

**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 RED LOBSTER MANAGEMENT LLC; RED LOBSTER
HOSPITALITY LLC and RED LOBSTER CANADA, INC.**

APPLICATION OF RED LOBSTER MANAGEMENT LLC
UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, C. C-36, AS AMENDED

**FACTUM OF THE FOREIGN REPRESENTATIVE
(CCAA TERMINATION ORDER)**

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PART 1 – OVERVIEW¹

1. This factum is filed in support of a motion by Red Lobster Management LLC (“**RL Management**”) in its capacity as foreign representative (in such capacity, the “**Foreign Representative**”) of itself, Red Lobster Hospitality LLC (“**RL Hospitality**”) and Red Lobster Canada, Inc. (“**RL Canada**” and, together with RL Management and RL Hospitality, the “**Canadian Debtors**”), for an order, among other things:

- (a) approving the fees, disbursements and activities of FTI Consulting Canada Inc. (“**FTI**”) in its capacity as Information Officer of the Debtor (the “**Information Officer**”) as set out in the Pre-Filing Report dated May 27, 2024 (the “**Pre-Filing Report**”), First Report dated June 17, 2024 (the “**First Report**”), Second Report

¹ Capitalized terms not otherwise defined herein have the meanings given to them in the [Third Report of the Information Officer](#) dated October 25, 2024 (the “**Third Report**”).

dated September 9, 2024 (the “**Second Report**”) and Third Report (collectively, the “**Reports**”); and

- (b) terminating the within proceeding (the “**CCAA Proceeding**”) under Part IV of the *Companies’ Creditors Arrangement Act* (“**CCAA**”) and granting related relief including discharging the Information Officer and granting a release in respect of the Information Officer and its counsel;

PART II – SUMMARY OF THE FACTS

A. BACKGROUND

(i) *The Chapter 11 Cases*

2. On May 19, 2024, the Debtors filed voluntary petitions for relief with the US Bankruptcy Court, thereby commencing cases (the “**Chapter 11 Cases**”) pursuant to chapter 11 of title 11 of the United States Code.²

3. On May 21, 2024, following a hearing in respect of certain “First Day Pleadings” in the Chapter 11 Cases that sought various relief, the US Court entered a number of orders (the “**First Day Orders**”) including an order (the “**Foreign Representative Order**”) authorizing RL Management to act as foreign representative in respect of the Debtors and the Chapter 11 Cases (in such capacity, the “**Foreign Representative**”).³

(ii) *The Recognition Proceeding*

4. On May 21, 2024, RL Management, in its capacity as the then-proposed foreign representative of the Debtors, brought an application before the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) for an order (the “**Interim Stay Order**”) granting an interim stay

² Third Report at para 1.

³ Third Report at para 2.

of proceedings in respect of the Canadian Debtors as well as their respective directors and officers in Canada. Pending the formal appointment of RL Management as the Foreign Representative in the Chapter 11 Cases, the Interim Stay Order was necessary to give effect in Canada to the automatic stay of proceedings arising under the Bankruptcy Code upon filing of the Petitions.⁴

5. On May 28, 2024, the Interim Stay Order was superseded and the Court granted an Initial Recognition and Supplemental Order, among other things, (i) declaring that RL Management is a “foreign representative” as defined in the CCAA, (ii) recognizing the Chapter 11 Cases as “foreign main proceedings” as defined in the CCAA in respect of the Canadian Debtors, (iii) recognizing certain First Day Orders of the US Court, (iv) granting a stay of proceedings in respect of the Canadian Debtors and their respective directors and officers in Canada, (v) granting certain court-ordered charges, including a DIP Charge, on the Canadian Debtors’ collateral in favour of the DIP Lenders, and (vi) appointing FTI as the Information Officer in the CCAA Proceedings.⁵

B. THE PLAN

6. The Debtors filed the Plan on July 19, 2024.⁶ The Plan implements a going-concern sale of the Debtors’ business to their Pre-petition Term Loan Lenders. The Plan continues the operation of Red Lobster’s restaurants in Canada, preserves the employment of RL Canada’s employees and maintains the value of RL Canada’s business for the benefit of all stakeholders. The Plan also provides potential recoveries for unsecured creditors, including Canadian unsecured creditors of the Canadian Debtors.⁷

⁴ Third Report at para 3.

