

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  
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

**FACTUM OF THE APPLICANTS**

June 5, 2023

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TO: THE SERVICE LIST

## PART I - OVERVIEW<sup>1</sup>

1. The Applicants seek protection from their creditors and certain other ancillary relief pursuant to an Initial Order made under the CCAA, substantially in the form of the draft order attached to the Application Record at Tab 3.
2. FFHC, through its wholly-owned subsidiaries, is an independent cannabis retail chain with 91 retail stores open across Canada. Certain subsidiaries of FFHC also carry on business as a wholesale cannabis distributor, a logistics provider, and operate digital platforms which provide various services and software products relating to cannabis products.
3. The Companies have been operating at a loss since they began operating in 2018. Most recently, the Companies have suffered significant operating losses of approximately \$45.4 million and \$83.4 million, in the fiscal years ended January 29, 2022 and December 31, 2022, respectively. From December 31, 2022 to March 31, 2023, the Companies suffered operating losses of approximately \$8.7 million.
4. While the Companies' financial difficulties were driven by a variety of factors, the significant net losses suffered by the Companies have largely stemmed from their cannabis retail operations. Increased competition and operating costs, margin pressure, and regulatory restrictions suffered by the Companies and the cannabis industry generally have collectively contributed to significantly lower revenues and higher costs than what the Applicants expected their cannabis retail stores would face.
5. Without the protection of the CCAA and the relief available thereunder, the Applicants will be unable to meet their obligations as they become imminently due. If the Applicants are not granted protection under the CCAA, the Applicants would be forced to shut down operations, which would be extremely detrimental to the Applicants' landlords, suppliers, lenders, customers, and their 774 employees.
6. If granted the Stay of Proceedings and the protections of the CCAA, the Applicants intend to, among other things: (a) maintain operations, for the benefit of most of its employees and other stakeholders; (b) disclaim unprofitable leases and several "dead leases" referenced below; (c) streamline their remaining operations with a view to generating a profit; and (d)

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<sup>1</sup> Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the affidavit of Stephane Trudel sworn June 5, 2023 (the "**Initial Trudel Affidavit**"). All references to currency in this factum are to Canadian dollars, unless otherwise noted.

conduct a court-approved SISP to obtain a going concern solution to maximize value for their stakeholders.

## PART II - FACTS

7. The facts with respect to this application are briefly summarized below and more fully set out in the Initial Trudel Affidavit.

### A. CORPORATE STRUCTURE

8. FFHC is a non-operating holding company continued under the CBCA. FFHC's registered and head office is located in Toronto, Ontario. Each of the other Companies are wholly owned, directly or indirectly, by FFHC. FFHC is a publicly traded company whose Common Shares are traded on the TSX under the symbol "FAF".<sup>2</sup>

9. FFI is the main operating entity with respect to the Companies and operates under the "Retail Segment" of the Applicants. FFI owns and operates 80 licensed cannabis retail stores under the trademark banner name of "Fire and Flower" throughout Canada.<sup>3</sup>

10. Friendly Stranger (together with FFI, the "**Retailers**") is the other entity operating under the Retail Segment of the Applicants. Friendly Stranger owns and operates 11 licensed cannabis retail stores under the trademark banner name of "Friendly Stranger" throughout Ontario.<sup>4</sup>

11. Open Fields Distribution operates a wholesale distribution business that purchases cannabis products directly from licensed producers and distributes such products to the Retailers' stores, as well as third-party independent retailers in Saskatchewan and Manitoba.<sup>5</sup>

12. Pineapple Express Delivery was acquired by FFHC and Hifyre in January 2022 to operate the delivery aspect of the Retailers' business. Pineapple Express Delivery provided the Retailers with cannabis e-commerce and delivery services for their retail stores. Pineapple Express Delivery operated out of British Columbia, Saskatchewan, Manitoba, and Ontario but its employees have been shifted to other Applicants in the group.<sup>6</sup>

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<sup>2</sup> Initial Trudel Affidavit at paras. 19-20.

<sup>3</sup> *Ibid* at para. 21.

<sup>4</sup> *Ibid* at para. 22.

<sup>5</sup> *Ibid* at para. 24.

<sup>6</sup> *Ibid* at para. 25.

13. Hifyre operates under the “Digital Platform Segment” of the Companies. Hifyre has developed and deployed a proprietary, omni-channel digital platform to drive the Retailers’ operations and provide insight into consumer behaviours. Hifyre licenses its digital platform to third parties and operates a virtual marketplace and last-mile delivery service to support the Retailers’ operations.<sup>7</sup>

14. PotGuide is the other operating entity with respect to the Digital Platform Segment of the Companies. PotGuide operates a cannabis website (potguide.com) and a content platform (wikileaf.com). In addition, PotGuide functions as a directory and referral service for cannabis retailers and delivery services.<sup>8</sup>

15. Hifyre US is a non-operating subsidiary of Hifyre. Hifyre US has no employees or operations and holds all the issued and outstanding shares of PotGuide.<sup>9</sup>

16. 133 Canada is a non-operating subsidiary of FFI. 133 Canada is a signatory for certain licensing agreements but otherwise does not have any employees or operations. 133 Canada sub-licenses the “Fire and Flower” brand to certain affiliates of ACT Parent Co.<sup>10</sup>

17. Hi-Line Ventures is a non-operating subsidiary of FFI. Hi-Line Ventures licenses the majority of the Applicants’ intellectual property and sub-licenses same to FAFUS, an unrelated entity which owns and operates a cannabis retail store in Colorado and California. Hi-Line Ventures otherwise does not have any employees or operations.<sup>11</sup>

18. Each of the Applicants are either CBCA or OBCA corporations with their registered offices being located in Alberta, Ontario, and Saskatchewan. The US Entities are corporations incorporated pursuant to the laws of the State of Delaware.<sup>12</sup>

## **B. THE COMPANIES’ BUSINESS AND OPERATIONS**

### **(i) Operations**

19. FFHC, through its wholly-owned subsidiaries, is an independent cannabis retail chain with four distinct segments: (a) the “Retail Segment” which sells cannabis products and

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<sup>7</sup> *Ibid* at para. 26.

