

**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 PAYLESS  
SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.**

(the "Applicants")

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**FACTUM OF THE APPLICANTS  
(Plan Sanction Order)**

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**PART I - OVERVIEW**

1. This factum is filed in support of the motion of Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (the "**Applicants**", and with Payless ShoeSource Canada LP, the "**Payless Canada Entities**") for an order (the "**Sanction Order**"), among other things, seeking this Court's sanction of the First Amended and Restated Plan of Compromise and Arrangement dated October 16, 2019 (as may be further amended and supplemented, the "**CCAA Plan**"), pursuant to the *Companies' Creditors Arrangement Act*<sup>1</sup>, (the "**CCAA**").

2. The CCAA Plan represents the culmination of the Payless Canada Entities' role in the global restructuring of the Payless entities. It achieves a resolution of these CCAA Proceedings and is the result of extensive negotiations among certain key stakeholders. The Monitor,

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<sup>1</sup> *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended [**"CCAA"**].

Supporting Term Loan Lenders<sup>2</sup> and Affected Creditors are all supportive of the CCAA Plan. If sanctioned by the Court and implemented, it will maximize distributions to unsecured creditors in a situation where the other alternative is likely a nil recovery for stakeholders other than the Term Loan Lenders.

3. At the Creditors' Meetings held on October 23, 2019, the CCAA Plan was overwhelmingly approved by the Required Majorities of both voting classes of Affected Creditors. The next step in these proceedings is for the CCAA Plan to be sanctioned by this Court as: (i) the CCAA Plan complies with the statutory requirement under the CCAA; (ii) nothing has been done which was not authorized by the CCAA; and (iii) the CCAA Plan is fair and reasonable in the circumstances.

## PART II - FACTS<sup>3</sup>

### BACKGROUND

#### The Cross-Border Proceedings

4. Payless Holdings LLC, through its subsidiaries and related parties (collectively, "**Payless**"), was the largest specialty family footwear retailer in the Western Hemisphere, which offered a wide range of shoes and accessory items at affordable prices. The Payless Canada Entities comprised the Canadian operating arm of the Payless global business and, as at February 19, 2019 (the "**Filing Date**"), sold Payless footwear and merchandise throughout Canada from over 240 retail stores across 10 provinces.<sup>4</sup>

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<sup>2</sup> Capitalized terms not defined herein shall have the meanings ascribed to such terms in the CCAA Plan.

<sup>3</sup> The facts with respect to this motion are more fully set out in the Affidavit of Stephen Marotta sworn October 23, 2019 (the "**Sanction Order Affidavit**"), at Tab 2 of the Motion Record. Additional facts, including the background to and mechanics of the CCAA Plan are described in (i) the Affidavit of Adrian Frankum, sworn September 10, 2019 (the "**Meetings Order Affidavit**"), attached as Exhibit "C" to the Sanction Order Affidavit, (ii) the Affidavit of Stephen Marotta, sworn September 17, 2019 (the "**Meetings Order Supplemental Affidavit**"), attached as Exhibit "D" to the Sanction Order Affidavit, (iii) the sixth report of the Monitor dated October 16, 2019 (the "**Sixth Report**") and (iv) the supplement to the fifth report of the Monitor dated September 17, 2019 ("**Supplemental Report**").

<sup>4</sup> Sanction Order Affidavit at para 4, Tab 2 of the Motion Record.

5. On February 18, 2019, the U.S. Debtors (and the Payless Canada Entities) commenced insolvency proceedings (the “**U.S. Proceedings**”) by filing voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code. The U.S. Proceedings are pending before the United States Bankruptcy Court for the Eastern District of Missouri (the “**U.S. Bankruptcy Court**”).<sup>5</sup>

### **CCAA PROCEEDINGS**

6. On the Filing Date, Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. sought and obtained the Initial Order dated February 19, 2019 under the CCAA (the “**Initial Order**”).

7. The Initial Order’s benefits and protections extend to Payless ShoeSource Canada LP as the operating entity of the Payless Canada Entities.<sup>6</sup>

8. Among other things, the Initial Order granted an initial stay of proceedings in favour of the Payless Canada Entities up to and including March 21, 2019 (the “**Stay Period**”) and appointed FTI Consulting Canada Inc. as the monitor (the “**Monitor**”) in these CCAA Proceedings. The Stay Period set out in the Initial Order has been extended several times, most recently to December 20, 2019.<sup>7</sup>

9. On September 19, 2019, the Court granted a meetings order (the “**Meetings Order**”) which, among other things, accepted for filing the September 17, 2019 version of the CCAA Plan (as may be amended in accordance with the Meetings Order and the terms thereof). After the granting of the Meetings Order, the Payless Canada Entities, in consultation with the Monitor, determined that certain amendments to the CCAA Plan were desirable. On October 16, 2019, in

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<sup>5</sup> Sanction Order Affidavit at para 5, Tab 2 of the Motion Record.

