

**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 INITIAL ORDER**

To the Honourable Justice John Bodurtha, the Applicants 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**”) seek relief under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”).<sup>1</sup>
2. IMV is a clinical-stage biopharmaceutical company developing a portfolio of immune-educating therapies based on their novel DPX lipid-in-oil delivery platform (“**DPX**”).
3. Given that IMV is currently in the preclinical and clinical stages of development, it does not yet have any products approved for commercial sale and consequently has not generated any revenue from product sales. Since its inception, IMV’s revenues have consisted primarily of income earned on cash balances held at a commercial bank. IMV does not expect to generate any revenues until such time as it obtains regulatory approval and commercializes one or more of its product candidates.
4. To date, IMV has financed its operations primarily through public offerings in Canada, private placements of securities, government grants and research support payments generated from collaborations with third parties. IMV has devoted substantially all efforts to research and development, including clinical trials.

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<sup>1</sup> RSC 1985, c C-36, as amended.

5. It is uncertain when or if IMV will achieve commercialization; however, IMV expects that its operating expenses will continue to increase in connection with ongoing and new, later-staged clinical trials, expanded preclinical activities and the development of product candidates in the pipeline. IMV therefore needs additional funding in order to continue its operations.
6. Despite the growing industry enthusiasm surrounding the cancer vaccine space and these recent clinical trial results, the current market conditions limited IMV's opportunities to raise the additional capital required to continue its clinical trials and realize the full potential of its lead candidate, MVP-S. As at the date hereof, despite the significant efforts expended by IMV, IMV has otherwise been unable to secure the additional funding required in the near term, thus jeopardizing the continuance of its operations as a going concern.
7. The Applicants seek a stay of proceedings (the "**Stay**") for the period up to and including May 5, 2023 (the "**Initial Stay Period**") under section 11.02(2) of the CCAA, together with related relief to continue the review of their strategic alternatives initiated in March 2023. IMV is entering these proceedings with the objective of implementing one or more transaction(s), as the case may be, which would allow IMV's business to continue, albeit in a different form, and for its DPX technology to continue to be developed in the hope that it can one day change the lives of patients with cancer.
8. The relief requested includes a declaration that Nova Scotia is IMV's "*centre of main interest*", the suspension of IMV Inc.'s Continuous Reporting Requirements (as defined hereinafter), the extension of the time limit to call and hold an annual shareholders' meeting, the authorization to pay a small portion of severance to employees whose employment will be terminated and to temporarily maintain their group benefits, as well as typical administration and directors' and officers' charges in an amount required for the Initial Stay Period.
9. At the Comeback Hearing, the Applicants anticipate seeking certain additional relief, including the approval of a sale and investment solicitation process, a claims process and a KERP and related KERP Charge. Ultimately, the Applicants intend to implement one or more transactions which would allow their business to continue and maximize the value for the benefit of all of their stakeholders.

## PART II – SUMMARY OF FACTS

10. The facts are more fully set out in the Affidavit of Andrew Hall.<sup>2</sup> Capitalized terms used herein and not otherwise defined shall have the meanings associated to them in the Hall Affidavit, unless the context shall otherwise require. Dollar amounts are given in Canadian dollars unless otherwise specified.

### A. Overview of Business and Operations

11. IMV Inc., the parent company of IMV, is a public company incorporated under the *Canada Business Corporations Act*, which has its head office in Dartmouth, Nova Scotia and has its shares publicly traded on the Toronto Stock Exchange (“**TSX**”) and the Nasdaq Stock Market (“**NASDAQ**”).
12. As previously stated, the Applicants form a publicly traded clinical-stage biopharmaceutical company developing a novel class of cancer vaccines leveraging the unique mechanism of action of the DPX platform, which are designed to induce an immune response that mimics the natural flow of antigens through the immune system. By reformulating peptides to the tumour associated antigen, survivin, acquired from Merck KGaA in 2010, IMV saw improved T cell reactivity in preclinical research highlighting the potential for the treatment of human cancers and IMV’s first clinical candidate. Merck had been unable to generate optimal T cell activation using traditional vaccine delivery technology.<sup>3</sup>
13. Since that time, MVP-S has shown favourable clinical outcomes in multiple cancer indications and across multiple clinical studies. In IMV’s clinical studies, over 300 patients have been dosed with MVP-S and the treatment is generally well tolerated with only mild to moderate site injection reactions reported as the primary adverse event. Clinical data supports the therapeutic potential of MVP-S in human cancers and also suggests that the anti-tumour activity of MVP-S in some tumour types may be further enhanced through combination with other immune modulators and/or anti-cancer drugs.<sup>4</sup>

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<sup>2</sup> Affidavit of Andrew Hall, sworn April 28, 2023 [Hall Affidavit].

<sup>3</sup> *Ibid* at paras 9-10, 23.

<sup>4</sup> *Ibid* at paras 10, 32.

14. Through the expertise of its teams, the quality of its science and emerging strategic partnerships, IMV aims to push the boundaries of its novel immunotherapeutic platform to offer better treatments for patients with solid or hematological cancers.<sup>5</sup>
15. Being a clinical-stage biopharmaceutical company, IMV's operations consist mainly in research and development, including sponsoring clinical studies, with the objective of achieving commercialization for one or more of its product candidates. IMV relies on third parties, with internal oversight, to conduct its clinical trials and may establish collaborations with third parties for the development and commercialization of its product candidates. IMV's clinical trials are currently being conducted across twelve (12) regulatory jurisdictions throughout the world.<sup>6</sup>
16. At this time, IMV is sponsoring six (6) clinical studies being conducted using the DPX platform and involving its main candidate: MVP-S. There are currently 30 patients receiving treatment in IMV's ongoing clinical studies and 8 patients in screening.<sup>7</sup>
17. MVP-S is currently being evaluated by IMV in clinical trials for hematologic and solid cancers, including Diffuse Large B Cell Lymphoma ("DLBCL") as well as ovarian, bladder and breast cancers.<sup>8</sup>

## **B. Applicants' Financial Situation**

### **(a) General Overview**

18. IMV is currently in the preclinical and clinical stages of development, such that it does not yet have any products approved for commercial sale and consequently does not generate any revenue from product sales.<sup>9</sup>
19. IMV's primary source of revenue since its inception has been income earned on cash balances held at a commercial bank.<sup>10</sup>

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<sup>5</sup> Hall Affidavit, *supra* note 2, at para 24.