<sup>8</sup> *Ibid* at para. 28.

<sup>9</sup> *Ibid* at para. 29.

<sup>10</sup> *Ibid* at para. 30.

<sup>11</sup> *Ibid* at para. 31.

<sup>12</sup> *Ibid* at para. 32.

accessories under its trademark banners; (b) the “Wholesale Segment” which operates as a wholesale cannabis business; (c) the “Delivery Segment” which delivers cannabis products across Canada; and (d) the “Digital Platform Segment” which develops digital experiences and retail analytical insights.<sup>13</sup>

**(A) Retail Segment**

20. FFI owns and operates 80 cannabis retail stores under the trademark banner name of “Fire and Flower” throughout Canada. FFI also conducts online sales of cannabis products and accessories in British Columbia, Saskatchewan, and Ontario.<sup>14</sup>

21. Friendly Stranger owns and operates 11 cannabis retail stores under the trademark banner names of “Friendly Stranger” throughout Ontario.<sup>15</sup>

22. The Applicants employ approximately 645 employees in their retail operations.<sup>16</sup>

23. The Applicants also license the Companies’ intellectual property to third parties to brand their cannabis retail stores through Hi-Line Ventures, 133 Canada, and Hifyre.<sup>17</sup>

24. Altogether, there are seven (7) cannabis retail stores operating pursuant to licensing agreements with Hi-Line Ventures, 133 Canada, and/or Hifyre. Of these cannabis retail stores, five (5) are being operated in Ontario under the “Fire & Flower” brand and two (2) are being operated in the United States, one of which operates under the “Fire & Flower” brand.<sup>18</sup>

**(B) Wholesale Segment**

25. In Saskatchewan, Open Fields Distribution operates a cannabis wholesale business. Open Fields Distribution purchases cannabis products directly from licensed producers in Saskatchewan and distributes such products to FFI’s stores as well as other third-party independent retailers in Saskatchewan.<sup>19</sup>

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<sup>13</sup> *Ibid* at para. 33.

<sup>14</sup> *Ibid* at para. 35.

<sup>15</sup> *Ibid* at para. 36.

<sup>16</sup> *Ibid* at para. 39.

<sup>17</sup> *Ibid* at para. 41.

<sup>18</sup> *Ibid* at para. 46.

<sup>19</sup> *Ibid* at para. 48.

26. Further, Open Fields Distribution also operates a cross-docking cannabis logistics and distribution facility in Manitoba pursuant to the Distribution Agreement.<sup>20</sup>

27. The Applicants employ approximately six (6) employees in their wholesale operations.<sup>21</sup>

### **(C) Delivery Segment**

28. Pineapple Express Delivery was acquired in January 2022 and operated as a delivery and logistics company servicing the Retailers' customers across Canada, as well as third party business-to-consumer ("B2C") and business-to-business customers. However, as a result of new rules were adopted in Ontario, in November 2022, the Applicants transitioned all of Pineapple Express Delivery's non-management employees to the Retailers. In total, approximately 50 employees are employed in the delivery aspect of the Applicants' business.<sup>22</sup>

### **(D) Digital Platform Segment**

29. Hifyre owns and operates the Hifyre digital platform, which is a proprietary, omni-channel digital platform to drive the Retailers' operations and provide insight into consumer behaviours. Hifyre licenses its products to various third parties for use in their cannabis retail operations.<sup>23</sup>

30. PotGuide is based in Delaware. It operates two websites and content platforms, "Potguide.com" and "Wikileaf.com". In addition, these websites and content platforms also function as a directory and referral service for cannabis retailers and delivery services. PotGuide does not sell any cannabis products.<sup>24</sup>

### **(ii) Cannabis Licenses**

31. The Companies operate in a highly regulated environment, in accordance with the *Cannabis Act* (Canada) and applicable provincial and municipal legislation.<sup>25</sup>

32. The Applicants hold a variety of licenses issued by the applicable regulatory authority in each province in which the Applicants operate. The Applicants hold all required permits and licenses to sell cannabis at all currently operated stores.<sup>26</sup>

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<sup>20</sup> *Ibid* at para. 50.

<sup>21</sup> *Ibid* at para. 52.

<sup>22</sup> *Ibid* at paras. 53-55.

<sup>23</sup> *Ibid* at para. 57.

<sup>24</sup> *Ibid* at para. 62.

<sup>25</sup> *Ibid* at para. 64.