<sup>6</sup> Sanction Order Affidavit at Exhibit “A”, paras 2 and 3; Sanction Order Affidavit at para 6, Tab 2 of the Motion Record.

<sup>7</sup> Sanction Order Affidavit at para 7, Tab 2 of the Motion Record.

accordance with the Meetings Order, the Payless Canada Entities served an amended version of the CCAA Plan. The material amendments are summarized in the Sixth Report.<sup>8</sup>

10. The Payless Canada Entities served a Plan Supplement on October 16, 2019 that outlines: (i) the technical transaction steps required to implement the CCAA Plan (including the treatment of certain intercompany obligations among the Payless group as they relate to the Payless Canada Entities); (ii) the Reserves to be established under the CCAA Plan; and (iii) the funds to be returned to the U.S. Debtors. As required by the Meetings Order, the Plan Supplement is in form and substance acceptable to the Payless Canada Entities, the Monitor and the Supporting Term Loan Lenders.<sup>9</sup>

11. If the CCAA Plan is sanctioned and the closing conditions are satisfied, the implementation of the CCAA Plan will provide for, among other things<sup>10</sup>:

- (a) a structured and efficient method to make distributions to unsecured creditors, which distributions would not otherwise be available absent the CCAA Plan;
- (b) distribution by way of repayment of intercompany loans of the remaining funds after providing for the Reserves, to Payless ShoeSource Distribution, Inc. (a U.S. Debtor);
- (c) distribution of any funds remaining in the Reserves after satisfaction of the applicable claims to the Payless Canada Entities, which funds are anticipated to be returned to the U.S. Debtors;
- (d) if the Receivership Order is granted, appointment of FTI as receiver over the Employee Distributions and \$100 on the terms set out in the Receivership Order

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<sup>8</sup> Sanction Order Affidavit at para 13, Tab 2 of the Motion Record.

<sup>9</sup> Sanction Order Affidavit at para 22, Tab 2 of the Motion Record.

<sup>10</sup> Sanction Order Affidavit at para 14, Tab 2 of the Motion Record.

which, among other things, will assist most former employees in accessing benefits under the *Wage Earner Protection Program Act* (“**WEPPA**”), as described in more detail in the Seventh Report; and

- (e) releases in favour of the Payless Canada Entities, the Directors, the Officers, certain professional advisors to the Payless Canada Entities and the U.S. Debtors, the Chief Restructuring Organization, the Term Loan Agent, each of the Term Loan Lenders (including the Supporting Term Loan Lenders) and the Monitor, and their respective directors, officers, agents, professionals and certain other parties (as described in greater detail herein).

**CREDITORS APPROVE THE CCAA PLAN AND PLAN SUPPLEMENT**

12. On October 23, 2019, the Creditors’ Meetings were held and both classes of Affected Creditors voted in favour of approving the CCAA Plan by the Required Majorities.<sup>11</sup>

13. According to the Monitor’s tabulation, the following votes were recorded in respect of the General Unsecured Creditor class:<sup>12</sup>

<b>NUMBER VOTING IN FAVOUR</b>	<b>DOLLAR AMOUNT VOTING IN FAVOUR</b>	<b>NUMBER VOTING AGAINST</b>	<b>DOLLAR AMOUNT VOTING AGAINST</b>
44 (97.78%)	\$498,372.90 (92.86%)	1 (2.22%)	\$38,323.00 (7.14%)

14. According to the Monitor’s tabulation, the following votes were recorded in respect of the Landlord class:<sup>13</sup>

<b>NUMBER VOTING IN FAVOUR</b>	<b>DOLLAR AMOUNT VOTING IN FAVOUR</b>	<b>NUMBER VOTING AGAINST</b>	<b>DOLLAR AMOUNT VOTING AGAINST</b>
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<sup>11</sup> Sanction Order Affidavit at paras 36 and 38, Tab 2 of the Motion Record

<sup>12</sup> Sanction Order Affidavit at para 39, Tab 2 of the Motion Record.

<sup>13</sup> Sanction Order Affidavit at para 40, Tab 2 of the Motion Record.