<sup>6</sup> *Ibid* at paras 26, 28, 48.

<sup>7</sup> *Ibid* at paras 29, 75.

<sup>8</sup> *Ibid* at paras 30-31.

<sup>9</sup> *Ibid* at para 49.

<sup>10</sup> *Ibidem*.

20. To date, Applicants have financed their operations primarily through public offerings in Canada, private placements of securities, grants and license as well as from upfront and milestone payments, and research support payments generated from collaborations with third parties. Every and all efforts have substantially been devoted to research and development, including clinical trials.<sup>11</sup>
21. Since its inception, IMV has incurred significant operating losses. The net loss was \$51.5 million for the year ended December 31, 2022, \$49.6 million for the year ended December 31, 2021, and \$31.7 million for the year ended December 31, 2020. As of December 31, 2022, IMV had an accumulated deficit of \$261.2 million.<sup>12</sup>
22. In September 2022, in order to reduce future cash needs and further streamline the organizational focus, IMV completed a strategic reorganization. IMV's workforce was reduced by approximately one third and the organization focused its resources on driving to near-term value-creating milestones, namely on MVP-S development in Ovarian and DLBCL and further validation of the DPX platform.<sup>13</sup>
23. In April 2022 and February 2023, IMV announced positive results in respect of two of its ongoing clinical trials. IMV hoped that these announcements would elicit a positive market reaction and allow it to raise the additional capital required to further continue its ongoing clinical studies. Despite the growing industry enthusiasm surrounding these recent clinical trial results, the current market conditions limited Applicants' opportunities to raise the additional capital required to continue their clinical trials and realize the full potential of its lead candidate, MVP-S.<sup>14</sup>
24. As disclosed to the market, IMV's ability to continue as a going concern depended upon raising additional funding through equity and non-dilutive funding and partnerships. Unfortunately, the current market conditions limited its ability to raise the additional funding required which forecasted short-term liquidity issues.<sup>15</sup>

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<sup>11</sup> Hall Affidavit, *supra* note 2, at para 50.

<sup>12</sup> *Ibid* at para 52.

<sup>13</sup> *Ibid* at para 53.

<sup>14</sup> *Ibid* at paras 54-55.

<sup>15</sup> *Ibid* at para 56. See also Exhibit A of the Hall Affidavit.

25. In light of the foregoing, in March 2023 IMV engaged Stonegate to assist it in the context of a review of its strategic alternatives, namely to pursue financing alternatives which included equity, debt, and non-dilutive financing alternatives, including co-development through potential collaborations, strategic partnerships or other transactions with third parties, that may or may not include merger and acquisition activities.<sup>16</sup>
26. As at December 31, 2022, IMV had, on a consolidated basis, total liabilities amounting to \$58.53 million, including its lease obligations, and assets with a book value of \$42.45 million, consisting primarily of cash and cash equivalents, accounts receivable, prepaid expenses, laboratory equipment and right-of-use assets.<sup>17</sup>
27. As of the end of its 2022 fiscal year, IMV expected that existing cash and cash equivalents and identified potential sources of cash, would be sufficient to fund IMV's operations and capital expenditure requirements into the second half of 2023.<sup>18</sup>
28. At this time, and despite the strategic reorganization implemented in September 2022 in order to reduce future cash needs and further streamline the organizational focus, the Applicants expect that they will not be able to meet their obligations as they generally become due within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring. IMV is therefore insolvent and, further to a review of its strategic alternatives, IMV determined that it was in the best interest of all stakeholders to initiate proceedings under the CCAA.<sup>19</sup>

#### **(b) Secured Debt**

29. IMV is party to the Horizon Agreement, pursuant to which Horizon and Powerscourt (collectively, the "**Lenders**") agreed to make available to IMV various loans which, in the aggregate, total \$33.85 million and were to be disbursed upon the achievement of certain milestones (the "**Venture Loan**"). The Venture Loan has been fully disbursed since June 22, 2022.<sup>20</sup>

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<sup>16</sup> Hall Affidavit, *supra* note 2, at para 57.

<sup>17</sup> *Ibid* at paras 59-60. See also Exhibit B of the Hall Affidavit.

<sup>18</sup> *Ibid* at para 61.

<sup>19</sup> *Ibid* at paras 62-63.

<sup>20</sup> *Ibid* at paras 64-65.

