as Monitor.⁴⁵
58. Further, the Applicants support the appointment of EY as the Monitor as, among other things, EY has been assisting the Applicants in their preparation for filing and has an

⁴⁵ Pre-Filing Report at para 11.

intimate knowledge of the Applicants' operations and financial situation. The Proposed Monitor has retained Torys LLP to act as its independent counsel.⁴⁶

59. For these reasons, the Court ought to approve the appointment of EY as Monitor.

(d) Each of the Charges Should be Approved

60. The proposed Initial Order provides for the following three charges (collectively, the "Charges"), in order of their requested priority:

- (a) First – an administration charge (the "**Administration Charge**") to the maximum initial amount of \$350,000 to secure payment of professional fees;
- (b) Second – a DIP lender's charge (the "**DIP Lender's Charge**") against the Property in the amount of the Initial Advance as security for the DIP Borrowers' obligations under the DIP Term Sheet; and
- (c) Third - a directors' and officers' charge (the "**D&O Charge**") to the maximum amount of \$251,000 to secure the indemnity given by the Applicants to their directors and officers pursuant to the Proposed Initial Order.

61. For the reasons set out below, each Charge is appropriate and necessary for the Applicants to successfully restructure their operations.

The Administration Charge is Appropriate and Necessary and Should be Granted

62. The Applicants request that this Court grant a super-priority Administration Charge on the Property in favour of the Proposed Monitor, counsel to the Proposed Monitor, and counsel

⁴⁶ Holmgren Affidavit at para 136, Application Record at Tab 2; Pre-Filing Report at para 12.

to the Applicants. Pursuant to the Proposed Initial Order, the Administration Charge will be requested in the amount of \$350,000 in respect of the Stay Period.

63. This Court has the jurisdiction to grant the Administration Charge pursuant to section 11.52 of the CCAA. In *Canwest Publishing*, Justice Pepall identified six non-exhaustive factors that the Court may consider when determining whether to grant an administration charge:
- (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.⁴⁷
64. The Administration Charge is warranted, necessary, and appropriate in the circumstances, for the following reasons:
- (a) the Applicants operate in a highly regulated environment, with a significant number of complex issues to address;
 - (b) the Applicants have 102 employees and are parties to approximately 13 leases;
 - (c) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout these CCAA proceedings;
 - (d) there is no anticipated unwarranted duplication of roles;

⁴⁷ [*Canwest Publishing Inc. Re*](#), 2010 ONSC 222, at [para 54](#) [*Canwest Publishing*].

- (e) the Applicants' advisors have engaged in a significant amount of work on a pre-filing basis, which has gone unpaid as of the filing date; and
- (f) the Proposed Monitor is supportive of the proposed Administration Charge and believes that the proposed quantum of the Administration Charge is reasonable.⁴⁸

65. The quantum of the Administration Charge for the Initial Stay Period was determined based on amounts incurred by the restructuring professionals prior to the filing, which has not been paid by the Applicants, and additional amounts that are expected to be incurred during the Initial Stay Period.⁴⁹

The DIP Lender's Charge is Appropriate and Necessary and Should be Granted

66. As demonstrated by the 2022-23 Annual Statements and the 2023 Q2 Statements, the Applicants are currently facing a liquidity crisis. In particular, the 2022-23 Annual Statements and Cash Flow Forecast indicates that the Applicants require interim financing to fund these CCAA Proceedings, including during the 10-day Stay Period. The Applicants are requesting approval of the DIP Term Sheet dated December 21, 2023.

67. The Applicants, in consultation with their legal and financial advisors, do not believe that any third party will be able to provide the financing the Applicants urgently require on significantly better terms or on the timeline required by the Applicants. Accordingly, the

⁴⁸ Holmgren Affidavit at paras 139-144, Application Record at Tab 2; Pre-Filing Report at paras 48-50.

⁴⁹ Pre-Filing Report at paras 48-50.

Applicants entered into the DIP Term Sheet to provide the necessary liquidity to continue their operations.⁵⁰

68. Section 11.2 of the CCAA provides the Court with the statutory authority to approve the DIP Term Sheet, the DIP Lender's Charge, and that the DIP Lender's Charge rank in priority over the claim of any secured creditor of the company.⁵¹ Section 11.2(4) sets out the following factors to be considered by the Court in deciding whether to grant a super-priority charge in respect of the DIP Charge:
- (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.⁵²

⁵⁰ Holmgren Affidavit at para 14, Application Record at Tab 2; Pre-Filing Report at para 54.