**(iii) Cannabis Suppliers**

33. The Retailers and Open Fields Distribution purchase their cannabis products from provincially authorized licensed suppliers in each of the provinces which they operate, with the exception of Saskatchewan given certain regulatory requirements which mandate that all cannabis products must be purchased by a provincially-prescribed distributor of cannabis products.<sup>27</sup>

**(iv) Other Suppliers**

34. Under their regulatory framework, the Applicants are required to obtain and maintain certain security and other services. The Companies have and maintain ongoing relationships with all the service providers required by the applicable statutes.<sup>28</sup>

**(v) Real Property and Leased Locations**

35. FFI owns a property located in Ottawa, Ontario, from which one of its cannabis retail stores operates.<sup>29</sup>

36. All of the Company's other retail stores are operated from leased premises. The Companies also lease office space in Alberta and Ontario and lease warehouse space in Ontario, British Columbia, and Manitoba.<sup>30</sup>

37. In total, the Applicants are parties to approximately 146 leases.<sup>31</sup>

**(vi) Intellectual Property**

38. FFI, Friendly Stranger, and Hifyre each own various trademarks used in connection with their respective business operations. 133 Canada, Hifyre, and Hi-Line Ventures licenses several of these trademarks to third parties.<sup>32</sup>

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<sup>26</sup> *Ibid* at paras. 66-72.

<sup>27</sup> *Ibid* at paras. 73-74.

<sup>28</sup> *Ibid* at para. 77.

<sup>29</sup> *Ibid* at para. 78.

<sup>30</sup> *Ibid* at paras. 79-81.

<sup>31</sup> *Ibid* at para. 84.

<sup>32</sup> *Ibid* at paras. 85-88.

**(vii) Cash Management System**

39. In the ordinary course of business, the Companies use a cash management system (the “**Cash Management System**”) to, among other things, collect funds and pay expenses associated with its operations. This Cash Management System (described in greater detail in the Trudel Affidavit) provides the Companies with the ability to efficiently and accurately track and control corporate funds and to ensure cash availability.<sup>33</sup>

**(viii) Employees**

40. As at June 2, 2023, the Applicants employed a total of 774 employees. Of these 774 employees, 581 were paid hourly, 6 were paid on contract, 185 were paid by salary, and two were on salary continuance.<sup>34</sup>

41. None of the Companies’ employees are subject to a collective bargaining agreement. The Companies do not have a pension plan in place.<sup>35</sup>

42. In total, approximately 50 employees are employed in the delivery aspect of the Applicants’ business. The Applicants expect that they will be terminating all of its “Pineapple Express Delivery Segment” employees shortly after filing, as the delivery aspect of the Companies’ operations has been highly unprofitable since the new rules were adopted in Ontario on March 15, 2022 which restricted private cannabis retailers from using third party delivery services like Pineapple Express Delivery for deliveries.<sup>36</sup>

**C. THE COMPANIES’ FINANCIAL POSITION**

43. The Companies have been operating at a loss since they began operating in 2018. The Companies suffered operating losses of:

- (a) over \$25.2 million for the fiscal year ended February 2, 2019;
- (b) over \$35.6 million for FY 2020;
- (c) over \$17.5 million for FY 2021;

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<sup>33</sup> *Ibid* at paras. 89-90.

<sup>34</sup> *Ibid* at para. 91.

<sup>35</sup> *Ibid* at para. 94.

<sup>36</sup> *Ibid* at para. 55.

- (d) approximately \$45.4 million for FY January 2022;
- (e) approximately \$83.4 million for FY December 2022; and
- (f) approximately \$8.7 million for the quarter ended March 31, 2023.<sup>37</sup>

44. The Companies lack working capital. Over the course of the past two years, the Companies' cash position has continually deteriorated. As at January 30, 2021, the Companies had \$30.6 million in cash. As at January 29, 2022, the Companies had \$19.8 million in cash. As at December 31, 2022, the Companies had \$12.4 million in cash. As at March 31, 2023, the Companies had \$8.2 million in cash and over \$50.8 million in current liabilities. That position only deteriorated further since then.<sup>38</sup>

**(i) Assets**

45. As at March 31, 2023, the assets of the Companies had an unaudited net book value of approximately \$147,031,000 (of which \$62,513,000 consisted of non-tangible assets).<sup>39</sup>

**(ii) Liabilities**

46. As at March 31, 2023, the liabilities of the Companies had an unaudited book value of approximately \$86,601,000.<sup>40</sup>

**D. THE COMPANIES' DEBT STRUCTURE**

**(i) Secured Obligations**

47. The Companies' only secured financing has come through the ACT Loan Agreement and ACT Facility, pursuant to which ACT Investor made a \$11 million non-revolving credit facility available to FFHC guaranteed by each of the Canadian subsidiaries of FFHC. FFHC's obligations are secured by the GSA executed by each of the Applicants granting a first-ranking charge on all of the Applicants' assets.<sup>41</sup>

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<sup>37</sup> *Ibid* at para. 101.

<sup>38</sup> *Ibid* at para. 104.

<sup>39</sup> *Ibid* at para. 105.

<sup>40</sup> *Ibid* at para. 106.

<sup>41</sup> *Ibid* at paras. 110 and 112-113.

48. FFHC has liabilities in excess of \$2.3 million to ACT Investor pursuant to debentures issued to ACT Investor with the maturity date being June 30, 2023.<sup>42</sup> ACT Investor holds approximately 35.7% of the issued and outstanding Common Shares, with a right to exercise certain Common Share purchase warrants of FFHC, which, if fully exercised, would result in ACT Investor holding 50.1% of the issued and outstanding Common Shares, on a fully-diluted basis. Additionally, ACT Investor is a party to several other agreements with the Applicants.<sup>43</sup>

49. In addition to ACT Investor, certain entities also hold registered secured interests against certain personal property of some of the Companies (some of which should be discharged as the relevant debt has been fully repaid).<sup>44</sup>

#### **(ii) Unsecured Obligations**

50. FFHC is also indebted to ACT Investor for approximately \$2,362,000 in respect of debentures issued to ACT Investor.<sup>45</sup>