30. In order to secure its obligations under the Horizon Agreement, IMV granted a priority security interest in favour of the Lenders in all of its assets, but excluding its intellectual property.<sup>21</sup>
31. As at December 31, 2022, IMV was indebted towards the Lender in the total amount of \$33,85 million.<sup>22</sup>

### **(c) Stakeholders**

32. In addition to the Lenders, IMV's stakeholders also include:
  - (i) Atlantic Canada Opportunities Agency, which has made available through its Atlantic Innovation Fund Program or Business Development Program unsecured loans, which are mostly repayable based on a percentage of future gross revenues, in the total amount of approximately \$11 million. As at December 31, 2022, IMV was indebted towards ACOA in the total amount of \$10.24 million;<sup>23</sup>
  - (ii) Its 58 employees located in Canada, the United States and France, including 33 employees at its head office in Dartmouth, Nova Scotia;<sup>24</sup>
  - (iii) The 38 patients which are currently receiving treatment in IMV's clinical studies or are in screening;<sup>25</sup>
  - (iv) Its shareholders holding the issued and outstanding 11,711,637 common shares as at March 15, 2023;<sup>26</sup> and
  - (v) Its trade and non-trade creditors, which are collectively owed \$12.24 million.<sup>27</sup>

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<sup>21</sup> Hall Affidavit, *supra* note 2, at para 67. See also Exhibit C of the Hall Affidavit.

<sup>22</sup> *Ibid* at para 66.

<sup>23</sup> *Ibid* at paras 68-71.

<sup>24</sup> *Ibid* at paras 72-74.

<sup>25</sup> *Ibid* at para 75.

<sup>26</sup> *Ibid* at paras 76-78.

<sup>27</sup> *Ibid* at paras 79-80.

### PART III – ISSUES

33. The issues before this Court, as addressed below, are whether:

- (i) IMV is entitled to seek protection under the CCAA and should be granted creditor protection, namely by way of a stay of proceedings;
- (ii) FTI should be appointed as Monitor;
- (iii) the Court should declare that Nova Scotia is the Applicants' "*centre of main interest*";
- (iv) the Administration Charge should be granted;
- (v) the Directors' Charge should be granted;
- (vi) this Court should authorize the payment of a small portion of severance and the temporary maintenance of group benefits for terminated employees;
- (vii) the time limit to call and hold IMV Inc.'s annual shareholders' meeting should be extended; and
- (viii) the Court should suspend IMV Inc.'s Continuous Reporting Requirements under applicable securities legislation.

## PART IV – THE LAW

### 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

34. 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>28</sup>
35. 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>29</sup>
36. 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 are 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>30</sup>
37. 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

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<sup>28</sup> 9354-9186 *Québec inc v Callidus Capital Corp*, 2020 SCC 10 [*Bluberi*] [at paras 40-42](#) [Tab 1].

<sup>29</sup> *Century Services Inc v Canada (AG)*, 2010 SCC 60 [*Century Services*] [at para 21](#) [Tab 2].

<sup>30</sup> *Metcalfe & Mansfield Alternative Investments II Corp* (2008), 2008 CanLII 21724 (Ont SCJ) [at para 43](#) [Tab 3]; *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (Ont SCJ) [at para 45](#) [Tab 4].

assets. The latter are referred to as “liquidating CCAAs” and are commonplace in the Canadian restructuring landscape.<sup>31</sup>

38. 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>32</sup>
39. The Applicants’ stakeholders include, *inter alia*, their 58 employees, their creditors, their shareholders, their supplier ecosystem, the patients enrolled in the ongoing clinical trials and the community of Dartmouth, Nova Scotia.

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

### **(i) The Applicants are Affiliated Debtor Companies Having Debts Totaling More Than \$5,000,000 to Which the CCAA Applies**

40. The CCAA applies to a “debtor company” or affiliated debtor companies if the total of claims against such company or affiliated companies is more than \$5,000,000.<sup>33</sup> The Applicants are all affiliated debtor companies with total claims against them that far exceed \$ 5,000,000.<sup>34</sup>
41. Pursuant to section 2 of the CCAA, a “debtor company” means, *inter alia*, a company that is insolvent. Whether a company is insolvent for the purposes of the definition of “debtor company” is evaluated by reference to the definition of “insolvent person” in the *Bankruptcy and Insolvency Act*<sup>35</sup> (the “BIA”) and to the expanded concept of insolvency accepted by the *Stelco*<sup>36</sup> test (the “Stelco test”). According to the Stelco test, a company is also insolvent for purposes of the CCAA “if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a

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<sup>31</sup> Bluberi, *supra* note 28, [at paras 41-43, 45-46 \[Tab 1\]](#).

<sup>32</sup> Century Services, *supra* note 29, [at para 60 \[Tab 2\]](#); *Air Canada, Re*, 2003 CanLII 49366 (Ont SCJ) [at para 13 \[Tab 5\]](#), leave to appeal to the CA refused (2003 CarswellOnt 5213); *Canadian Red Cross Society, Re*, 2000 CanLII 22488 (Ont SCJ) [at para 2 \[Tab 6\]](#).

<sup>33</sup> CCAA, [s 3\(1\)](#).

<sup>34</sup> Hall Affidavit, *supra* note 2, at paras 39-40, 42-43, 59, 66, 70, 79.

<sup>35</sup> RSC 1985, c B-3.

<sup>36</sup> *Stelco Inc, Re*, 2004 CanLII 24933 (Ont SCJ) [*Stelco*] [at para 26 \[Tab 7\]](#), leave to appeal to CA refused (2004 CarswellOnt 2936), leave to appeal to SCC refused (2004 CarswellOnt 5200), cited with approval in *Target Canada Co (Re)*, 2015 ONSC 303 [at paras 26-27 \[Tab 8\]](#); *Nordstrom Canada Retail, Inc*, 2023 ONSC 1422 [*Nordstrom*] [at para 26 \[Tab 9\]](#).

restructuring.”<sup>37</sup> The Applicants are currently insolvent under both, the BIA test for solvency and the Stelco test.