⁵ Third Report at para 4.

⁶ Third Report at para 6.

⁷ Second Report at para 41.

7. The Debtors' Plan was confirmed by the US Court on September 6, 2024 by way of the Confirmation Order. The Canadian Court recognized the Confirmation Order on September 10, 2024. On September 16, 2024, the Effective Date of the Plan Occurred.⁸

8. Now that the Effective Date of the Plan has occurred, the Foreign Representative does not anticipate requiring any further relief from the Canadian Court within these CCAA Proceedings. Accordingly, the Foreign Representative asks this Court to attend to the last outstanding matters in these proceedings by approving the activities, fees and disbursements of the Information Officer, discharging the Information Officer, and terminating these CCAA Proceedings upon filing by the Information Officer of a certificate (the "**CCAA Termination Certificate**").⁹

9. The proposed CCAA Termination Order provides that:

- (a) upon receiving confirmation from the Foreign Representative or its counsel that any remaining matters to be attended to in these CCAA proceedings have been completed, the Information Officer will file the CCAA Termination Certificate with the Canadian Court confirming the same; and
- (b) upon filing of the CCAA Termination Certificate:
 - i. the Information Officer and its counsel will be released and discharged from any and all liability that they have or may have in connection with the CCAA Recognition Proceedings or with respect to their respective conduct in connection therewith, save and except for any claim or liability arising from gross negligence or wilful misconduct (the "**Releases**");
 - ii. the CCAA Recognition Proceedings will be terminated; and
 - iii. the Administration Charge in the Supplemental Order will be discharged.

PART III – ISSUES

10. The issue addressed by this motion is whether the Canadian Court should:

⁸ Third Report at paras 6-7; [Affidavit of Nancy Thompson](#) sworn October 25, 2024 at para 2 (the "**Thompson Affidavit**").

⁹ Third Report at para 8; Thompson Affidavit at para 3.

- (a) approve the activities, fees and disbursements of the Information Officer; and
- (b) authorize the mechanism for terminating these CCAA Proceedings and grant the Releases in connection therewith.

11. For the reasons set out herein, the Foreign Representative submits that the answer to each of the foregoing questions is “yes”.

PART IV – THE LAW AND ARGUMENT

A. THE ACTIVITIES, FEES AND DISBURSEMENTS OF THE INFORMATION OFFICER SHOULD BE APPROVED

(i) Activities

12. In *Target Canada Co. (Re)*, this Court noted that there are good policy and practical reasons to grant the approval of a monitor’s reports and activities, including (a) allowing the monitor to bring its activities before the court; (b) allowing an opportunity for stakeholders’ concerns to be addressed; (c) enabling the court to satisfy itself that the monitor’s activities have been conducted in a prudent and diligent manner; (d) providing protection for the monitor not otherwise provided by the CCAA; and (e) protecting creditors for delay that may be caused by re-litigation of steps or potential indemnity claims by the monitor.¹⁰

13. Recently, the principles set out in *Target* were affirmed by Chief Justice Morawetz in *Laurentian University of Sudbury*.¹¹

14. These comments and the policy considerations identified by this Court apply with equal force to information officers appointed under Part IV of the CCAA.

¹⁰ [2015 ONSC 7574](#) at paras 2, 22-23 [*Target*].

¹¹ [2022 ONSC 2927](#) at paras 13-14.

15. The activities of the Information Officer outlined in the Pre-Filing Report, First Report, Second Report and Third Report were carried out in accordance with the Information Officer's mandate and responsibilities as set out in the Supplemental Order and done in furtherance of the Canadian Debtors' restructuring. The Foreign Representative therefore respectfully submits that the order approving the activities of the Information Officer should be granted.

(ii) *Fees and Disbursements*

16. The Supplemental Order requires the Information Officer and its legal counsel to pass their accounts from time to time and refers such accounts to this Court for this purpose.¹² The Foreign Representative submits that there is no separate standard under the law to be applied to the fees and accounts of an information officer in a Part IV proceeding, and that the Information Officer's fees should be assessed according to the same standard as that of court-appointed monitors in plenary CCAA proceedings.