⁵¹ [CCAA, s. 11.2.](#)

⁵² [CCAA, s. 11.2\(4\).](#)

69. In *Canwest Publishing*, Justice Pepall highlighted the importance of meeting the criteria set out in section 11.2(1) in addition to those found in section 11.2(4), namely:
- (a) whether notice has been given to secured creditors likely to be affected by the security or charge;
 - (b) whether the amount to be granted under a DIP charge is appropriate and required having regard to the debtors' cash-flow statement; and
 - (c) whether the DIP charge secures an obligation that existed before the order approving the DIP was made.⁵³
70. The criteria from sections 11.2(1) and 11.2(4) of the CCAA support approving the DIP Term Sheet and granting the DIP Lender's Charge on the terms sought in the Initial Order, for the following reasons:
- (a) the notice requirements under section 11.2(1) of the CCAA have been met, albeit on short notice;
 - (b) given the Applicants' circumstances, they cannot obtain alternative financing outside of these CCAA proceedings;
 - (c) the DIP Term Sheet is necessary for the Applicants to pursue its restructuring efforts, which will preserve its maintenance as a going-concern for the benefit of all its stakeholders;
 - (d) without the DIP loan, the Applicants may not be able to continue operating;
 - (e) the quantum of the DIP Term Sheet is reasonable and appropriate having regard to the 2022-23 Annual Statements and Cash Flow Forecast; and

⁵³ [CCAA, s. 11.2\(1\); *Canwest Publishing*](#), 2010 ONSC 222, at [paras. 42-44](#).

- (f) the Proposed Monitor is supportive of the approval of the DIP Term Sheet and corresponding DIP Lender's Charge.⁵⁴

71. It is essential that the DIP Term Sheet is approved so that the Applicants may be certain that adequate financing is available from the first day of these CCAA proceedings to support their continued operations.

The D&O Charge is Appropriate and Necessary and Should be Granted

72. The Applicants request that this Court grant a priority D&O Charge on the Property in favour of the Applicants' current and future directors and officers in the amount of \$251,000, ranking subordinate to the Administration Charge and DIP Lender's Charge.

73. The D&O Charge protects the current and future directors and officers against obligations and liabilities they may incur as directors and officers of the Applicants after the commencement of the CCAA Proceedings, except to the extent that any such claims or the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct.

74. Section 11.51 of the CCAA provides the Court with the statutory jurisdiction to grant the D&O Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.⁵⁵

⁵⁴ Holmgren Affidavit at paras 20, 145-153, Application Record at Tab 2; Pre-Filing Report at paras 51-56.

⁵⁵ [CCAA, s. 11.51](#).

75. In *Jaguar Mining Inc., Re*, Justice Morawetz (as he then was) stated that the Court must be satisfied of the following factors before granting a D&O Charge:
- (a) notice has been given to the secured creditors likely to be affected by the charge;
 - (b) the amount is appropriate;
 - (c) the applicant could not obtain adequate indemnification insurance for the directors at a reasonable cost; and
 - (d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.⁵⁶
76. The D&O Charge is appropriate and necessary in the circumstances for the following reasons:
- (a) the Applicants will benefit from the active and committed involvement of the directors and officers, who have considerable institutional knowledge and valuable experience and whose continued participation will help facilitate an effective restructuring;
 - (b) the Applicants cannot be certain whether the existing insurance will be applicable or respond to any claims made, and the Applicants do not have sufficient funds available to satisfy any given indemnity should its directors and officers need to call upon such indemnities;
 - (c) the D&O Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct;
 - (d) absent approval by this Court of the D&O Charge in the amounts set out above, some or all of the Applicants' directors and officers may resign; and

⁵⁶ *Jaguar Mining Inc., Re*, 2014 ONSC 494 at [para. 45](#).

- (e) the Proposed Monitor is of the view that the D&O Charge is reasonable and appropriate in the circumstances.⁵⁷

PART V - ORDER SOUGHT

77. For all of the foregoing reasons, the Applicants request an Order substantially in the form of the proposed Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of December 2023.



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⁵⁷ Holmgren Affidavit at paras. 154-162, Application Record at Tab 2; Pre-Filing Report at paras 57-60.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Cinram International Inc., Re*, 2012 ONSC 3767](#)
2. [*Stelco Inc. \(Re\)*, 2004 CarswellOnt 1211 \(Ont. Sup. Ct. J. \[Commercial List\]\)](#)
3. [*Stelco Inc. \(Re\)*, 2005 CarswellOnt 1188 \(Ont. C.A.\)](#)
4. [*Nortel Networks Corporation \(Re\)*, 2009 CarswellOnt 4467 \(Ont. Sup. Ct. J. \[Commercial List\]\)](#)
5. [*Sino-Forest Corporation \(Re\)*, 2012 ONSC 2063](#)
6. [*Lehndorff General Partner Ltd.*, 1993 CarswellOnt 183 \(O.C.J. Gen. Div. \[Commercial List\]\)](#)
7. [*Canwest Publishing Inc., Re*, 2010 ONSC 222](#)
8. [*Jaguar Mining Inc., Re*, 2014 ONSC 494](#)

**SCHEDULE “B”
RELEVANT STATUTES**

[Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.](#)

Interpretation

Definitions

2 In this Act,

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

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

[Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36.](#)

Definitions

2 (1) In this Act,

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

debtor company means any company that

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

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

Application

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

Jurisdiction of 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.

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.

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.

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.

Security or charge relating to director's indemnification

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

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 TREES CORPORATION, ONTARIO CANNABIS HOLDINGS CORP., MIRACULO INC., 2707461 ONTARIO LTD., OCH ONTARIO CONSULTING CORP., AND 11819496 CANADA INC.

Court File No. _____

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

Proceedings commenced at Toronto, Ontario

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