42. IMV Inc. is incorporated under the *Canada Business Corporation Act*<sup>38</sup> (the “CBCA”). It is the parent company of IVT, which is incorporated under the *Companies Act*<sup>39</sup> (Nova Scotia), and of IMV USA, which is incorporated under the laws of the State of Delaware.<sup>40</sup> The Applicants are thus affiliated debtor companies for the purposes of the CCAA.<sup>41</sup>
43. 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>42</sup>
44. 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>43</sup>
45. IMV is insolvent due to the following:
  - (i) IMV is expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring,<sup>44</sup> and
  - (ii) IMV’s current and long-term liabilities both exceed its current and long-term assets.<sup>45</sup>
46. Therefore, the CCAA applies to the Applicants.

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<sup>37</sup> *Stelco*, *supra* note 36, [at paras 26, 40](#) [Tab 7].

<sup>38</sup> RSC 1985, c C-44.

<sup>39</sup> RSNS 1989, c 81.

<sup>40</sup> Hall Affidavit, *supra* note 2, at paras 39-40, 42-43.

<sup>41</sup> CCAA, [s 2](#), *sub verbo* “debtor company”.

<sup>42</sup> *Stelco*, *supra* note 34, [at paras 21-22](#) [Tab 7].

<sup>43</sup> *Stelco*, *supra* note 34, [at paras 26-27](#) [Tab 7].

<sup>44</sup> Hall Affidavit, *supra* note 2, at para XX

<sup>45</sup> *Ibid* at paras 59-60.

## **(ii) The Nova Scotia Supreme Court Has Jurisdiction Over the Proceedings**

47. 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 in which the debtor company has its “*head office or chief place of business*”.<sup>46</sup> IMV’s head office is located in Dartmouth, Nova Scotia.<sup>47</sup> Additionally, the Applicants’ chief place of business is Nova Scotia: its only laboratory is in Nova Scotia and 33 of its 58 employees report to the Dartmouth head office.<sup>48</sup> Furthermore, all of its revenues and operations are centralized in IVT, which is incorporated in Nova Scotia. Accordingly, this Court has jurisdiction to hear this application for relief under the CCAA.<sup>49</sup>

## **(iii) The Relief Sought is Reasonably Necessary**

### **(a) The Relief Sought Is Limited to What Is Necessary**

48. Pursuant to section 11.001 of the CCAA, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period. The stated purpose of section 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>50</sup>
49. As specifically detailed below, IMV has worked with its advisors and the Proposed Monitor to limit the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its business. In each case, IMV considered whether the requested relief is necessary for the immediate stabilization of its business or to protect its value, as well as the interests of its various stakeholders. In cases where immediate relief is necessary, IMV has attempted to limit any authorizations from the Court to what is required within the Initial Stay Period and will only seek additional authorization at the time of the Comeback Hearing.<sup>51</sup>

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<sup>46</sup> CCAA, [s 9\(1\)](#).

<sup>47</sup> Hall Affidavit, *supra* note 2, at para 40.

<sup>48</sup> *Ibid* at paras 42, 72.

<sup>49</sup> *Ibid* at paras 42, 46.

<sup>50</sup> *Lydian International Limited (Re)*, 2019 ONSC 7473 [at paras 22-26](#) [Tab 10]; *Laurentian University of Sudbury*, 2021 ONSC 659 [at para 66](#) [Tab 11].

<sup>51</sup> Hall Affidavit, *supra* note 2, at paras 18-19.

50. In particular, both the Administration Charge and Directors' Charge have been limited, based upon analysis performed by IMV, in consultation with the Proposed Monitor, to liabilities that could arise during the Initial Stay Period.<sup>52</sup> Additionally, the relief regarding IMV Inc.'s status as a listed issuer is necessary as IMV Inc. has incessantly upcoming Continuous Reporting Requirements and the annual shareholders' meeting should be convened shortly in order to comply with the requirements of the CBCA. Finally, in order to minimize cash burn, IMV will need to immediately proceed to the termination of the employment of some of its employees; the employee relief is therefore necessary to ensure the collaboration of these employees during the transition in the oversight of clinical trials and for their involvement should it be required with respect to obtaining clinical trial information to be used in the context of the sale and investment process, the approval of which will be sought at the time of the Comeback Hearing.

**(b) The Stay of Proceedings Should be Granted**

51. Section 11.02 of the CCAA provides the Court with the power to grant an initial stay of proceedings of up to 10 days on application for an initial order, provided such a stay is appropriate and the Applicants have acted with due diligence and in good faith.<sup>53</sup>

52. A Stay of Proceedings is a common element of an Initial CCAA Order. It is appropriate to provide the debtor with "some breathing space during which solvency is restored" and emerge from the CCAA proceedings as a going concern, as it is well established that companies retain more value as going concerns than in liquidation.<sup>54</sup>

53. The Applicants require the Initial Stay of Proceedings to prevent potential enforcement action by certain contractual counterparties. It would be detrimental to the Applicants' business if proceedings were commenced or continued or rights and remedies were executed against them and, without the Stay of Proceedings, the Applicants are unable to continue operations in the ordinary course of business.

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<sup>52</sup> Pre-Filing Report of the Proposed Monitor dated April 28, 2023 at paras 35, 38.

<sup>53</sup> CCAA, [s 11.02\(3\)\(a\)-\(b\)](#).

<sup>54</sup> Century Services, *supra* note 29, [at paras 14, 18 \[Tab 2\]](#).

54. The Stay of proceedings will stabilize and preserve the value of the Applicants' business and ultimately provide the Applicants with breathing space to develop and oversee an orderly sale and investment process, for which the Applicants will seek this Court's approval at the time of the Comeback Hearing, while maintaining business operations thus remaining attractive for potential buyers or investors and ensure that the objectives of the CCAA in these proceedings are achieved.<sup>55</sup>
55. The Stay of proceedings will also preserve the *status quo* during the restructuring, preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors. The Stay of proceedings is therefore in the best interest of the stakeholders and appropriate in the circumstances.