51. In addition, Hifyre owes approximately \$6.7 million in unpaid income taxes.<sup>46</sup>

52. The Companies have liabilities in respect of trade payables in the aggregate approximate amount of \$13.8 million.<sup>47</sup>

53. The Companies have monthly lease obligations of approximately \$1,328,283 in the most recent month. The Companies' monthly lease obligations in respect of its non-operating retail stores are significant and total approximately \$394,911. The Companies intend to disclaim the non-operating leases, as well as leases utilized in the Pineapple Express Delivery's delivery business shortly after filing, in order to preserve the Companies' liquidity.<sup>48</sup>

54. One or more of the Applicants are named as defendants in certain routine litigation matters. In the aggregate, the amounts being claimed are over \$15 million.<sup>49</sup>

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<sup>42</sup> *Ibid* at para. 114.

<sup>43</sup> *Ibid* at paras. 20 and 118.

<sup>44</sup> *Ibid* at para. 116.

<sup>45</sup> *Ibid* at para. 118.

<sup>46</sup> *Ibid* at para. 117.

<sup>47</sup> *Ibid* at para. 122.

<sup>48</sup> *Ibid* at paras. 126-128.

<sup>49</sup> *Ibid* at para. 129.

## **E. THE COMPANIES' FINANCIAL DIFFICULTIES**

55. While the Companies' financial difficulties were driven by a variety of factors, the significant operating losses suffered by the Companies have largely stemmed from their Retail Segment. Increased competition, margin pressure, and regulatory uncertainty have collectively contributed to significantly lower revenues than what the Retailers had expected, and several lease liabilities for locations in which the Retailers could not ultimately operate.<sup>50</sup>

56. The regulatory environment has also encouraged significantly increased competition amongst cannabis retailers. The Retailers were unaware that many of its retail stores would have several other cannabis retailers within close proximity. There have also been significant margin pressures from competitors, and, in certain provinces, competition from government operated physical stores, online stores and delivery sales. Retailers also have to compete with the illicit market that continues to sell cannabis products that do not comply with the strict regulations of the *Cannabis Act* (Canada). According to the Government of Canada's 2022 Canadian Cannabis Survey, only 61% of the respondents who purchased cannabis in the last twelve (12) months reported they had made a purchase from a legal storefront<sup>51</sup>

57. Approximately 48% of the Companies' aggregate liabilities are in respect of its lease obligations. Without the corresponding revenue that the Retailers expected for these retail locations, including from delivery sales, the Retailers have been operating at a significant loss with respect to its Retail Segment.<sup>52</sup>

58. Certain investments made by the Applicants have also resulted in a net drain on the Companies' resources.<sup>53</sup>

## **F. RESPONSE TO FINANCIAL DIFFICULTIES**

59. In September 2022, in response to the Companies' liquidity challenges, a special committee of the board of directors of the Company was formed to assist the Board in reviewing and negotiating matters related to the Companies' existing strategic capital investments and financing arrangements.<sup>54</sup>

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<sup>50</sup> *Ibid* at para. 131.

<sup>51</sup> *Ibid* at para. 133; Government of Canada, [Canadian Cannabis Survey 2022: Summary](#).

<sup>52</sup> *Ibid* at para. 134.

<sup>53</sup> *Ibid* at para. 135.

<sup>54</sup> *Ibid* at para. 136.

60. Shortly thereafter, in October 2022, the Company entered into (i) the ACT Loan Agreement, which was fully drawn down on October 21, 2022; and (ii) the Warrant and Share Transaction. Ultimately, the shareholders voted down the Warrant and Share Transaction and the Companies did not receive the additional \$5 million of working capital or the extension of the maturity date of certain unsecured convertible debentures held by ACT Investor.<sup>55</sup>

61. On January 9, 2023, the Applicants implemented a restructuring of its operations resulting in a reduction in headcount of approximately 13 employees and, on March 20, 2023, the Applicants implemented a further restructuring of its Pineapple Express Delivery business resulting a further reduction in headcount of 23. The Applicants have pursued further opportunities for cost reduction measures through more aggressive efforts to sub-lease “dead lease” properties with lower recovery rates, and a thorough review of ongoing selling, general and administrative expenses.<sup>56</sup>

62. In April 2023, the Company once again formed a special committee of the board of directors to review and assess potential financing opportunities and strategic alternatives. The special committee has engaged in discussions pertaining to potential financing, acquisitions and/or sale transactions with ACT Investor, key stakeholders of the Company and other industry participants and financial institutions. Despite these efforts, the Applicants have been unable to secure additional financing or identify a transaction that, the Companies, in consultation with their legal and financial advisors, identified as being executable in the Companies’ strained liquidity situation and/or would maximize recovery for their stakeholders.<sup>57</sup>

## **G. THE DIP FACILITY AGREEMENT**

63. In order to fund the operations of the Applicants during these CCAA Proceedings, the Applicants commenced negotiations with ACT Investor to provide debtor-in-possession financing. For various reasons, the Applicants did 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.<sup>58</sup>

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<sup>55</sup> *Ibid* at para. 137.

<sup>56</sup> *Ibid* at para. 138.

<sup>57</sup> *Ibid* at para. 140.

<sup>58</sup> *Ibid* at paras. 157-158.