17. The test on a motion to pass accounts is to consider the "overriding principle of reasonableness".¹³ The overall value contributed by the Information Officer and its counsel is the predominate consideration in assessing the reasonableness of the accounts.¹⁴ The court does not engage in a docket-by-docket or line-by-line assessment of the accounts; rather, the Ontario Court of Appeal has found that "the focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took."¹⁵

18. The Ontario Court of Appeal has recognized the following list of non-exhaustive factors that aid in the determination of whether a court-appointed officer's fees are fair and reasonable:

¹² [Supplemental Recognition Order](#) dated May 28, 2024 at para 18.

¹³ *Nortel Networks Inc.*, [2022 ONSC 6680](#) at para 10.

¹⁴ *Re Nortel Networks Corporation et al.*, [2017 ONSC 673](#) at paras 15, 21.

¹⁵ *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#) at para 45 [*Diemer*].

- (a) the nature, extent and value of the assets being handled;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the company, its officers or its employees;
- (d) the time spent;
- (e) the court-appointed officer's knowledge, experience and skill;
- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results achieved; and
- (i) the cost of comparable services when performed in a prudent and economical manner.¹⁶

19. The Information Officer, with the assistance of its counsel Fasken, carried out various activities during the CCAA Proceedings, as detailed in the Reports. These activities included, (i) preparing for and attending the motions of the Foreign Representative, (ii) monitoring the docket in the Chapter 11 Cases to remain apprised of the status of such Chapter 11 Cases, (iii) updating the Case Website, (iv) engaging in discussions with the Debtors and the Purchaser regarding the Plan and termination of these CCAA Proceedings, (v) responding to stakeholder inquiries, (v) preparing the Reports for the purpose of updating the Canadian Court and stakeholders regarding the Chapter 11 Cases and commenting on the appropriateness of relief sought by the Foreign Representative, and (vi) corresponding with the Foreign Representative and its counsel regarding preparation for the various motions in the CCAA Proceedings.¹⁷

¹⁶ Diemer at para 33.

¹⁷ Third Report at para 16.

20. The time spent, and thus the fees and disbursements of the Information Officer and Fasken, are commensurate with the role and responsibilities and activities undertaken. Such time, fees, and disbursements of the Information Officer and Fasken are described in greater detail in the Rosenberg Affidavit and Stephenson Affidavit (collectively, the “**Fee Affidavits**”), respectively.¹⁸ The work described therein was undertaken with a view to advancing the CCAA Proceedings and overall restructuring of the Debtors.

21. Accordingly, it is respectfully submitted that the remuneration of the Information Officer and its counsel is fair and reasonable and that their fees and disbursements for the period of the CCAA Proceedings should be approved.

22. In addition to the amounts set forth in the Fee Affidavits, the Information Officer has requested that the Canadian Court authorize and approve the fees of the Information Officer and Fasken that are not set out in the Fee Affidavits but have been or will be incurred in the performance of the duties of the Information Officer up to a maximum aggregate amount of CAD \$75,000 (the “**Maximum Remaining Amount**”), plus disbursements and applicable HST.¹⁹

23. The Foreign Representative respectfully submits that the Maximum Remaining Amount should be approved as it represents a fair and reasonable reserve to ensure that the Information Officer and Fasken are compensated for all work completed before the CCAA Termination Time.

B. THE MECHANISM FOR TERMINATION OF THE CCAA PROCEEDING SHOULD BE APPROVED

24. When a foreign main proceeding has been recognised under Part IV of the CCAA, section 49 empowers this Court to make any order that it considers appropriate to protect the debtor’s

¹⁸ Third Report, Appendix D (Rosenberg Affidavit) and Appendix E (Stephenson Affidavit).

¹⁹ Third Report, para. 20. The Maximum Remaining Amount represents an estimate of the fees to be incurred by the Information Officer and Fasken between the time the Fee Affidavits were sworn and the CCAA Termination Time, plus a buffer amount.

property or the interests of one or more creditors.²⁰ The Court’s discretion in this regard is broad: an order under Part IV of the CCAA “may be made on any terms and conditions that the Court considers appropriate in the circumstances.”²¹ This Court therefore has the discretion to grant the CCAA Termination Order, and doing so is appropriate in the circumstances.