### **C. The Court Should Appoint FTI as Monitor**

56. Upon the granting of an Initial Order, section 11.7 of the CCAA requires that at the same time the Court appoint a person to monitor the business and financial affairs of the company.<sup>56</sup>
57. FTI is a trustee within the meaning of section 2(1) of the BIA and is not subject to any of the restrictions as to who may be appointed as monitor per section 11.7(2) of the CCAA.<sup>57</sup> FTI has a significant amount of experience acting as a court-appointed monitor in CCAA proceedings.<sup>58</sup>
58. FTI has recently started assisting the Applicants as financial advisor and is familiar with the Applicants' assets, business and personnel. In this role, FTI has obtained significant information in respect of the business, operations and assets of IMV, an understanding of the many issues faced by IMV and relevant to their restructuring efforts as well as a familiarity with the management and personnel of IMV, and has been in contact with Stonegate regarding the informal solicitation process that has been implemented since

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<sup>55</sup> Bluberi, *supra* note 28, [at paras 40-42 \[Tab 1\]](#); Century Services, *supra* note 29, [at para 70 \[Tab 2\]](#).

<sup>56</sup> CCAA, [s 11.7](#)

<sup>57</sup> BIA, [s 2](#), *sub verbo* "trustee".

<sup>58</sup> Pre-Filing Report of the Proposed Monitor dated April 28, 2023 at para 9.

March 2023. FTI also has significant extensive and in-depth existing knowledge and understanding of IMV's business.<sup>59</sup>

59. FTI has consented to acting as the Monitor in these CCAA Proceedings. As such, FTI should be appointed as Monitor of the Applicant.<sup>60</sup>

**D. The Court Should Declare that Nova Scotia is the Applicants' Centre of Main Interest**

60. The Applicants will be seeking the recognition of these CCAA Proceedings in the United States by filing a petition under the Chapter 15 of the United States *Bankruptcy Code*.

61. The Applicants therefore request a declaration from the Court that Nova Scotia is their "*centre of main interest*", thus making these CCAA proceedings "*foreign main proceedings*" for the purposes of a petition to be filed in the United States under the Chapter 15 of the United States *Bankruptcy Code* or before any other court or tribunal. Such declarations are generally made by the Courts where a debtor has the intention of having its CCAA proceedings recognized in another jurisdiction.<sup>61</sup>

62. Subsection 45(2) of the CCAA provides that "*in the absence of proof to the contrary, a debtor's registered office is deemed to be the centre of the debtor's main interests*".<sup>62</sup>

63. In determining the "*centre of main interest*" of a corporate group, Courts generally consider the following criteria: (a) the location where corporate decisions are made; (b) the location of employee administrations, including human resource functions; (c) the location of the company's marketing and communication functions; (d) whether the enterprise is managed on a consolidated basis; (e) the extent of integration of an enterprise's international operations; (f) the centre of an enterprise's corporate, banking, strategic and management functions; (g) the existence of shared management within entities and in an organization; (h) the location where cash management and accounting functions are overseen; (i) the

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<sup>59</sup> Hall Affidavit, *supra* note 2, at paras 87-88; Pre-Filing Report of the Proposed Monitor dated April 28, 2023 at paras 10, 14.

<sup>60</sup> Hall Affidavit, *supra* note 2, at para 90; Pre-Filing Report of the Proposed Monitor dated April 28, 2023 at para 13. See also Exhibit D of the Hall Affidavit.

<sup>61</sup> *Angiotech Pharmaceuticals Ltd (Re)*, 2011 BCSC 115 [*Angiotech*] at para 11 [Tab 12]; *Re Just Energy Corp*, 2021 ONSC 1793 [*Just Energy*] at paras 40-47 [Tab 13]; *In the matter of the compromise of arrangement of Xebec Adsorption Inc et al*, [First Day Initial Order](#) issued September 29, 2022 [Que SC Court File No. 500-11-061483-224] [*Xebec First Day Initial Order*] at para 67 [Tab 14]; *In the matter of the compromise of arrangement of Groupe Dynamite Inc et al*, [Initial Order](#) issued September 8, 2020 [Que SC Court File No. 500-11-058763-208] [*Groupe Dynamite Initial Order*] at para 75 [Tab 15].

<sup>62</sup> CCAA, [s 45\(2\)](#).

location where pricing decisions and new business development initiatives are created; and  
(j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.<sup>63</sup>

64. Considering the foregoing criteria, it is respectfully submitted that the “*centre of main interest*” of the Applicants is in Nova Scotia, Canada for the reasons set out below:

- (i) IMV Inc. and IVT’s registered office is in Nova Scotia, Canada;
- (ii) IMV’s laboratory and head office is located in premises rented at 130 Eileen Stubbs Avenue, Suite 19, Dartmouth, Nova Scotia;
- (iii) IMV Inc., the parent company of IVT and IMV USA, is incorporated under the CBCA and its head office is in Dartmouth, Nova Scotia;
- (iv) the majority of IMV’s assets are located in Canada;
- (v) all of the accounting, marketing, finance and administrative functions are located in Dartmouth, Nova Scotia;
- (vi) all research and development and quality system management are located in Dartmouth, Nova Scotia;
- (vii) most clinical trial oversight is located in Canada;
- (viii) the supply chain is managed from Dartmouth, Nova Scotia;
- (ix) 50% of IMV’s management team and almost all of IMV’s employees are located in Canada. IMV employs 58 employees located in Canada, the United States and France, including 33 employees reporting to its head office in Dartmouth, Nova Scotia;
- (x) all information technology functions are provided out of Dartmouth, Nova Scotia;  
and

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<sup>63</sup> Angiotech, *supra* note 61, [at para 7 \[Tab 12\]](#); Just Energy, *supra* note 61, [at paras 40-47 \[Tab 13\]](#).