124 (98.41%)	\$44,313,068.88 (98.57%)	2 (1.59%)	\$642,667.73 (1.43%)
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**THE CCAA PLAN AND PLAN SUPPLEMENT**

15. The key provisions of the CCAA Plan include:

<b>Treatment of General Unsecured Creditors</b>	Each General Unsecured Creditor with a Proven Claim will receive a distribution in an amount equal to its <i>pro rata</i> share of the General Unsecured Pool from the Affected Creditor Distribution Account, <i>provided, however</i> , that if the Receivership Order is granted, the Employee Distributions to WEPPA-eligible individuals will be paid to the Receiver to facilitate the receivership proceedings as described in the Seventh Report. <sup>14</sup>
<b>Treatment of Landlords</b>	Each Landlord will receive the lesser of, for each Lease: (i) \$3,840.00 or (ii) the amount asserted in the Landlord’s Notice of Dispute of Claim Statement or Proof of Claim, or, if no Notice of Dispute of Claim Statement or Proof of Claim was filed, then the amount in the Landlord’s Claim Statement. Only one distribution will be made in respect of each Lease regardless of whether one or more Person is identified as the Landlord under the Lease. <sup>15</sup>
<b>Administration Charge</b>	Discharged against all property other than the Administrative Reserve. <sup>16</sup>
<b>Directors’ Charge</b>	Discharged against all property other than the Directors’ Claim Reserve. <sup>17</sup>
<b>Payless Canada Entities Released Parties</b>	Provided with releases to the full extent permitted by applicable law with the exception of any Person having or claiming any entitlement or compensation relating to a Director/Officer Claim which Person will be irrevocably limited to recovery solely from the proceeds of applicable insurance policies held by the Payless Canada Entities. <sup>18</sup>

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<sup>14</sup> Sanction Order Affidavit at para 17, Tab 2 of the Motion Record.  
<sup>15</sup> Sanction Order Affidavit at para 17, Tab 2 of the Motion Record.  
<sup>16</sup> Sanction Order Affidavit at para 17, Tab 2 of the Motion Record.  
<sup>17</sup> Sanction Order Affidavit at para 17, Tab 2 of the Motion Record.  
<sup>18</sup> Sanction Order Affidavit at paras 25-27, Tab 2 of the Motion Record.



16. The remaining conditions precedent to the implementation of the CCAA Plan include<sup>19</sup>:
- (a) the Sanction Order must be granted and the operation and effect of it must not be stayed, reversed or amended, and in the event of an appeal or application for leave to appeal, final determination must be made by the appellate court;
  - (b) the Reserves and the Affected Creditor Distribution Account must be funded by the Payless Canada Entities;
  - (c) the U.S. Plan must be effective (at which time the Payless Canada Entities' U.S. Proceedings will be dismissed) pursuant to the U.S. Bankruptcy Court order;
  - (d) the Payless Canada Entities shall have received written confirmation from the Supporting Term Loan Lenders that the Supporting Term Loan Lenders are satisfied with (i) the treatment of the Post-Filing Intercompany Loans, (ii) the form and substance of the Plan Supplement, and (iii) all variations and modifications of, and amendments and supplements to the CCAA Plan and the Sanction Order, to and including the Implementation Date; and
  - (e) the Implementation Date must occur no later than December 31, 2019, unless otherwise agreed to by the Payless Canada Entities, the Monitor and the Supporting Term Loan Lenders.

17. Once the CCAA Plan is effective, distributions to General Unsecured Creditors and Landlords under the CCAA Plan are also conditional upon receipt from the CRA of a Comfort Letter. In the event that the CCAA Plan becomes effective, but the Comfort Letter is not received by December 31, 2019, the Payless Canada Entities will notify the Term Loan Agent and the

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<sup>19</sup> Sanction Order Affidavit at para 20, Tab 2 of the Motion Record.

Supporting Term Loan Lenders and may seek further directions from the Court on five Business Days notice to the Service List.

### **PART III - ISSUES**

18. In deciding whether it is appropriate to grant the Sanction Order in the form requested, the following issues are before the Court:

- (a) Has the test for sanction of the CCAA Plan under the CCAA been met?
- (b) Are the Releases contemplated by the CCAA Plan appropriate?

### **PART IV - LAW**

#### **A. The Test for Sanction of the Plan has been Satisfied**

19. The CCAA at section 6(1) provides that the court has discretion to sanction a plan if it has achieved the requisite “double majority” vote at the meetings of creditors held under section 4 of the CCAA.<sup>20</sup> There is no dispute in this case that the required creditor approval of both classes of Affected Creditors has been overwhelmingly achieved at the Creditors’ Meetings, which were properly called in accordance with the Meetings Order.

