

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF: **Application by IMV Inc., Immunovaccine Technologies Inc. and IMV USA Inc. (the “Applicants”), for relief under the *Companies’ Creditors Arrangement Act***

FACTUM OF THE APPLICANTS IN SUPPORT OF THE ISSUANCE OF AN APPROVAL AND VESTING ORDER AND AN INTERIM DISTRIBUTION AND WEPPAS ORDER

To the Honourable Justice John P. Bodurtha, the Applicants respectfully submit:

PART I – OVERVIEW

1. The Debtors / Applicants IMV Inc., Immunovaccine Technologies Inc. (“**IVT**”) and IMV USA Inc. (“**IMV USA**” and collectively with IMV Inc. and IVT, “**IMV**” or the “**Applicants**”) obtained relief under the *Companies’ Creditors Arrangement Act*¹ (the “**CCAA**”) by an initial order dated May 1, 2023 (the “**Initial Order**”). The Initial Order, among other things, appointed FTI Canada Consulting Inc. as monitor of the Applicants in these proceedings (the “**Monitor**”) and provided an initial stay of proceeding until and including May 5, 2023 (the “**Stay Period**”). The Court granted an Amended and Restated Initial Order (the “**ARIO**”) on May 5, 2023, which, among other things, extended the Stay Period until and including July 17, 2023, and approved a sale and investment solicitation process (the “**SISP**”) to solicit offers for a broad range of executable transactions in respect of the business and/or assets of the Applicants.
2. On May 9, 2023, the Court granted a Claims Process Order, approving the procedure for the determination and adjudication of claims against the Applicants and their directors and officers (the “**Claims Process**”).
3. On July 17, 2023, the Court granted an Extension Order which, among other things, extended the Stay Period until and including August 18, 2023.

¹ RSC 1985, c C-36, as amended.

4. On August 17, 2023, the Court granted a Second Extension Order which, among other things, extended the Stay Period until and including September 29, 2023.
5. The Applicants now seek the issuance of:
 - (i) an Approval and Vesting Order, approving the transaction (the “**Proposed Transaction**”) contemplated by the Agreement of Purchase and Sale dated September 1, 2023, by and between Horizon Technology Finance Corporation (“**Horizon**”), as purchaser, and IMV Inc. and IVT, as vendors, for the sale of the Intellectual Property (as defined herein) (the “Purchase Agreement”); and
 - (ii) an Interim Distribution and WEPPA Order (i) approving an interim distribution to the Secured Lenders (as defined hereinafter), (ii) declaring that pursuant to section 5(5) of the WEPPA, IMV Inc. and IVT meet the criteria established by section 3.2 of the WEPPA Regulations and (iii) approving the fees and disbursements of the Monitor and its legal counsel.
6. The relief sought is within the Court’s jurisdiction and discretion to grant under the CCAA and is consistent with the objectives of the CCAA. The Applicants have been proceeding in good faith and with due diligence to implement their restructuring plan for the benefit of all of their stakeholders. The proposed orders have been developed in consultation with the Monitor and are supported by the Monitor and the Secured Lenders.
7. For the reasons set out below, the Applicants submit that the requested relief should be granted.

PART II – THE FACTS

8. The facts are more fully set out in the Affidavit of Brittany Davison sworn September 1, 2023 (the “**Davison Affidavit**”).² Capitalized terms used herein and not otherwise defined shall have the meanings associated to them in the Davison Affidavit, unless the context shall otherwise require. Dollar amounts are given in Canadian dollars unless otherwise specified.

² Affidavit of Brittany Davison sworn September 1, 2023 [*Davison Affidavit*].

PART III – ISSUES

9. The issues to be considered on this motion are whether:
- (i) this Court should approve the Proposed Transaction;
 - (ii) this Court should approve and authorize the Interim Distribution;
 - (iii) this Court should declare that, pursuant to section 5(5) of the WEPPA, IMV Inc. and IVT meet the criteria established by section 3.2 of the WEPPA Regulations.