25. The CCAA Proceedings have achieved their purpose. The Effective Date of the Plan has occurred and the Plan is in the process of being implemented. The ancillary matters to be attended to post-Effective Date do not require the continuation of the CCAA Proceedings. The Foreign Representative does not anticipate requiring any further relief from the Canadian Court. Accordingly, there is no further need for these CCAA Proceedings and the CCAA Proceedings should be terminated on filing of the CCAA Termination Certificate.

26. The CCAA Termination Order also contains Releases in favour of the Information Officer and its counsel, Fasken (the “**Released Parties**”).

27. The Released parties have clearly contributed time, energy and resources to assist the Debtors in achieving a successful restructuring and are therefore deserving of the Releases being sought. The Releases are sufficiently narrow and do not include any claim or liability arising out of gross negligence or wilful misconduct on the part of the Released Parties. Once the CCAA Proceedings are terminated, the Releases will provide finality and certainty to the Released Parties, professionals whose contribution was critical to the success of the restructuring in Canada. No party has objected to the Releases.

²⁰ CCAA, s. 49.

²¹ CCAA, s. 50.

28. The Releases are appropriate in the circumstances and should be granted. CCAA courts in proceedings under Part IV have routinely granted similar releases to the information officer and its counsel upon termination of Part IV recognition proceedings.²²

PART V – RELIEF REQUESTED

29. The Foreign Representative requests that the Court grant the CCAA Termination Order in the form included at Tab 3 of the Motion Record. The Information Officer supports the requested relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2024.



Blake, Cassels & Graydon LLP
Lawyers for the Foreign Representative

²² See, e.g., [*Re David's Bridal, LLC et al.*, Termination of CCAA Proceedings Order of Honourable Justice Conway dated September 29, 2023 \(Ont. Sup. Ct. J. \[Commercial List\]\), Court File No. CV-23-00698107-00CL](#); [*Re Hornblower Cruises and Events Canada Ltd. et al.*, Fourth Supplemental Order \(Recognition, Termination and Discharge\) of Honourable Justice Penny dated June 17, 2024 \(Ont. Sup. Ct. J. \[Commercial List\]\), Court File No. CV-24-00715202-00CL](#); [*Re Voyager Digital Ltd.*, Order \(Approval of LGO Agreement and Termination of CCAA Recognition Proceeding\) of Honourable Justice Cavanagh dated October 11, 2023 \(Ont. Sup. Ct. J. \[Commercial List\]\), Court File No. CV-22-00683820-00CL](#).

SCHEDULE “A”

LIST OF AUTHORITIES

<u>Cases</u>	
1.	<i>Target Canada Co. (Re)</i> , 2015 ONSC 7574
2.	<i>Laurentian University of Sudbury</i> , 2022 ONSC 2927
3.	<i>Nortel Networks Inc.</i> , 2022 ONSC 6680
4.	<i>Re Nortel Networks Corporation et al</i> , 2017 ONSC 673
5.	<i>Bank of Nova Scotia v Diemer</i> , 2014 ONCA 851
6.	Re David’s Bridal, LLC et al, Termination of CCAA Proceedings Order of Honourable Justice Conway dated September 29, 2023 (Ont. Sup. Ct. J. [Commercial List]), Court File No. CV-23-00698107-00CL
7.	Re Hornblower Cruises and Events Canada Ltd. et al, Fourth Supplemental Order (Recognition, Termination and Discharge) of Honourable Justice Penny dated June 17, 2024 (Ont. Sup. Ct. J. [Commercial List]), Court File No. CV-24-00715202-00CL
8.	Re Voyager Digital Ltd., Order (Approval of LGO Agreement and Termination of CCAA Recognition Proceeding) of Honourable Justice Cavanagh dated October 11, 2023 (Ont. Sup. Ct. J. [Commercial List]), Court File No. CV-22-00683820-00CL

SCHEDULE “B”

RELEVANT STATUTES AND RULES

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

PART IV

Cross-border Insolvencies

Other orders

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company’s property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company’s property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company’s business and financial affairs in Canada for the purpose of reorganization.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

Terms and conditions of orders

50 An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

Court File No.: CV-24-00720567-00CL

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