20. “[C]ourts have emphasized that perfection is not required” in assessing the fairness and reasonableness of a plan.<sup>21</sup> Rather, if the plan provides a compromise that is reasonable and viable, and a better option than other alternatives available, courts can take a “big picture” perspective and assess the impact of the plan as a whole when applying the test of sanctioning the plan to the facts.<sup>22</sup> The criteria that the Payless Canada Entities must satisfy when seeking the sanction of a plan are well established:

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<sup>20</sup> CCAA at ss. 4, 6(1).

<sup>21</sup> *Re Canadian Airlines Corp.*, 2000 ABQB 442 [“**Canadian Airlines**”] at paras 178-179, leave to appeal denied 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 13, 2001, BOA Tab 1.

<sup>22</sup> *Canadian Airlines* at paras 178-179, BOA Tab 1.

- (a) there must be strict compliance with all statutory requirements;
- (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
- (c) the plan must be fair and reasonable.<sup>23</sup>

**i. Compliance with all Statutory Requirements**

21. Under the first branch of the test for sanctioning a CCAA plan, the court typically considers factors including, whether: (a) the applicant comes within the definition of “debtor company” under section 2(1) of the CCAA<sup>24</sup>; (b) the applicant or affiliated debtor companies have total claims in excess of \$5 million; (c) the creditors were properly classified; (d) the notice of meeting was sent in accordance with the Order of the court; (e) the creditors’ meetings were properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.<sup>25</sup>

22. As set out in this Court’s reasons for decision in connection with the Initial Order, the Applicants in these CCAA Proceedings come within the definition of “debtor company”.<sup>26</sup> In connection with the Initial Order, this Court determined that “in order to ensure that the objectives of the CCAA are achieved” it would extend the benefits of the Initial Order to Payless ShoeSource Canada LP.<sup>27</sup>

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<sup>23</sup> Canadian Airlines at para 60 BOA Tab 1; *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.) [“**Sammi Atlas**”] at para 2, BOA Tab 2; *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 [“**Canwest Global**”] at para 14, BOA Tab 3; *Re Skylink Aviation*, 2013 ONSC 2519 [“**Skylink**”] at para 26, BOA Tab 4.

<sup>24</sup> CCAA s. 2(1).

<sup>25</sup> Canadian Airlines at para 62, BOA Tab 1; *Canwest Global*, at para 15, BOA Tab 3.

<sup>26</sup> *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215 [“**Payless**”] at para 23, BOA Tab 5.

<sup>27</sup> *Payless* at para 27, BOA Tab 5; Sanction Order Affidavit at Exhibit A at para 2, Tab 2A of the Motion Record.

23. The remaining elements are factual issues, each of which has been demonstrated in the record. As the Court noted in its reasons for decision, the Applicants have more than \$5 million in aggregate claims,<sup>28</sup> and the Seventh Report makes clear that claims far in excess of that amount have been asserted. The Meetings Order determined that creditors were properly classified and the Seventh Report confirmed that notice of the Creditors' Meetings were sent in accordance with the Meetings Order, the meetings held were properly constituted, voting was carried out and the CCAA Plan was approved by the Required Majorities.

24. As set out in the Seventh Report, the CCAA Plan strictly complies with the provisions of the CCAA including providing for payment of certain claims as required under section 6 of the CCAA.<sup>29</sup>

**ii. No Unauthorized Steps taken by the Payless Canada Entities**

25. In making a determination as to whether anything has been done — or is purported to have been done — that is not authorized by the CCAA, the Court should rely on the parties, the stakeholders and the reports of the Monitor.<sup>30</sup>As confirmed by the Seventh Report, no unauthorized steps have been taken or have alleged to have been taken<sup>31</sup> in these CCAA Proceedings and this Court has been kept apprised of all of the key issues facing the Payless Canada Entities throughout the process.

**iii. The Plan is Fair and Reasonable**

26. Canadian courts have repeatedly emphasized that when considering whether a plan is fair and reasonable, the court should consider the relative degrees of prejudice that would flow from granting or refusing to grant relief sought under the CCAA and whether the plan represents a

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<sup>28</sup> Payless at paras 21-23, BOA Tab 5.

<sup>29</sup> Seventh Report at paras 37-50.

<sup>30</sup> Canadian Airlines at para 64, BOA Tab 1; Canwest Global, at para 17, BOA Tab 3.