PART IV – THE LAW

A. The Court Should Grant the Approval, Assignment and Vesting Order

(i) The Process Leading to the Proposed Transaction was Reasonable in the Circumstances

10. The criteria used to determine whether a sale of the assets of an insolvent debtor should be approved ought to be adopted to determine whether the process followed by the Applicants before submitting for approval and implementation the Proposed Transaction was appropriate and reasonable.
11. Courts rely on the leading case *Soundair*,³ cited in more than 200 decisions, which sets out criteria to examine in order to determine whether a sale of assets of an insolvent debtor by a receiver should be approved:
- (i) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
 - (ii) the interests of all parties;
 - (iii) the efficacy and integrity of the process by which offers have been obtained; and
 - (iv) whether there has been unfairness in the working out of the process⁴.

³ *Royal Bank v Soundair Corp*, [1991 CanLII 2727 \(Ont CA\)](#) [Soundair].

⁴ *Ibid.* at p 8-9.

12. These criteria, developed in the context of a sale by a receiver, have been applied by analogy to sales of assets under the CCAA, and should likewise be applied to decide whether the Proposed Transaction should be approved.⁵
13. Section 36 of the CCAA provides the statutory authority for court approval of the sale of a debtor company's assets outside of the ordinary course of business and also provides six non-exhaustive criteria that a Court must consider⁶
14. In deciding whether to grant the authorization, the court is to consider, among other things,
 - (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.⁷

⁵ *AbitibiBowater inc (Arrangement relatif à)*, [2010 QCCS 1742](#) at paras 34-35, Gascon J.

⁶ CCAA, s [36](#).

⁷ CCAA, s [36 \(3\)](#).

15. In the matter at hand, a robust SISP was conducted by the Monitor, in consultation with IMV and the Collateral Agent, in two phases: (i) a non-binding LOI phase to qualify prospective bidders as qualified bidders and (ii) a binding offer phase where qualified bidders submit binding qualified bids. Furthermore, the SISP provided that if IMV, in consultation with the Monitor and the Collateral Agent, determined that more than one qualified bid is received that is in the best interests of its stakeholders, the Monitor could conduct an auction to determine the best qualified bid.⁸
16. In the context of the SISP:
- (i) the Monitor, with the assistance of IMV, developed a list of known potential bidders and provided them with a summary (the “**Teaser**”) regarding the opportunity and outlining the process under the SISP and inviting them to participate in the SISP. The Teaser was sent to 575 potential bidders;⁹
 - (ii) the Monitor arranged for the notice of the SISP to be published in The Globe and Mail (National Edition), La Presse+ and the Wall Street Journal;¹⁰
 - (iii) several interested potential bidders were provided with a confidential information package and access to a data room after executing a non-disclosure agreement;¹¹
 - (iv) the Monitor received two LOIs from potential bidders, both of which were considered to be from qualified bidders; and¹²
 - (v) the Monitor received two binding offers and one non-binding offer to purchase the assets or part of the assets of Applicants.¹³
17. The SISP Procedures provide that if no bid is received in the SISP that contemplates a purchase price sufficient to repay in cash all outstanding amounts owed to the Secured Lenders, they shall be authorized to submit a Credit Bid under the SISP.¹⁴

⁸ Davison Affidavit, *supra* note 2 at paras 21 and 23-24.

⁹ *Ibid* at para 22(a); Fourth Report of the Monitor dated September 1, 2023 [*Fourth Report*].

¹⁰ Davison Affidavit, *supra* note 2 at para 22(b).

¹¹ *Ibid* at para 22(c).

¹² *Ibid* at paras 23-24.

¹³ *Ibid* at para 25.

¹⁴ *Ibid* at para 26 and Exhibit A, SISP Procedures, s 9.

18. Further to the Bid Deadline, given that no bids were received which contemplated a purchase price sufficient to repay in cash all outstanding amounts owed to the Secured Lenders, the Collateral Agent informed the Monitor that it intended to submit a Credit Bid in accordance with the SISP Procedures subject to completing its due diligence.¹⁵
19. On August 23, 2023, the Collateral Agent submitted a Credit Bid to the Monitor, which bid was determined to be the Successful Bid.¹⁶
20. Accordingly, it is respectfully submitted that the process leading to the Proposed Transaction was more than fair and reasonable in the circumstances.