- (xi) IMV's treasury management functions, including management of accounts receivable and accounts payable, are in Dartmouth, Nova Scotia.<sup>64</sup>

65. Therefore, not only is Nova Scotia, Canada deemed to be the “*centre of main interest*” for IMV Inc. and IVT according to subsection 45(2) of the CCAA, but IMV, as a corporate group which includes IMV USA, has its centre of main interest in Canada. Accordingly, the Court should declare that Nova Scotia is the Applicants’ “*centre of main Interest*”.

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

66. The Applicants seek a Court-ordered charge in the amount of \$350,000 over their Property in favour of the Proposed Monitor, counsel to the Proposed Monitor and counsel to the Applicants (the “**Professionals**”) to secure payment of their professional fees and disbursements incurred both prior to and after the commencement of the CCAA Proceedings.

67. Section 11.52 of the CCAA expressly provides this Court with the authority to grant the Administration Charge.<sup>65</sup>

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

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor’s duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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

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<sup>64</sup> Hall Affidavit, *supra* note 2 at paras 21, 40, 42, 46, 72.

<sup>65</sup> *Canwest Publishing Inc, Re*, 2010 ONSC 222 [*Canwest Publishing*] [at para 53](#) [Tab 16].

68. Pursuant to this section, the Court may grant such a charge. In deciding whether to do so, Courts have considered a number of factors including: (a) the size and complexity of the businesses being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the Monitor.<sup>66</sup>
69. Having regards to these criteria, the Applicants submit the following:
- (i) IMV's operations consist mainly in research and development, including clinical trials, in the highly-regulated and complex biopharmaceutical industry. IMV is currently sponsoring and overseeing six clinical trials being conducted across 12 jurisdictions. The complexity of IMV's business warrant the granting of the Administration Charge;<sup>67</sup>
  - (ii) the beneficiaries of the Administration Charge have, and will continue, to contribute to these CCAA Proceedings and assist the Applicants throughout the CCAA Proceedings to help them achieve restructuring objectives;
  - (iii) each of the proposed beneficiary of the Administration Charge is performing unique functions without duplication of roles;
  - (iv) the Applicants are not requesting at this time that the Administration Charge prime existing secured creditors;<sup>68</sup>
  - (v) the quantum of the proposed charge was established in consultation with the Proposed Monitor, is fair and reasonable and limited to the amount reasonably necessary for the Initial Stay Period;<sup>69</sup> and

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<sup>66</sup> Canwest Publishing, *supra* note 59, [at para 54 \[Tab 16\]](#); Nordstrom, *supra* note 36, [at paras 54-55 \[Tab 9\]](#); *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd and 2496750 Ontario Inc*, 2023 ONSC 753 [*Original Traders*] [at para 68 \[Tab 17\]](#).

<sup>67</sup> Hall Affidavit, *supra* note 2, at paras 28-33, 48.

<sup>68</sup> Pre-Filing Report of the Proposed Monitor dated April 28, 2023 at para 34.

<sup>69</sup> *Ibid* at para 35.

(vi) the Proposed Monitor is of the view that the size and scope of the Administration Charge is reasonable in the circumstances. Accordingly the Proposed Monitor is supportive of the Administration Charge and recommends its approval.<sup>70</sup>

70. The quantum of the Administration Charge is strictly limited to what is reasonably necessary until the Comeback Hearing, at which time the Applicants will seek an increase to the Administration Charge and an order granting same super-priority.<sup>71</sup>

#### **F. The Directors' Charge Should be Granted**

71. The Applicants seek a Court-ordered charge in the amount of \$450,000 \$ in favour of the Directors and Officers as security for the potential liability of the Directors and Officers incurred in such capacity after the date of the Initial Order. The Directors' Charge would act as security for IMV's indemnification obligations for director and officer liabilities that may be incurred after the commencement of the CCAA Proceedings, except for liability incurred as a result of the Directors and Officers' gross negligence or willful misconduct.<sup>72</sup>

72. Section 11.51 of the CCAA provides this Court with the express statutory jurisdiction to grant the Directors' 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>73</sup> Given the proposed ranking of the Directors' Charge, no secured creditors are likely to be affected should it be granted by the Court.

73. The Directors and Officers benefit from directors' and officers' insurance coverage up to an amount of \$20 million; however, this coverage may prove insufficient or subject to standard exclusions which could make it difficult to cover all potential liabilities that can arise in the context of a restructuring process, including liabilities for employee wages and vacation pay.<sup>74</sup> The Directors and Officers have significant concerns about their potential personal liability and have indicated that their continued service and involvement in the CCAA Proceedings is conditional upon the granting of the Directors' Charge.<sup>75</sup>

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<sup>70</sup> *Ibid* at para 36.

<sup>71</sup> *Ibid* at para 34-36.

<sup>72</sup> Hall Affidavit, *supra* note 2, at para 101.

<sup>73</sup> CCAA, [s 11.51](#).

<sup>74</sup> Hall Affidavit, *supra* note 2, at para 100; Pre-Filing Report of the Proposed Monitor dated April 28, 2023 at para 37.

<sup>75</sup> Hall Affidavit, *supra* note 2, at para 101; Pre-Filing Report of the Proposed Monitor dated April 28, 2023 at para 42; Nordstrom, *supra* note 36, [at para 57 \[Tab 9\]](#).