<sup>31</sup> Seventh Report at para 52.

reasonable and fair balancing of interests, in light of the other commercial alternatives available.<sup>32</sup> The meaning of “fairness” and “reasonableness” are necessarily shaped by the unique circumstances of each case, within the context of the CCAA.”<sup>33</sup>

27. Where creditors have signalled their support of a plan by means of the vote, the court will be very reluctant to second-guess the business decisions made by the stakeholders as a body.<sup>34</sup>

28. In assessing whether a proposed plan is fair and reasonable, the court will consider: (i) whether the claims were properly classified and whether the requisite majority of creditors approved the plan; (ii) what creditors would receive on bankruptcy or liquidation as compared to the plan; (iii) alternatives available to the plan and bankruptcy; (iv) oppression of the rights of creditors; (v) unfairness to shareholders; and (vi) the public interest.<sup>35</sup>

#### Classification of Creditors and Approval

29. In this case, Affected Creditors voted as two separate classes on the basis of commonality of interest vis-à-vis the Payless Canada Entities and the fact that different treatment was proposed for the General Unsecured Creditors and the Landlords. The classification of creditors was supported by the Monitor and approved by the Meetings Order. As detailed above, the results illustrate that over 98% in number and 98.5% in dollar value of the Eligible Voting Creditors in each of the General Unsecured Creditor class and the Landlord class voted in favour of the CCAA Plan.<sup>36</sup>

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<sup>32</sup> Canadian Airlines at para 3, BOA Tab 1; Canwest Global, at para 19, BOA Tab 3.

<sup>33</sup> Canadian Airlines at para 94, BOA Tab 1.

<sup>34</sup> Sammi Atlas at para 5, BOA Tab 2; Canadian Airlines, at para 97, BOA Tab 1; *Re AbitibiBowater Inc.*, 2010 QCCS 4450 at para 34, BOA Tab 6; *Olympia & York Developments v. Royal Trust Co.*, 1993 CarswellOnt 182 at paras 35-40, BOA Tab 7.

<sup>35</sup> Canwest Global at para 21, BOA Tab 3.

<sup>36</sup> Sanction Order Affidavit at para 41, Tab 2 of the Motion Record.

30. Overwhelming creditor support received in a case creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan.<sup>37</sup> The creditor approval of the CCAA Plan reflects the fact that it is a product of negotiation and communication among stakeholders. The Payless Canada Entities believe that the CCAA Plan is fair and reasonable in the circumstances.

#### Best Available Alternative

31. The CCAA Plan is the best available path forward for the Payless Canada Entities' unsecured creditors.<sup>38</sup> The Payless Canada Entities believe that all stakeholders will benefit more from the implementation of the CCAA Plan than any other potential alternative, including a bankruptcy. In a bankruptcy, there would be no recovery for unsecured creditors, except for WEPPA-eligible former employees.<sup>39</sup> Moreover, a bankruptcy for any of the Payless Canada Entities would require, among other things, the approval of the Court and sufficient financing for the proceeding to satisfy a trustee in bankruptcy. Therefore, a bankruptcy may not be an option in these circumstances.<sup>40</sup> Because the amendments to the CCAA Plan provide for funding of a receivership from the Employee Distributions (if the Receivership Order is granted in connection with the CCAA Plan), most former employees will have the benefits of WEPPA,<sup>41</sup> which may not otherwise be available.<sup>42</sup>

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<sup>37</sup> Canadian Airlines, at para 97, BOA Tab 1.

<sup>38</sup> Sixth Report at para 59.

<sup>39</sup> Seventh Report at para 57.

<sup>40</sup> Sixth Report at paras 54-55.

<sup>41</sup> Seventh Report at para 71.

<sup>42</sup> A similar receivership order was granted in other CCAA proceedings to allow employees to access the benefits of WEPPA. See *In the Matter of a Plan of Compromise or Arrangement of Sears Canada Inc. et al.*, Amended and Restated Receivership Order of the Honourable Justice Hainey dated October 16, 2018, Court File No. CV-17-11846-00CL, BOA Tab 8; See also *In the Matter of a Plan of Compromise or Arrangement of Victorian Order of Nurses for Canada, Victorian Order of Nurses for Canada – Eastern Region and Victorian Order of Nurses for Canada – Western Region*, Receivership Order of the Honourable Justice Penny dated November 25, 2015, Court File No. CV-15-11192-00CL, BOA Tab 9; *Victorian Order of Nurses for Canada, Re*, 2015 ONSC 7371 at paras 48-55, BOA Tab 10.