(ii) The Court should grant deference to the Monitor's opinion on the Proposed Transaction

21. Absent clear evidence that the proposed sale transaction is improvident or that there has been an abuse of process, the Court should grant deference to the Monitor's opinion on the Proposed Transaction. The Court should be reluctant to second-guess the business decisions taken by Applicants and supported by the Monitor; only in exceptional circumstances should the Court intervene.¹⁷
22. The role of the Monitor, appointed by the court, specifically includes providing advisory opinion to the Court on orders sought by parties to proceedings under the CCAA.¹⁸
23. In the matter at hand, the SISP was conducted by the Monitor, the latter having been involved in all aspects of the SISP, from its development to its conduct.
24. In fact, the Monitor has submitted a report to Court essentially:
 - (i) confirming that the SISP process was conducted in a transparent and fair manner;
 - (ii) stating that, in its opinion, a sale or disposition of the purchased assets under a bankruptcy would not result in a better outcome for Applicants' stakeholders;

¹⁵ Davison Affidavit, *supra* note 2 at para 27.

¹⁶ *Ibid* at para 28.

¹⁷ Soundair, *supra* note 3 at para 10; *Bloom Lake GPL (Arrangement Relatif à)*, [2015 QCCS 1920](#) at para 28, leave to appeal to the CA dismissed, [2015 QCCA 754](#).

¹⁸ *9354-9186 Québec inc v Callidus Capital Corp*, [2020 SCC 10](#) at para 52.

- (iii) stating that, in its opinion, the aggregate consideration provided for under the Proposed Transaction is fair and reasonable in the circumstances and that it is the best offer received; and
- (iv) recommending the approval by the Court of the Proposed Transaction.¹⁹

25. Therefore, it is respectfully submitted that the Court should grant deference to the Monitor's opinion on the Proposed Transaction.

(iii) The Proposed Transaction is the best outcome for Applicants' stakeholders

- 26. The Proposed Transaction is the result of a robust SISP which was conducted by the Monitor with diligence, which only goes to show that the terms reached was the best offer that could be obtained under the circumstances.
- 27. There is no other realistic alternative to the Proposed Transaction. A sale of the assets of the IMV under a bankruptcy would not yield a better result than the Proposed Transaction. The Monitor considers that the Proposed Transaction would be more beneficial to the Applicants' stakeholders than a sale or disposition of assets under a bankruptcy.
- 28. The Court should therefore grant the Approval and Vesting Order it minimizes the stakeholders' social and economic losses which would result from a liquidation of Applicants.

B. The Court Should Grant the WEPPA Declaration

- 29. The Distribution and WEPPA Order seeks a declaration that, pursuant to section 5(5) of WEPPA, that the IMV Inc. and IVT's employees meet the criteria established by section 3.2 of the WEPPA Regulations.
- 30. Section 5(1) of WEPPA provides as follows:²⁰

5(1) An individual is eligible to receive a payment if

(a) the individual's employment ended for a reason prescribed by regulation;

(b) one of the following applies:

¹⁹ Fourth Report, *supra* note 9.

²⁰ *Wage Earner Protection Program Act*, SC 2005, c 47, s [5\(1\)](#) [WEPPA].

- (i) the former employer is bankrupt,
- (ii) the former employer is subject to a receivership,
- (iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act*; and
 - (A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and
 - (B) a trustee is appointed, or
- (iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer.

31. Section 5(5) of WEPPA provides that “[o]n application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation”.²¹ Section 3.2 of the WEPPA Regulations provides that “[f]or the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer *all of whose employees in Canada have been terminated other than any retained to wind down its business operations*.”²²
32. Declarations under section 5(5) of WEPPA and section 3.2 of the WEPPA Regulation have been made in previous CCAA proceedings where the criteria of section 3.2 of the WEPPA Regulations were satisfied.²³
33. The Applicants and their former employees would become eligible under WEPPA at the date of the Distribution and WEPPA Order, if granted.²⁴

²¹ *Ibid* s [5\(5\)](#).

²² *Wage Earner Protection Program Regulation*, SOR/2008-222 s [3.2](#).

²³ *Figr Brands, Re (Stay Extension, Distribution, WEPPA and Fee Approval Order)*, ONSC Court file No . CV-21-00655373-00CL, February 2, 2022, McEwen J.

²⁴ WEPPA, *supra* note 20 s [2\(1\)](#) *sub verbo* “eligible wages” (a)(iii).