64. Accordingly, on June 5, 2023, the DIP Facility Agreement was entered into between FFHC, as borrower, the Guarantors, as guarantors, and ACT Investor, as the DIP Lender.<sup>59</sup>

65. The DIP Facility is subject to customary covenants, conditions precedent, and representations and warranties made by the Applicants to the DIP Lender. Among other things, the DIP Facility Agreement provides for the following:

(a) DIP Facility: non-revolving loan up to the maximum amount of \$9.8 million, with an Initial Advance of \$2.7 million during the initial 10-day Stay Period.

(b) Additional Tranches: two additional tranches made no earlier than every four (4) weeks from the date of the Initial Advance, in the amounts of \$3 million and \$4.1 million, respectively (each additional advance being a “**Subsequent Advances**”).

(c) Interest Rate: twelve percent (12%) per annum, compounded and calculated weekly.

(d) Fees: exit fee of \$400,000.<sup>60</sup>

66. Per the DIP Facility Agreement, the DIP Facility must be repaid in full by the date that is the earliest of: (a) the date on which the Stay of Proceedings is lifted or terminated; (b) September 15, 2023 (or such other date as may be agreed to in writing by the DIP Lender); and (c) the date on which the DIP Lender elects to terminate the DIP Facility as a result of an event of default under the DIP Facility Agreement.<sup>61</sup>

67. While the DIP Facility Agreement is also subject to customary events of default, including that the Applicants may not have a negative variance of net cash flows calculated in accordance with the methodology set out in Schedule “B” to the DIP Facility Agreement of more than ten percent (10%).<sup>62</sup>

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<sup>59</sup> *Ibid* at para. 159.

<sup>60</sup> *Ibid* at para. 160.

<sup>61</sup> *Ibid* at para. 161.

<sup>62</sup> *Ibid* at para. 162.

### **PART III – ISSUES**

68. The issues in respect of the relief being sought under the Initial Order are whether:

- (a) the Applicants are entitled to seek protection under the CCAA and should be granted creditor protection, namely by way of a Stay of Proceedings;
- (b) the DIP Facility Agreement and the DIP Lender's Charge should be approved and granted, respectively; and
- (c) this Court should exercise its discretion to grant the Administration Charge and the D&O Charge.

### **PART IV – LAW AND ANALYSIS IN RESPECT OF INITIAL ORDER**

#### **A. The Remedial Purpose of the CCAA is to Restructure Insolvent Corporations to Avoid the Social and Economic Losses Which Would Result from a Liquidation**

69. Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect Parliament's intention that those statutes minimize the wide ranging and potentially catastrophic impacts insolvency can have on the stakeholders of insolvent debtors. As part of this framework, the CCAA generally prioritizes avoiding the social and economic losses resulting from liquidation of an insolvent corporation by allowing it to restructure its business and financial affairs. The CCAA also has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by a debtor's financial distress and enhancement of the credit system generally.<sup>63</sup>

70. To fulfill these remedial objectives, Parliament chose to keep two legislations where one benefits from significant flexibility to meet the ever-growing challenges of reorganizing debtors in a complex world which required creative and effective decisions. The CCAA has been and remains the engine of this evolution and adaptation that is required to restructure debtors nowadays.<sup>64</sup>

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<sup>63</sup> 9354-9186 *Québec inc v Callidus Capital Corp*, 2020 SCC 10 [*Bluberi*] at paras. 40-42.

<sup>64</sup> *Ted Leroy Trucking [Century Services] Ltd. (Re)*, 2010 SCC 60 at para. 21. [*Century Services*]

71. A restructuring under the CCAA may take any number of forms, limited only by the creativity of those proposing the restructuring. The courts have developed new and creative remedies to ensure that the objectives of the CCAA are met. Judges have often told opposing parties that if they make a particular order it will be the first time in Canadian jurisprudence. Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.<sup>65</sup>

72. Since the enactment of the CCAA in 1933, restructuring has evolved from the survival of a debtor in an operational state to the survival of the business conducted by a debtor under a different corporate form or ownership, including some form of liquidation of a debtor's assets. The latter are referred to as "liquidating CCAAs" and are commonplace in the Canadian restructuring landscape.<sup>66</sup>

73. Such evolution of the concept of restructuring is recognition of the number of stakeholders in a CCAA context that extend beyond the insolvent corporation's creditors and include its employees, directors, the parties doing business with the insolvent corporation, the general public and the community in which the insolvent corporation operates.<sup>67</sup>

74. The Applicants' stakeholders include, *inter alia*, their 774 employees, their creditors, their shareholders, their supplier ecosystem, and the various regulatory authorities in each province in which the Applicants' carry on business.

## **B. The Applicants are Entitled to Seek and Should Obtain Protection Under the CCAA**

### **(i) The Applicants are Debtor Companies Having Debts Totaling More than \$5 million to Which the CCAA Applies**

75. The CCAA applies to a "debtor company" or "affiliated debtor companies" where the total of claims against the debtor or its affiliates exceeds \$5 million.<sup>68</sup> The Applicants are all affiliated debtor companies with total claims against them that far exceed \$5 million.<sup>69</sup>

76. The CCAA defines "company" as, among other things,

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<sup>65</sup> *Metcalf & Mansfield Alternative Investments II Corp (2008)*, 2008 CanLII 21724 (Ont SCJ) at [para 43](#); *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (Ont SCJ) at [para 45](#).

<sup>66</sup> *Blueberi, supra* at paras. 41-43, 45-46.

<sup>67</sup> *Century Services, supra* at [para. 60](#); *Air Canada, Re*, 2003 CanLII 49366 (Ont. SCJ) at [para. 13](#), leave to appeal to the CA refused (2003 CarswellOnt 5213).

<sup>68</sup> CCAA, [s. 3\(1\)](#).

