

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC., 13318184
CANADA INC., 11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER
HOLDINGS CORP., PINEAPPLE EXPRESS DELIVERY INC., and HIFYRE INC.**

Applicants

SUPPLEMENTARY FACTUM OF THE APPLICANTS

June 15, 2023

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TO: THE SERVICE LIST

PART I - OVERVIEW¹

1. As a result of the Applicants' financial difficulties, the Applicants sought and obtained relief under the CCAA pursuant to the Initial Order dated June 5, 2023. The Initial Order, among other things:

- (a) appointed FTI as Monitor of the Applicants;
- (b) granted a Stay of Proceedings in favour of the Applicants until and including June 15, 2023;
- (c) approved the execution of the DIP Facility Agreement, pursuant to which the Applicants were authorized to borrow up to the Initial Advance of \$2.7 million, and granted the corresponding DIP Lender's Charge in the amount of the Initial Advance; and
- (d) granted the Administration Charge in the amount of \$600,000 and the D&O Charge in the amount of \$2.8 million.

2. The Applicants are now seeking, among other things, the SISP Order granting:

- (a) approval of the SISP in a form substantially similar to the form attached as Schedule "A" to the SISP Order;
- (b) authority for the Applicants and the Monitor to immediately commence the SISP;
- (c) authority and direction to the Monitor, the Applicants, and their respective affiliates, partners, employees, advisors and agents (collectively, the "**Assistants**") to take any and all actions as may be necessary or desirable to implement and carry out the SISP in accordance with its terms and the SISP Order; and
- (d) approving the Stalking Horse Agreement to be entered into between the Applicants and ACT Investor (in such capacity, the "**Stalking Horse Bidder**") solely for the purpose of constituting the "**Stalking Horse Bid**" under the SISP.

¹ Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the affidavit of Stephane Trudel sworn June 5, 2023 (the "**Initial Trudel Affidavit**") and the affidavit of Stephane Trudel sworn June 13, 2023 (the "**Second Trudel Affidavit**").

3. The support for the appropriateness and necessity of the relief sought by the Applicants is set out in the Factum of the Applicants dated June 14, 2023 (the “**Comeback Factum**”).

4. This Supplementary Factum is meant to supplement and be read in conjunction with the Comeback Factum.

PART II – FACTS

5. Background information on the Applicants and these CCAA proceedings are more fully set out in the Initial Trudel Affidavit and the Second Trudel Affidavit.

6. The Applicants received correspondence from Green Acre Capital LP (“**Green Acre**”) dated June 13, 2023 and June 14, 2023 wherein Green Acre requested an adjournment for 30 days of the relief requested by the Applicants in respect of the proposed SISP and approval of the Stalking Horse Agreement (solely for the purpose of approving it as the Stalking Horse Bidder).

7. The Applicants understand that Green Acre is a shareholder of the Company and holds no secured or unsecured debt.

8. The Applicants responded to the Green Acre correspondence on June 14, 2023. The Applicants advised that they are not agreeable to an adjournment of matters relating to the SISP, for a variety of reasons outlined in greater detail in their letter.

9. Copies of the above and other correspondence with Green Acres are attached to the Supplement to the First Report of the Monitor dated June 14, 2023 (the “**Supplement to the First Report**”).

PART III – ISSUES

10. This Supplementary Factum addresses the sole issue of whether this Court should grant Green Acre’s request for an adjournment of the proposed SISP and related relief for 30 days.

PART IV – LAW AND ARGUMENT

A. This Court Should not Adjourn the Proposed SISP and Related Relief

(i) Shareholders have no standing in CCAA proceedings like the present one where their shares have lost all value

11. In *Stelco Inc., Re*, this Court addressed the relevant issue of whether to grant a shareholder group’s request to adjourn approval of a plan of arrangement under the CCAA for 60 days and to direct the Monitor to conduct an independent sales process for the sales of the debtor company.²

12. In *Stelco*, the plan of arrangement provided that all of the existing shares would be wiped out and eliminated. New equity would be created in which the existing shareholders would not participate.³

13. The Court cited the landmark decision in *Canadian Airlines Corp. Re*, wherein it was held that “[W]here a company is insolvent, only the creditors maintain a meaningful stake in its assets”.⁴

14. If shareholders truly have no economic interest to protect, then they have no claim to a right under the proposed arrangement.⁵ In *Stelco*, the facts did not support the shareholders having any true economic interest to protect.⁶ Similar to the facts in the case at bar, Green Acre truly has no economic interest to protect, as its shares in FFHC have no value independent of the proposed SISP and relate relief. In other words, Green Acre will receive no value for their shares in FFHC on a go-forward basis in any scenario.

15. Green Acre themselves acknowledge that to be true and that there is no path forward for the Applicants outside of a CCAA process (which inevitably wipes out the value of any equity). In their letter of June 13, 2023, counsel for Green Acres states as follows:

Green Acre’s conclusion is that a simple restructuring effort using the CCAA would immediately result in renewed interest for those equity holders that would be encouraged to invest in a “cleaned up” FAF. A secondary conclusion is that

² *Stelco Inc., Re*, 2006 CanLII 1773 (Ont. Sup. Ct. J.). [*Stelco*]

³ *Ibid* at para. 13.