34. At the commencement of the CCAA Proceedings, the Applicants had approximately 58 employees, 48 of which were employed by IVT and located in Canada.²⁵
35. Since the issuance of the Initial Order on May 1, 2023, IMV has terminated the employment of 50 employees and one employee has resigned.²⁶
36. IMV currently employs a total of seven (7) employees, all of which are employed by IVT, and the employment of three (3) employees will be effective on September 1, 2023.²⁷ All of IMV's employees, other than those necessary to complete the wind-down of its operations, will have been terminated at the time of the presentation of the Applicants' motion.²⁸ In fact, the remaining employees are being retained solely to assist with the wind-down of the clinics, sale of the lab equipment and the closing of the Proposed Transaction.²⁹
37. In light of the foregoing, it is respectfully submitted that it is appropriate at this time for this Court to declare that IMV Inc. and IVT meet the criteria established by section 3.2 of the WEPPA Regulations, as such declaration would help alleviate the impact of the CCAA Proceedings on IMV's eligible former employees by providing them with the relief described in the WEPPA.

C. The Interim Distribution Should be Approved

38. Pursuant to the Interim Distribution and WEPPA Order, the Applicants seek the authorization to make and the approval of an interim distribution to the Secured Lenders in the amount of \$2,000,000, representing the current cash available to IMV less the amounts potentially required by IMV to complete the CCAA Proceedings and a provision for any unexpected expenses and to cover the CCAA charges.
39. One of the most important features of the CCAA, and what makes it flexible enough to adapt to each restructuring, is the broad discretionary power it confers to the Court. Indeed, section 11 of the CCAA allows the Court to make any order it considers appropriate in the circumstances.³⁰

²⁵ Davison Affidavit, *supra* note 2 at para 45.

²⁶ *Ibid* at para 46-47.

²⁷ *Ibid* at para 48.

²⁸ *Ibid* at para 49; Fourth Report, *supra* note 9.

²⁹ Fourth Report, *supra* note 9.

³⁰ CCAA, s [11](#).

40. Such orders include interim distribution orders with a reserve or holdback, which are routinely granted by courts in insolvency proceedings.³¹
41. In *Re Abitibiwater Inc.*, Justice Gascon considered a number of factors in deciding whether to approve an interim distribution under the CCAA including whether the payee's security is valid and enforceable, whether the distribution would result in significant interest savings and whether the distribution will leave the estate with sufficient liquidity.³²
42. The application of these factors to the present case demonstrate why this Court should approve the Interim Distribution.
43. The Monitor has received an opinion from its counsel that the Security is valid and enforceable.³³ Further, the sooner the Security is paid out or reduced, the sooner interest will stop accumulating or accumulate at a lower amount, limiting the accrual of additional fees and interest.³⁴
44. Further, IMV currently has an amount of approximately \$5.6 million in available cash. IMV expects that it may require an amount of up to \$3.6 million in order to complete the wind-down of its business operations and complete these CCAA Proceeding. IMV would therefore have sufficient liquidity to complete its restructuring after the Interim Distribution, if approved by this Court.³⁵
45. It is respectfully submitted that the Court must use its discretion to approve the Interim Distribution sought. Such a distribution is appropriate and reasonable in the circumstances as it will limit the accrual of additional fees and interest and will not negatively affect the completion of the CCAA Proceedings.

PART V – NATURE OF THE ORDER SOUGHT

46. The Applicants therefore request that the Court should issue the proposed orders substantially in the form of the draft Approval and Vesting Order and the draft Interim Distribution and WEPPA Order.

³¹ *Re Abitibiwater Inc.*, [2009 QCCS 6461 \(CanLII\) \(QC SC\)](#) at paras 71-75.

³² *Ibid* at para 75.

³³ Davison Affidavit, *supra* note 2 at para 39; Fourth Report, *supra* note 9.

³⁴ *Ibid* at para 43

³⁵ *Ibid* at paras 40-41 and 43; Fourth Report, *supra* note 9.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of September, 2023:

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SCHEDULE A
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3.	<i>Bloom Lake GPL (Arrangement Relatif à)</i> , 2015 QCCS 1920 leave to appeal to the CA dismissed, 2015 QCCA 754
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6.	<i>Re Abitibowater Inc</i> , 2009 QCCS 6461 (CanLII) (QC SC)