74. IMV requires the continued participation of its Directors and Officers throughout the CCAA Proceedings; the resignation of the Directors and Officers would likely render these CCAA Proceedings and the conduct of a sale and investment solicitation process more challenging, and possibly more costly, to the detriment of IMV's creditors and other stakeholders.<sup>76</sup>
75. Indeed, to ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their Directors and Officers, who have considerable institutional knowledge and specialized expertise.
76. The Debtors submit that the approval of the Directors' Charge is necessary and appropriate in the circumstances given that:
- (i) the Directors' Charge would allow indemnification of the Directors and Officers only to the extent that such claims are not covered by the current insurance coverage in place for the Directors and Officers;
  - (ii) the Directors' Charge would cover only obligations and liabilities in the context of the present proceedings and does not cover willful misconduct or gross negligence;
  - (iii) the Directors and Officers are actively involved in efforts to address the current circumstances faced by IMV;
  - (iv) the amount of the Directors' Charge has been calculated, with the assistance of the Proposed Monitor, based on the estimated potential exposure of the Directors and Officers to certain corporate liabilities;<sup>77</sup> and
  - (v) the Proposed Monitor is of the view that the granting of the Directors' Charge is necessary in the circumstances and that the quantum and scope of the charge is both fair and reasonable.<sup>78</sup>

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<sup>76</sup> Hall Affidavit, *supra* note 2, at paras 47, 102; Pre-Filing Report of the Proposed Monitor dated April 28, 2023 at para 40; *Original Traders*, *supra* note 66, [at para 70 \[Tab 17\]](#).

<sup>77</sup> Pre-Filing Report of the Proposed Monitor dated April 28, 2023 at para 38.

<sup>78</sup> *Ibid* at para 42.

77. The quantum of the Directors' Charge is strictly limited to what is reasonably necessary until the Comeback Hearing, at which time the Applicants will seek an increase to the Directors' Charge and an order granting same super-priority.<sup>79</sup>

**G. This Court Should Authorize the Payment of a Small Portion of Severance and the Temporary Maintenance of Group Benefits for Terminated Employees**

78. The most important feature of the CCAA, which “enables it to be adapted so readily to each reorganization” is the broad discretion given to the supervising judges in section 11 of the CCAA to make a variety of orders, as needed. The CCAA is a flexible instrument that is skeletal in nature.<sup>80</sup>

79. As Justice Deschamps writes in *Century*, when deciding on the granting of an order not provided for in the CCAA, “[t]he question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA”. Even “when an order is sought that does realistically advance the CCAA’s purposes, the ability to make it is within the discretion of a CCAA court”.<sup>81</sup>

80. Section 11 of the CCAA has been interpreted broadly, including “to sanction measures for which there is no explicit authority in the CCAA”. Indeed, as Justice Côté recently held in *Canada v Canada North Group* (with Chief Justice Wagner and Justice Kasirer concurring), the section 11 power is vast and serves a broad purpose.<sup>82</sup>

[21] The most important feature of the CCAA - and the feature that enables it to be adapted so readily to each reorganization - is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the CCAA confers jurisdiction on the supervising court to “make any order that it considers appropriate in the circumstances”. This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, “On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be ‘appropriate in the circumstances’” (*Callidus Capital*, at para. 67).  
[...]

[Emphasis added]

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<sup>79</sup> *Ibid* at para 34-36.

<sup>80</sup> *Canada v Canada North Group Inc*, 2021 SCC 30 [*Canada North*] [at para 21](#) [Tab 18].

<sup>81</sup> *Century Services*, *supra* note 29, [at paras 70-71](#) [Tab 2].

<sup>82</sup> *Canada North*, *supra* note 79, [at paras 20, 31, 176, 178](#) [Tab 18]; *Bluberi*, *supra* note 28, [at para 65](#) [Tab 1]; *Century Services*, *supra* note 29, [at para 61](#) [Tab 2].

81. However, while the supervising judge's discretion under section 11 of the CCAA is vast, it is not unlimited and, to exercise this discretion, the supervising judge must be satisfied that the proposed order sought is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence.<sup>83</sup>
82. Whether an order is appropriate will depend upon the unique factual matrix of each case. However, in considering the relevant factual circumstances, the overarching question is whether both the purpose of the order sought and the means it seeks to employ advance the remedial purpose of the CCAA.<sup>84</sup>
83. It is expected that some of IMV's employees will be provided with a notice of termination on, or shortly after, the commencement of these CCAA proceedings.<sup>85</sup> IMV's employees who will be terminated possess knowledge, information and expertise which may be required in order to ensure a smooth transition with the employees who will be tasked with overseeing the clinical trials during the CCAA Proceedings and/or which potential purchasers and/or investors would need in the context of a sale and investment solicitation process.<sup>86</sup>
84. In order to ensure a smooth transition between the employees who will be terminated and those who will remain employed throughout part or all of the CCAA Proceedings, and to ensure that such employees collaborate with IMV throughout the restructuring process, IMV is seeking this Court's authorization to pay a small portion of the severance owed as well as to make the required payments to temporarily maintain the terminated employee's group benefits. Courts often grant debtor companies the flexibility to make such payments as part of CCAA initial orders.<sup>87</sup>
85. Authorizing IMV to pay salary, accrued vacations and a small portion of severance owed to the employees whose employment will be terminated and temporarily maintain their group benefits could go a long way towards ensuring their cooperation over the coming weeks

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<sup>83</sup> Bluberi, *supra* note 28, [at paras 49-50, 70 \[Tab 1\]](#); Century Services, *supra* note 29, [at paras 59, 69, 70 \[Tab 2\]](#).

<sup>84</sup> Century Services, *supra* note 29, [at paras 59, 70 \[Tab 2\]](#).