⁴ *Ibid* at para. 15; citing *Canadian Airlines Corp., Re*, 2000 ABQB 442 (affirmed at 2001 ABCA and leave to appeal to SCC refused). [*Canada Airlines*]

⁵ *Ibid* at para. 17.

⁶ *Ibid*.

the original process marketed a highly distressed asset without the key disclosure that FAF could utilize a CCAA process to restructure legacy liabilities. Put another way, the original marketing process was flawed in that it marketed a company that nobody would invest in.

16. In *Stelco*, the Court squarely addressed and rejected the exact same relief that Green Acre is seeking: an adjournment of proposed relief that the debtor companies seek for the benefit of all of its stakeholders, including its secured creditors, unsecured creditors, employees, customers, and suppliers (shareholders are at the “bottom rung”, which will be discussed in greater detail below).

17. Notably, in denying the shareholder group’s request for an adjournment, Justice Farley in *Stelco* stated:

“If the existing equity has no true value at present, then what is to be gained by putting off to tomorrow (the ever present and continuous problem in these proceedings of manāna — which never comes) which should be done today.”

“The [shareholders] speculate, with no concrete basis for foundation, that something good may happen. I am of the view that that approach was accurately described in court by one counsel as a desperation Hail Mary pass and the willingness of someone, without any of his own chips, in the poker game willing to bet the farm of someone else who does have an economic interest in Stelco”⁷ (emphasis added).

18. The above-referenced quotes are equally applicable to the circumstances in the case at bar. There is nothing to be gained by adjourning the SISP by 30 days, when the Applicants are already insolvent and facing an imminent liquidity crisis. On the contrary, the Applicants will be in default under the DIP Facility Agreement without having the SISP approved. The Cash Flow Statement indicates that the Applicants will run out of cash without additional financing under the DIP Facility by June 30, 2023.⁸ This is despite the aggressive cost cutting measures already taken by the Applicants.⁹

(ii) Shareholders’ interests are pushed to the “bottom rung” of the priority ladder in insolvency proceedings and often do not have any interests to be protected

19. As held by the Court in *Canada Airlines*, through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the “bottom rung” of the

⁷ *Ibid* at para. 8.

⁸ Exhibit “F” to the Second Trudel Affidavit.

⁹ Supplement to the First Report, *supra* at para. 8.

priority ladder.¹⁰ This is because shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company.¹¹

20. CCAA courts have recently held in several proceedings that a transaction or plan of arrangement wherein shareholders would receive no value were squarely in line with insolvency laws in Canada. A few examples are set out below.

21. In *Lydian*, the applicants brought a motion to sanction and approve their plan of arrangement.¹² The proposed plan of arrangement did not provide for any compensation to shareholders.¹³ Some shareholders requested a delay of three months in the proceedings and raise concerns about the fairness of the proposed plan of arrangement. In granting the applicants' motion to sanction and approve their plan of arrangement, Chief Justice Morawetz held that the shareholders' not receiving any compensation for their shareholdings was a reflection of the insolvency of the Applicants and the lack of priority afforded to shareholders by the CCAA.¹⁴

22. In *Harte Gold*, in approving a "reverse vesting" transaction where shareholders would receive no compensation for their shareholdings, Justice Penny stated:

Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like *Harte Gold's*, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re)*, 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.¹⁵ (emphasis added)

23. In *Blackrock Metals*, in approving a "reverse vesting" transaction where shareholders would receive no compensation for their shareholdings, the Court held that "shareholders have

¹⁰ *Canada Airlines, supra* at para. 143.

¹¹ *Ibid.*

¹² *Lydian International Limited (Re)*, 2020 ONSC 4006. [*Lydian*]

¹³ *Ibid* at para. 45.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

little or no say in CCAA proceedings like the present one, where the debtor company is insolvent, and its shares have lost all value.”¹⁶

24. While the above-referenced decisions were in the context of a debtor company proposing a transaction or a plan of arrangement, the principles are equally applicable in the circumstances with respect to the relief that Green Acre is seeking.

25. As the shareholdings in FFHC have lost all value, Green Acre is at the “bottom rung” of the priority ladder with no real interests to protect.

26. Shareholders without any realistic hope of receiving compensation for their shareholdings should not have standing to oppose the SISF and related relief, all of which is supported by the Monitor and the Applicants’ DIP Lender and only secured lender.

PART V – ORDER SOUGHT

27. For the foregoing reasons, Green Acre’s request for an adjournment of the SISF and related relief should be denied in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15 day of June, 2023.



STIKEMAN ELLIOTT LLP
Counsel for the Applicants

¹⁶ *Arrangement relatif a Blackrock Metals Inc.*, 2022 QCCS 2828 at para. 119 (leave to appeal to QCCA and SCC refused).

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Stelco Inc., Re*, 2006 CanLII 1773 (Ont. Sup. Ct. J.).
2. *Canadian Airlines Corp., Re*, 2000 ABQB 442
3. *Lydian International Limited (Re)*, 2020 ONSC 4006
4. *Harte Gold Corp. (Re)*, 2022 ONSC 653
5. *Arrangement relatif a Blackrock Metals Inc.*, 2022 QCCS 2828

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