### No Oppression for Creditors

32. Case law makes it clear that a plan can be fair and reasonable even if it does not provide exactly the same recoveries for all creditors, as long as there is a sufficient rationale for any differences in recovery for particular creditors.<sup>43</sup> Creditor treatment must be equitable, however, “*equitable treatment is not necessarily equal treatment.*”<sup>44</sup>

33. The CCAA Plan contemplates two classes of unsecured creditors – the Landlord Class and the General Unsecured Creditor Class. Both classes voted in favour of the CCAA Plan and accepted it. The difference in treatment between the classes was premised on the proposition that the Landlord Claims would be far too costly and complex to resolve given the levels of recovery at issue. The simplified treatment for the Landlord Class eliminates the need to reconcile their Claims and the related professional costs associated with that process. This procedural mechanism for resolving the Landlord Claims will translate into greater recovery for unsecured creditors as a whole under the CCAA Plan by limiting the administrative steps required.

### Public Interest

34. Implementing the CCAA Plan will allow the Payless Canada Entities, upon receipt of a Comfort Letter from the CRA, to make distributions to unsecured creditors that would not otherwise be available to them. Further if the CCAA Plan is implemented and the Receivership Order is granted, the combination will allow most former employees to access government benefits that would otherwise not be available for procedural reasons. The CCAA Plan represents the best path forward for the most stakeholders.<sup>45</sup>

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<sup>43</sup> Canwest Global at paras 22-24, BOA Tab 3.

<sup>44</sup> *Sammi Atlas* at para 4, BOA Tab 2; See also *Re Air Canada*, 2004 CarswellOnt 469 at para 9, BOA Tab 11 and *Re Lutheran Church*, 2016 ABQB 419 at para 142, BOA Tab 12.

<sup>45</sup> Sanction Order Affidavit at para 43, Tab 2 of the Motion Record.

**B. The Releases are Fair and Reasonable**

35. As detailed in the Sanction Order Affidavit,<sup>46</sup> Article 8 of the CCAA Plan provides broad releases (the “**Releases**”) for the Payless Canada Entities, the Directors, the Officers and any alleged fiduciary (whether acting as a director, officer, or other responsible party), Cassels, Akin, S&K, FTI, the Monitor, the Chief Restructuring Organization, the Term Loan Agent, and each of the Term Loan Lenders (including each of the Supporting Term Loan Lenders), together with each of their respective current and former legal counsel, financial advisors, representatives, directors, officers, predecessors, affiliates, member companies, related companies, partners, shareholders, administrators, executors, employees, and professional advisors (collectively, the “**Released Parties**” and individually, a “**Released Party**”).<sup>47</sup>

36. The Releases specifically do not release:

- (a) the Payless Canada Entities and their respective assets, undertakings and properties from any Unaffected Claim that has not been paid in full under the CCAA Plan or the Plan Supplement to the extent of such non-payment;
- (b) a Released Party from its obligations under the CCAA Plan or the Plan Supplement;
- (c) a Released Party found by a court of competent jurisdiction by final determination on the merits to have committed fraud or wilful misconduct in relation to a Released Claim for which it is responsible at law; or

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<sup>46</sup> Sanction Order Affidavit at paras 23-34, Tab 2 of the Motion Record.

<sup>47</sup> Sanction Order Affidavit at para 24, Tab 2 of the Motion Record.



- (d) the Directors from any Claims which have been preserved in accordance with the Claims Procedure Order that cannot be compromised due to the provisions of section 5.1(2) of the CCAA.<sup>48</sup>

37. It is accepted that Canadian courts have jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the “compromise” or “arrangement” where the release reasonably relates to the proposed restructuring and is not overly broad.<sup>49</sup> There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.<sup>50</sup>

38. In considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA.<sup>51</sup> While no single factor will be determinative,<sup>52</sup> the courts have considered the following factors:<sup>53</sup>

- (a) *Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor:* The Releases were critical components of the decision-making process for the Directors’, Officers’ and the Supporting Term Loan Lenders’ participation in the CCAA Proceedings and support for the CCAA Plan;<sup>54</sup>
- (b) *Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it:* The Payless Canada Entities would not have brought

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<sup>48</sup> Sanction Order Affidavit at para 26, Tab 2 of the Motion Record.

<sup>49</sup> *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, [“Metcalfe”] at para 61, BOA Tab 13; *Canwest* at paras 28-30, BOA Tab 3, *Re Kitchener Frame Ltd.*, 2012 ONSC 234 [“Kitchener Frame”] at paras 85-88, BOA Tab 14.

<sup>50</sup> Metcalfe at para 70, BOA Tab 13.

<sup>51</sup> Skylink at para 30, BOA Tab 4.

<sup>52</sup> Kitchener Frame at para 82, BOA Tab 14.