<sup>85</sup> Hall Affidavit, *supra* note 2, at para 104.

<sup>86</sup> *Ibid* at para 105.

<sup>87</sup> *Ibid* at para 106; *1057863 B.C. Ltd (Re)*, 2020 BCSC 1359 [at para 77 \[Tab 19\]](#); [Xebec First Day Initial Order](#), *supra* note 61, at para 37(b) [\[Tab 14\]](#); [Groupe Dynamite Initial Order](#), *supra* note 61, at para 41(b) [\[Tab 15\]](#); *In the matter of the compromise of arrangement of Groupe Sélection Inc et al*, [Initial Order](#) issued November 21, 2022 [Que SC Court File No. 500-11-061657-223] at para 41(c) [\[Tab 20\]](#).

and therefore minimize any impact that the CCAA Proceedings will have on the clinical trials – and thus on patients who are already suffering as a result of their condition – as well as maximize value for IMV’s stakeholders.<sup>88</sup> It is therefore in the best interest of all of IMV’s stakeholders that it be allowed to make the payments requested.

#### **H. The Time Limit to Call An Annual General Meeting Should Be Extended**

86. Subsection 133(1)(b) of the CBCA provides that a corporation must call an annual shareholders’ meeting no later than six months after the end of its preceding financial year. Given that IMV Inc. is incorporated under the CBCA and that its financial year ended on December 31, 2022, it is required to call and hold its annual shareholders’ meeting by June 30, 2023.<sup>89</sup>
87. In light of the initiation of the present proceedings, it is in the best interest of IMV and its stakeholders that the Directors and Officers and other employees of IMV are allowed to focus their efforts on the restructuring, without having to call, prepare for and hold an annual shareholders’ meeting.<sup>90</sup>
88. Where a corporation incorporated under the CBCA initiates proceedings under the CCAA, it is common for the Court to extend the delay to call and hold the annual shareholders’ meeting until after the CCAA Proceedings are concluded – the CBCA expressly provides that the Court can render an order extending the delay to do so.<sup>91</sup>
89. The cost associated with the holding of a meeting of the Applicants’ shareholders, is significant, especially for an insolvent company which needs to preserve available cash for the purpose of its restructuring, and requires a lot of time and efforts considering IMV Inc. is a public company. Postponing the annual shareholders’ meeting would allow the Directors and Officers and IMV’s management and employees to focus on the restructuring process and would preserve available cash for the purpose of the restructuring. Shareholders would not be prejudiced as a result of the postponement given that financial and other information regarding the Applicants and their business will be made available to IMV’s stakeholders

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<sup>88</sup> Hall Affidavit, *supra* note 2, at para 107.

<sup>89</sup> *Ibid* at para 116.

<sup>90</sup> *Ibid* at para 118.

<sup>91</sup> CBCA, [s 133\(3\)](#); *Re Canwest Global Communications Corp*, 2009 CanLII 55114 (Ont SCJ) [at paras 53-54 \[Tab 21\]](#); *Nemaska Lithium Inc (Re)*, [Initial Order](#) issued December 23, 2019 [Que SC Court No. 500-11-057716-199] at para 30 [\[Tab 22\]](#).

through the Proposed Monitor's reports which will be filed periodically throughout the proceedings and available on the Proposed Monitor's website.

**I. The Court Should Suspend IMV Inc.'s Continuous Reporting Requirements Under Applicable Securities Legislation**

90. The Applicants seek the suspension of any and all continuous disclosure, reporting and filing obligations of, and audit committee requirements applicable to IMV Inc. as a result of its status as a reporting issuer in each of the provinces and territories of Canada subject to Canadian securities laws, rules, regulations and policy statements (the "**Continuous Reporting Requirements**") until further order of this Court.
91. Incurring the time and costs associated with preparing documents for and complying with Continuous Reporting Requirements would detract the Applicants as well as their management and employees from the restructuring efforts. Furthermore, there is no prejudice to stakeholders given that financial and other information regarding the Applicants and their business will be made available to IMV's stakeholders through the Proposed Monitor's reports which will be filed periodically throughout the proceedings and available on the Proposed Monitor's website. The Court has granted similar relief in CCAA proceedings of other reporting issuers and it is appropriate in the current circumstance to grant the relief sought.<sup>92</sup>

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<sup>92</sup> [Xebec First Day Initial Order](#), *supra* note 61, at para 19 [Tab 14]; *CannTrust Holdings Inc, Re, Initial Order* issued March 31, 2020 [Ont SCJ Court File No. CV-20-00638930-00CL] at paras 46-47 [Tab 23]; *Pure Global Cannabis, Inc, Re, Initial Order* issued March 19, 2020 [Ont SCJ Court File No. CV-20-00638503-00CL] at para 49 [Tab 24]; *The Flowr Corporation, Re, Initial Order* issued October 20, 2020 [Ont SCJ Court File No. CV-22-00688966-00CL] at para 45 [Tab 25].

**PART V – NATURE OF THE ORDER SOUGHT**

92. The Applicants therefore request an Initial Order substantially in the form of the draft Order attached as Schedule “B” to the Notice of Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of April, 2023:**



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**INDEX OF AUTHORITIES**  
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| 2.  | <i>Century Services Inc v Canada (AG)</i> , <a href="#">2010 SCC 60</a>  |
| 3.  | <i>Metcalfe &amp; Mansfield Alternative Investments II Corp</i> (2008), <a href="#">2008 CanLII 21724</a> (Ont SCJ)  |
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| 6.  | <i>Canadian Red Cross Society, Re</i> , <a href="#">2000 CanLII 22488</a> (Ont SCJ)  |
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