<sup>69</sup> Initial Trudel Affidavit, *supra* at paras. 32, 106 -109, and 117-125.

Any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated ( ... )<sup>70</sup>

77. Each of the Applicants are companies incorporated by or under an Act of Parliament or of the legislature of a province. Accordingly, each of the Applicants meet the CCAA definition of "company" and are thus debtor companies for the purposes of the CCAA.<sup>71</sup>

78. Pursuant to section 2 of the CCAA, a "debtor company" means, among other things, any company that is insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") or the expanded concept of insolvency accepted by the *Stelco* test (the "**Stelco test**").<sup>72</sup> In *Stelco*, Justice Farley applied an expanded definition of insolvent in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying part (a) of the BIA's definition of "insolvent person" to include a financially troubled corporation that 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".<sup>73</sup>

79. The Applicants are currently insolvent under both the BIA test for solvency and the *Stelco* test.

80. The insolvency of a debtor is assessed at the time of the filing of the CCAA application. The CCAA does not define "insolvent", but the definition of "insolvent person" under the BIA is commonly referenced by Courts in assessing whether an applicant is a debtor company in the context of the CCAA.<sup>74</sup>

81. In addition to the test under the BIA, it has consistently been held that a corporation is insolvent if there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity crisis that will result in the debtor company not being able to pay its debts as they become due without the benefit of a stay of proceedings.<sup>75</sup>

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<sup>70</sup> CCAA, s 2(1).

<sup>71</sup> Cite.

<sup>72</sup> CCAA, s. 2(1) and s. 3(1).

<sup>73</sup> *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (Ont. Sup. Ct. J. [Commercial List]) at paras. 25-26. [*Stelco*]

<sup>74</sup> *Stelco*, *supra* at paras. 26 and 40.

<sup>75</sup> *Stelco*, *supra* at paras. 25-26.

82. The Applicants are insolvent because, as demonstrated by the Cash Flow Statement, the Applicants are unable or are expected to soon become unable to meet their obligations generally as they become due.<sup>76</sup>

83. Therefore, the CCAA applies to the Applicants.

**ii. This Court has Jurisdiction Over the Applicants**

84. 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.” If “the head office is in one province or territory and its chief operations are located in another, an application can be made in either jurisdiction.”<sup>77</sup>

85. FFHC directly or indirectly owns all the issued and outstanding shares of each of the other Applicants. FFHC’s registered and head office is located in Toronto, Ontario.<sup>78</sup> Further, several of the other Applicants also have their registered office located in Toronto, Ontario.<sup>79</sup>

86. The only real property owned by the Applicants is located in Ottawa, Ontario. Several of the Companies’ operating leases are also located in Ontario.<sup>80</sup>

87. Accordingly, the Ontario court is the appropriate venue for these CCAA Proceedings.

**iii. The Relief Sought is Reasonably Necessary**

88. Pursuant to s. 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. The stated purpose of s. 11.001 is to “limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players.”<sup>81</sup>

89. As detailed in the Initial Trudel Affidavit, the Applicants have worked with its advisors and the Proposed Monitor to limit the relief sought on this initial application to only the relief that

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<sup>76</sup> Initial Trudel Affidavit, *supra* at para. 144.

<sup>77</sup> CCAA, s. 9(1); J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* 2nd ed. (2013), at p. 128.

<sup>78</sup> Initial Trudel Affidavit, *supra* at para. 19.

<sup>79</sup> *Ibid* at paras. 32 and 82.

<sup>80</sup> *Ibid* at paras. 34-36 and 78.

<sup>81</sup> CCAA, s. 11.001, 11.02(1) and (3); *Lydian International Limited (Re)*, 2019 ONSC 7473 at paras. 22-26.

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.<sup>82</sup> In cases where immediate relief is necessary, the Applicants have attempted to limit any authorizations from the Court to what is required within the proposed initial stay period and will only seek additional authorization on the Comeback Motion.

90. The Applicants intend to start disclaiming leases and terminating employees during the initial 10-day Stay Period and respectfully submit that such steps are reasonably necessary in the Companies' circumstances

91. With respect to the termination of employees, new rules adopted in Ontario in March 2022 restricted private cannabis retailers from using third party delivery services like Pineapple Express Delivery for deliveries, which required the Applicants to transition all of Pineapple Express Delivery's non-management employees to the Retailers. The Applicants seek to terminate all of its "Pineapple Express Delivery Segment" employees shortly after filing, as the delivery aspect of the Companies' operations has been highly unprofitable since March 2022.<sup>83</sup>

92. The Companies' largest liability is their lease obligations, which represent approximately 48% of the Companies' aggregate total liabilities. Of the 146 leases that the Companies are tenants under, 45 are non-operating and 20 are being subleased to third parties. The Companies' monthly lease operations in respect of their non-operating retail stores are significant and total approximately \$394,911 (with the Companies' most recent monthly lease obligations being approximately \$1,328,283).

93. As seen from the Cashflows filed in connection with this application, the Companies are experiencing a significant cash liquidity crisis and, accordingly, it is reasonably necessary for the Companies to disclaim its non-operating leases in an effort to preserve their liquidity.<sup>84</sup>

### **C. The Stay of Proceedings is Necessary**

94. Pursuant to section 11.02(1) of the CCAA, a Court may 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.<sup>85</sup>

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<sup>82</sup> Initial Trudel Affidavit, *supra* at paras. 144-145, 151, 155, 166, and 174.

<sup>83</sup> *Ibid* at para. 55.

<sup>84</sup> *Ibid* at paras. 123-128.