<sup>53</sup> Metcalfe at para 71, BOA Tab 13; *Re Cline Mining Corp.*, 2015 ONSC 622 at paras 22-28, BOA Tab 15; Kitchener Frame at para 80, BOA Tab 14.

<sup>54</sup> Sanction Order Affidavit at para 29, Tab 2 of the Motion Record.

forward the CCAA Plan and the Supporting Term Loan Lenders would not have supported the CCAA Plan absent the inclusion of the Releases;

- (c) *Whether the plan could succeed without the releases:* The support of the Term Loan Lenders in terms of agreeing to provide Canadian unsecured creditors with an amount for the purpose of distribution and their consent to the transactions set out in the CCAA Plan and the Plan Supplement, is essential to the CCAA Plan's viability. Without such support, which is conditional on the Releases, the CCAA Plan would not succeed and the benefits under the CCAA Plan would not have been available to the Payless Canada Entities' stakeholders;<sup>55</sup>
- (d) *Whether the parties being released were contributing to the plan:* The Released Parties made significant contributions to the Payless Canada Entities restructuring, both prior to and throughout the CCAA Proceedings.<sup>56</sup> The extensive efforts of the Directors and Officers of the Payless Canada Entities, the U.S. Debtors, the Chief Restructuring Officer and the Supporting Term Loan Lenders resulted in the negotiation of the CCAA Plan, all of which form the foundation for the completion of these CCAA Proceedings;<sup>57</sup>
- (e) *Whether the release benefitted the debtors as well as the creditors generally:* The active negotiation of the CCAA Plan by the Released Parties, namely the Directors and Officers, the Chief Restructuring Organization, as well as the Supporting Term Loan Lenders were and are critical to providing recoveries to unsecured creditors. The Releases are an integral part of the CCAA Plan. As set out above, in the

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<sup>55</sup> Sanction Order Affidavit at para 30, Tab 2 of the Motion Record.

<sup>56</sup> Sanction Order Affidavit at para 28, Tab 2 of the Motion Record.

<sup>57</sup> Sanction Order Affidavit at para 29, Tab 2 of the Motion Record.

event the CCAA Plan is not sanctioned and implemented, there would be no distributions to unsecured creditors;<sup>58</sup> and

- (f) *Whether the creditors voting on the plan had knowledge of the nature and effect of the releases:* The Releases apply to the extent permitted by law. The release in favour of the Directors and Officers is compliant with section 5.1(2) of the CCAA, which mandates certain exceptions to the compromise of claims against directors set out under section 5.1(1) of the CCAA.<sup>59</sup> Further, the channeling of director and officer indemnification through insurance policies has been granted by this Court in a number of cases, such as *Re Guestlogix Inc.*, *Re Sino-Forest Corp.*, *Re Skylink Aviation* and *Banro Corporation*.<sup>60</sup> Full disclosure of the Releases was made to Affected Creditors in the Meetings Order Affidavit<sup>61</sup>, the Monitor's reports<sup>62</sup> and in the CCAA Plan.<sup>63</sup>

39. The Releases are an integral part of the CCAA Plan and necessary to the support of key stakeholders. In order to facilitate the consensual resolution of these CCAA Proceedings, the

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<sup>58</sup> Sanction Order Affidavit at para 31 and 42, Tab 2 of the Motion Record.

<sup>59</sup> CCAA ss 5.1 (1) and (2); Sanction Order Affidavit at para 26, Tab 2 of the Motion Record.

<sup>60</sup> See *In the Matter of a Proposed Plan of Compromise or Arrangement of Guestlogix Inc. and Guestlogix Ireland Limited*, Plan Sanction Order of the Honourable Justice Morawetz dated September 12, 2016, Court File No. CV-16-11281-00CL at paras 5, 7 and ss. 6.1-6.3 of the Plan of Compromise and Arrangement dated July 29, 2016, BOA Tab 16; *In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation*, Plan Sanction Order of the Honourable Justice Morawetz dated December 10, 2012, Court File No. CV-12-9667-00CL at paras 7, 9 and 20 and Schedule "A" Plan of Compromise and Reorganization dated December 3, 2012 ss 4.9(e)-(f), BOA Tab 17; *In the Matter of a Plan of Compromise or Arrangement of Skylink Aviation Inc.*, Plan Sanction Order of the Honourable Justice Morawetz dated April 23, 2013, Court File No. 13-1003300-CL at paras 10 and 23 and Schedule "A" Plan of Compromise and Arrangement dated April 18, 2013 ss. 3.7(b), 7.1(b), BOA Tab 18; *In the Matter of a Plan of Compromise or Arrangement of Banro Corporation, Banro Group (Barbados) Limited, Banro Congo (Barbados) Limited, Namoya (Barbados) Limited, Lugushwa (Barbados) Limited, Twangiza (Barbados) Limited and Kamituga (Barbados) Limited*, Plan Sanction Order of the Honourable Justice Hainey dated March 27, 2018, Court File No. CV-17-589016-00CL at paras 25 and 26, BOA Tab 19.