95. Exercising discretionary authority to grant a stay pursuant to the CCAA must be informed by the purpose behind the CCAA, which should be broadly and liberally interpreted.<sup>86</sup>

96. The purpose of the CCAA is to, amongst 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 Supreme Court of Canada has held that when exercising judicial discretion under the CCAA, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, and even other parties doing business with the insolvent company.<sup>87</sup>

97. The Applicants require a Stay of Proceedings in order to provide them with the breathing room necessary to, among other things: (a) maintain operations, for the benefit of most of its employees and other stakeholders; (b) disclaim unprofitable leases and the “dead leases” referenced above; (c) streamline their remaining operations with a view to generating a profit; and (d) provide the Applicants with time to prepare a SISF for a going concern solution to maximize value for their stakeholders, which the Applicants will seek approval of at the Comeback Motion.<sup>88</sup>

98. Without the protection of the CCAA and the relief available thereunder, the Applicants will be unable to meet their obligations as they become imminently due. If the Applicants are not afforded the protection of the CCAA, the Applicants would be forced to shut down operations, which would be extremely detrimental to the Applicants’ landlords, suppliers, lenders, customers, and their 774 employees.<sup>89</sup>

99. The Applicants are also requesting that, during the Stay Period, no parties shall fail to renew or perform any renewal right in favour of or held by the Applicants, including but not limited to renewal rights in respect of existing insurance policies on the same terms, except with the written consent of the Applicants and the Monitor. This relief is necessary as the D&O

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<sup>85</sup> CCAA, s. 11.02(1).

<sup>86</sup> *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 [Nortel]; *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at para. 40 [Sino-Forest].

<sup>87</sup> *Ted Leroy Trucking [Century Services] Ltd. (Re)*, 2010 SCC 60 at para. 60; *Nortel*, *supra* at para. 47.

<sup>88</sup> Initial Trudel Affidavit, *supra* at para. 17.

<sup>89</sup> *Ibid* at para. 16.

Insurance policy is coming up for renewal on June 19, 2022 and the renewal of the policy has not been finalized.<sup>90</sup>

100. For the foregoing reasons, the initial Stay of Proceedings up to June 15, 2023 and relief mandating parties to renew existing insurance policies on the same terms should be granted on the terms sought herein.

**D. The DIP Facility Agreement and DIP Lender's Charge Should be Approved and Granted, Respectively**

101. The Applicants are facing a liquidity crisis. The Cash Flow Statement demonstrates that the Applicants expect the need for interim financing to fund these CCAA Proceedings, including during the 10-day Stay Period prior to the Comeback Motion.<sup>91</sup> The Applicants are requesting approval of the DIP Facility Agreement between FFHC, as borrower, the Guarantors, as guarantors, and ACT Investor, as the DIP Lender, the terms of which are further described in the DIP Facility Agreement attached as Exhibit "N" to the Initial Trudel Affidavit.<sup>92</sup>

102. Based on: (a) the results of the Company's previous efforts to seek additional liquidity dating back to September 2022; and (c) ACT Investor being the major secured creditor of the Applicants, the Applicants, in consultation with their legal and financial advisors, did not believe that any third party would be able to providing the financing the Companies urgently require on significantly better terms or on the timeline required by the Applicants. Therefore, the Applicants entered into the DIP Facility Agreement with ACT Investor.<sup>93</sup>

103. Section 11.2 of the CCAA provides the Court with the express statutory authority to approve the DIP Facility Agreement 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.<sup>94</sup> 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 Facility:

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

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<sup>90</sup> *Ibid* at para. 170; *IMV Inc. (Re)*, Court File No. 523334 (Supreme Court of Nova Scotia) (Initial Order dated May 1, 2023); *OpenHydro Technology Canada Ltd.*, Court File No. 480604 (Initial Order dated November 13, 2018).

<sup>91</sup> Initial Trudel Affidavit, *supra* at para. 157.

<sup>92</sup> *Ibid* at paras. 160-162.

<sup>93</sup> *Ibid* at para. 158.

<sup>94</sup> CCAA, s. 11.2.

- (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.<sup>95</sup>

104. 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 facility 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.<sup>96</sup>

105. The criteria from sections 11.2(1) and 11.2(4) of the CCAA, support approving the DIP Facility Agreement and granting the DIP Lender's Charge on the terms sought in the Initial Order, as:

- (a) the notice requirements under section 11.2(1) of the CCAA have been met;
- (b) given the Applicants' circumstances, they cannot obtain alternative financing outside of these CCAA proceedings;

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<sup>95</sup> CCAA, s. 11.2(4).

<sup>96</sup> CCAA, s. 11.2(1); *Canwest Publishing Inc. Re*, 2010 ONSC 222, at paras. 42-44 [*Canwest Publishing*].

- (c) the DIP Facility is necessary in order 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 Facility, the Applicants may not be able to continue operating;
- (e) the quantum of the DIP Facility is reasonable and appropriate having regard to the Cash Flow Statement; and
- (f) the Proposed Monitor is supportive of the approval of the DIP Facility Agreement and corresponding DIP Lender's Charge.<sup>97</sup>

106. Ultimately, it is essential that the DIP Facility Agreement 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.

#### **E. The Administration Charge Should be Granted**

107. 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 to the Applicants. Pursuant to the Initial Order, the Administration Charge will be requested in the amount of \$600,000 in respect of the Stay Period.

108. 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

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<sup>97</sup> Initial Trudel Affidavit, *supra* at paras. 157-158 and 165-166.