<sup>61</sup> Meetings Order Affidavit at para 32, attached as Exhibit "C" to the Sanction Order Affidavit.

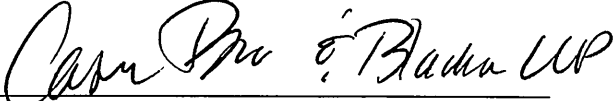
<sup>62</sup> Fifth report of the Monitor dated September 12, 2019 at para 37; Supplemental Report at para 37; Sixth Report at para 58; Seventh Report at para 37.

Payless Canada Entities submit that the Releases as set out in the CCAA Plan and Sanction Order are appropriate in the circumstances.

**PART V - RELIEF SOUGHT**

40. The Payless Canada Entities request that this Court exercise its discretion and grant the proposed Sanction Order which is reasonable in the circumstances, related to the proposed restructuring and an essential step in the CCAA Proceedings for the Payless Canada Entities.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of October, 2019.**

  
Cassels Brock & Blackwell LLP  
*Lawyers for the Payless Canada Entities*

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Re Canadian Airlines Corp.*, 2000 ABQB 442.
2. *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.).
3. *Re Canwest Global Communications Corp.*, 2010 ONSC 4209.
4. *Re Skylink Aviation*, 2013 ONSC 2519.
5. *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215.
6. *Re AbitibiBowater Inc.*, 2010 QCCS 4450.
7. *Olympia & York Developments v. Royal Trust Co.*, 1993 CarswellOnt 182.
8. *In the Matter of a Plan of Compromise or Arrangement of Sears Canada Inc. et al.*, Amended and Restated Receivership Order of the Honourable Justice Hainey dated October 16, 2018, Court File No. CV-17-11846-00CL.
9. *In the Matter of a Plan of Compromise or Arrangement of Victorian Order of Nurses for Canada, Victorian Order of Nurses for Canada – Eastern Region and Victorian Order of Nurses for Canada – Western Region*, Receivership Order of the Honourable Justice Penny dated November 25, 2015, Court File No. CV-15-11192-00CL.
10. *Victorian Order of Nurses for Canada, Re*, 2015 ONSC 7371.
11. *Re Air Canada*, 2004 CarswellOnt 469.
12. *Re Lutheran Church*, 2016 ABQB 419.
13. *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587.
14. *Re Kitchener Frame Ltd.*, 2012 ONSC 234.
15. *Re Cline Mining Corp.*, 2015 ONSC 622.
16. *In the Matter of a Proposed Plan of Compromise or Arrangement of Guestlogix Inc. and Guestlogix Ireland Limited*, Plan Sanction Order of the Honourable Justice Morawetz dated September 12, 2016, Court File No. CV-16-11281-00CL.
17. *In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation*, Plan Sanction Order of the Honourable Justice Morawetz dated December 10, 2012, Court File No. CV-12-9667-00CL.
18. *In the Matter of a Plan of Compromise or Arrangement of Skylink Aviation Inc.*, Plan Sanction Order of the Honourable Justice Morawetz dated April 23, 2013, Court File No. 13-1003300-CL.

19. *In the Matter of a Plan of Compromise or Arrangement of Banro Corporation, Banro Group (Barbados) Limited, Banro Congo (Barbados) Limited, Namoya (Barbados) Limited, Lugushwa (Barbados) Limited, Twangiza (Barbados) Limited and Kamituga (Barbados) Limited, Plan Sanction Order of the Honourable Justice Hainey dated March 27, 2018, Court File No. CV-17-589016-00CL.*

**SCHEDULE "B"**  
**RELEVANT STATUTES**

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

*Definitions*

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

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.

*Compromise with unsecured creditors*

**4** Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

*Compromise with secured creditors*

**5** Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

*Claims against directors — compromise*

**5.1 (1)** A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

*Exception*

**(2)** A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

*Compromises to be sanctioned by court*

**6 (1)** If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.



**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 PAYLESS SHOESOURCE CANADA INC. AND PAYLESS  
SHOESOURCE CANADA GP INC.**

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

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANTS  
(Plan Sanction Order)**

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