- (f) the position of the monitor.<sup>98</sup>

109. The Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:

- (a) the Applicants operate in a highly regulated environment, with a significant number of complex issues to address;
- (b) the Applicants employ 774 people and are parties to approximately 146 leases, some of which are being subleased to third parties;
- (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;
- (e) the Applicants' advisors have engaged in a significant amount of work on a pre-filing basis; and
- (f) the Proposed Monitor is supportive of the proposed Administration Charge and believes that the proposed quantum of the Administration Charge is reasonable.<sup>99</sup>

#### **F. The D&O Charge Should be Granted**

110. 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 \$2.8 million ranking subordinate to the Administration Charge.

111. The Directors' 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.

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<sup>98</sup> *Canwest Publishing, supra* at para. 54.

<sup>99</sup> Initial Trudel Affidavit, *supra* at paras. 64, 91, 123, and 155.

112. Section 11.51 of the CCAA provides the Court with the express 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.<sup>100</sup>

113. In *Jaguar Mining Inc., Re*, Justice Morawetz (as he then was) stated that, in order to grant a D&O Charge, the Court must be satisfied of the following factors:

- (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.<sup>101</sup>

114. With respect to the Applicants, the D&O Charge is reasonable in the circumstances because:

- (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

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<sup>100</sup> CCAA, s. 11.51.

<sup>101</sup> *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.<sup>102</sup>

**PART V – ORDER SOUGHT**

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 5<sup>th</sup> day of June, 2023.



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**STIKEMAN ELLIOTT LLP**  
Counsel for the Applicants

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<sup>102</sup> Initial Trudel Affidavit, *supra* at paras. 167-175.

**SCHEDULE “A”  
LIST OF AUTHORITIES**

**Cases**

1. *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10
2. *Air Canada, Re*, 2003 CanLII 49366 (Ont. SCJ)
3. *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (Ont. SCJ)
4. *Canwest Publishing Inc, Re*, 2010 ONSC 222
5. *Jaguar Mining Inc, Re*, 2014 ONSC 494
6. *Lydian International Limited (Re)*, 2019 ONSC 7473
7. *Metcalfe & Mansfield Alternative Investments II Corp (2008)*, 2008 CanLII 21724 (Ont. SCJ)
8. *Nortel Networks Corporation (Re)*, 2009 CarswellOnt 4467 (Ont. Sup. Ct. J. [Commercial List])
9. *Sino-Forest Corporation (Re)*, 2012 ONSC 2063
10. *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (Ont. Sup. Ct. J. [Commercial List])
11. *Stelco Inc. (Re)*, 2005 CarswellOnt 1188 (Ont. C.A.)
12. *Ted Leroy Trucking [Century Services] Ltd. (Re)*, 2010 SCC 60

**Other Authorities**

13. J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at p. 128

**SCHEDULE “B”  
RELEVANT LEGISLATION**

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

**Definitions**

**2 (1)** In this Act,

**aircraft objects**[Repealed, [2012, c. 31, s. 419](#)]

**bargaining agent** means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

**bond** includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

**cash-flow statement**, in respect of a company, means the statement referred to in [paragraph 10\(2\)\(a\)](#) indicating the company’s projected cash flow; (*état de l’évolution de l’encaisse*)

**claim** means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of [section 2](#) of the [Bankruptcy and Insolvency Act](#); (*réclamation*)

**collective agreement**, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

**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*)

**court** means

- **(a)** in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,
- **(a.1)** in Ontario, the Superior Court of Justice,
- **(b)** in Quebec, the Superior Court,
- **(c)** in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen’s Bench,
- **(c.1)** in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

- (d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

**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; (*compagnie débitrice*)

**director** means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; (*administrateur*)

**eligible financial contract** means an agreement of a prescribed kind; (*contrat financier admissible*)

**equity claim** means a claim that is in respect of an equity interest, including a claim for, among others,

- (a) a dividend or similar payment,
- (b) a return of capital,
- (c) a redemption or retraction obligation,
- (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

**equity interest** means

- (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
- (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

**financial collateral** means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in

respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

- (a) cash or cash equivalents, including negotiable instruments and demand deposits,
- (b) securities, a securities account, a securities entitlement or a right to acquire securities, or
- (c) a futures agreement or a futures account; (*garantie financière*)

**income trust** means a trust that has assets in Canada if

- (a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or
- (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act; (*fiducie de revenu*)

**initial application** means the first application made under this Act in respect of a company; (*demande initiale*)

**monitor**, in respect of a company, means the person appointed under [section 11.7](#) to monitor the business and financial affairs of the company; (*contrôleur*)

**net termination value** means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

**prescribed** means prescribed by regulation; (*Version anglaise seulement*)

**secured creditor** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (*créancier garanti*)

**shareholder** includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; (*actionnaire*)

**Superintendent of Bankruptcy** means the Superintendent of Bankruptcy appointed under [subsection 5\(1\)](#) of the [Bankruptcy and Insolvency Act](#); (*surintendant des faillites*)

**Superintendent of Financial Institutions** means the Superintendent of Financial Institutions appointed under [subsection 5\(1\)](#) of the [Office of the Superintendent of Financial Institutions Act](#); (*surintendant des institutions financières*)

**title transfer credit support agreement** means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

**unsecured creditor** means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

### **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.

### **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.

### **Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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

(3) The court shall not make the order unless

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

### **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.

#### **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.

#### **Priority**

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

#### **Restriction — indemnification insurance**

**(3)** The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

#### **Negligence, misconduct or fault**

**(4)** The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

#### **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 *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

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

PROCEEDING COMMENCED AT TORONTO

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